

SUMMARY

2019/44 Equal pay principle – New measures to reduce the gender pay gap – the example of Switzerland (CH)

The European Commission recently conducted a public consultation on the measures that may be taken to ensure the full application of the principle of equal pay between women and men. Its evaluation report is expected before the end of this year. The new Swiss legislation on monitoring and disclosure of the gender pay gap may be inspiration for future EU initiatives in this area.

Introduction

Gender equality is one of the fundamental values of the European Union. Yet, it is not a reality at work. Gender inequalities in the labour market have been contained but not erased and existing initiatives need to be strengthened and adapted.

Based on this observation, the European Commission, for which closing the gender pay gap remains a political priority, issued an action plan aiming to further translate this commitment into a list of key, concrete actions.

Rather than singling out only one factor or cause, the action plan includes a broad set of activities to tackle the gender pay gap from all possible angles (e.g. improving the application of the equal pay principle, combatting segregation in occupations and sectors, breaking the glass ceiling, tackling the care penalty, better valorising women's skills, efforts and responsibilities, fighting and uncovering inequalities and stereotypes, alerting and informing about the gender pay gap, and enhancing partnerships to tackle the gender pay gap).

Actions are to be implemented by the end of the mandate of the current Commission in

cooperation with various stakeholders and Member States.

Regarding the improvement of the application of the equal pay principle, the Commission wishes, among other things, to assess whether the Gender Equality Recast Directive should be amended by making some or all of the measures on pay transparency foreseen in the 2013 Recommendation binding, such as:

entitlement of employees to request information on pay levels;
regular reporting by employers of wages by category of employee or position; and
clarification of the notion of work of equal value.

A public consultation was held in spring 2019, which showed among other things that most respondents believe that greater pay transparency contributes to reducing the gender pay gap and to improving the public image of the employer.

The Commission's evaluation of the EU legal framework on equal pay is expected to be published before the year-end.

Several EU countries have already taken measures to ensure the application of the principle of equal pay. For example, Belgium and the Czech Republic have organised an equal pay day for many years now which takes place every year. The French government has hardened existing sanctions against firms with over 50 employees that do not respect their obligations regarding gender equality and forced big firms (with 300 employees and above) to negotiate an action plan. In Austria, the national action plan for gender equality requires companies to publish equal pay reports.

In this context, the new Swiss legislation on monitoring and disclosure of the gender pay gap may provide the inspiration for future EU initiatives.

Example of increased pay transparency – Switzerland

Switzerland is not bound by the European Gender Equality Directive. However, the observation regarding pay gap is similar: unexplained pay gaps between women and men remain despite the entry into force of the Swiss Federal Act on Gender Equality on 1 July 1996 (the 'Gender Act') and the promotion of voluntary measures during a 'dialogue on equal pay' project, which lasted from 2009 to 2014.

Consequently, the Swiss Parliament decided on 14 December 2018 to amend the Gender Act

(the ‘Amendments’) and increase pay transparency by introducing an obligation for certain companies to carry out an analysis of equal pay between women and men (see §§ 1. and 2. below), to have the analysis independently monitored (see § 3. below) and to inform the employees of the outcome of this analysis (see § 4. below).

Companies concerned

Companies employing at least 100 employees at the beginning of a calendar year will be subject to the obligation to carry out an analysis of equal pay between women and men for that year. The calculation of the number of employees will take into account all employees, regardless of their working rates. Apprentices will not however be counted as staff.

Companies employing 100 employees or more will be exempted from the obligation to carry out an equal pay analysis where such companies:

are subject to a control of compliance with equal pay between women and men in the context of a procedure for the awarding of a public procurement contract; or

are subject to a control of compliance with equal pay between women and men in the context of an application for the awarding of state subsidies; or

have already been subject to a control of compliance with equal pay between women and men and have demonstrated that they meet the requirements, provided that the reference month of such control does not date back more than four years.

Companies employing less than 100 employees will not be subject to the obligation to carry out an equal pay analysis. They may however decide to do so on a voluntary basis.

Equal pay analysis

All companies subject to the obligation to carry out an analysis of equal pay between women and men shall use a ‘scientific and legally compliant method’.

The Swiss Confederation provides a standard analysis model free of charge and available online.

Nonetheless, companies will be free to use another scientific and legally compliant method. This method shall be transparent, understandable and practicable.

The equal pay analysis shall be repeated every four years. However, if the initial analysis shows that a company meets the requirements, they will be exempted from carrying out any

further analyses in the future. If the equal pay analysis shows that a company does not meet the requirements, the next analysis will take place four years later.

Monitoring of the equal pay analysis

The equal pay analysis shall then be independently monitored. To carry out this independent monitoring, employers will be entitled to choose between:

an authorised audit company;
an organisation whose task is, under its statutes, to promote equality between women and men or to defend the interests of the employees within the meaning of Article 7 of the Gender Act; or
an employee representation within the meaning of the Swiss Federal Act on Information and Consultation of Employees in Companies.

The Federal Ordinance on the monitoring of equal pay analysis establishes the criteria governing the training of the persons leading the monitoring as well as some formal aspects of the monitoring.

If they choose to have their equal pay analysis monitored by an authorised audit company, companies shall provide the audit company with all the documents and information it needs to carry out the audit. The audit company will then review the conformity of the analysis from a formal perspective. It will also prepare a report on the execution of the equal pay analysis for the attention of the management of the audited companies within one year of the analysis being carried out.

If they choose to have the equal pay analysis monitored by an organisation within the meaning of Article 7 of the Gender Act or by an employee representation, companies shall conclude an agreement with them on the procedure to be followed for the monitoring and submission of the report to the companies' management.

Information on the outcome of the equal pay analysis

To increase transparency, companies subject to the obligation to carry out an analysis of equal pay between women and men shall inform their employees in writing of the outcome of the analysis no later than one year after completion of the monitoring.

Companies whose shares are listed on a stock exchange shall publish the outcome of such analysis in the appendix to their annual report.

Entry into force and transitional provisions

The Amendments shall enter into force on 1 July 2020 together with the Federal Ordinance on the monitoring of equal pay analysis.

The Amendments include a transitional period of one year. Consequently, companies subject to the duty to carry out an equal pay analysis shall have carried out such analysis by the end of June 2021 at the latest.

The validity of the Amendments is limited to a total duration of 12 years after their entry into force (i.e. until 30 June 2032). The Swiss Federal Council shall also report on the efficiency of the equal pay analysis and its monitoring to the Swiss Federal Parliament at the latest nine years after the entry into force of the Amendments.

Conclusion

It is obviously too early to say if this obligation to carry out an analysis of equal pay between women and men and to inform the employees of the analysis outcome will help in efficiently reducing the gender pay gap.

Some European countries may be inspired by the Swiss legislation on monitoring and disclosure of the gender pay gap. In Germany, for example, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth has already adapted the Swiss tool to the German situation (Logib-D).

In any case, it should be viewed at the most as one possible measure, not sufficient in itself to erase the pay gap, and should not dissuade from tackling the gender pay gap from other angles. In this respect, it will be interesting to see which concrete measures emerge from the evaluation report of the European Commission expected this autumn.

Comments from other jurisdictions

Denmark (Christian K. Clasen, Norrbom Vinding): From a Danish point of view, the new Swiss legislation is quite interesting, as a comparable requirement is laid down in Danish law: the Danish Equal Pay Act contains a requirement for certain employers to provide gender-specific pay statistics. This requirement was enacted in 2006 and has been in force since 2007. The requirement to provide gender-specific pay statistics may also be set out in collective agreements.

In its original form, the requirement applied to all companies (except for a few industries) with at least 35 employees of whom at least 10 of each gender worked in the same job function, which contrasts with the Swiss requirement that applies to employers having 100 employees or more. The obligation has, however, been subject to several amendments.

It should be noted that in 2011 a review of the Danish Equal Pay Act was published, showing that only between one-fourth and one-third of employers required to provide gender-specific pay statistics actually complied with the requirement.

By an amendment in 2014, the scope of the application of the requirement was extended, being applicable to employers with a headcount corresponding to 10 full-time employees of whom at least three were of each gender. Furthermore, with the amendment the employers who were required to provide the statistics would – if possible – automatically receive the finalised gender-specific pay statistics.

However, in 2015 the government was of the opinion that it was inappropriate to impose the requirement on employers with very few employees, e.g. based on reasons of anonymity. Thus, in 2016 the extension of the scope of the application of the requirement to provide statistics was rolled back to cover employers with 35 employees of whom at least 10 of each gender work in the same job function.

Thus, in Denmark, the requirement for employers to provide gender-specific pay statistics has been under development ever since it was first enacted. Accordingly, it will be interesting to see how the newly adopted Swiss requirement will take effect and, additionally, how and if it may evolve in the years to come.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): Unlike Switzerland, Germany is bound by the European Gender Equality Directive. Furthermore, in order to counter the pay gap, the federal government introduced the Pay Transparency Act (*Entgelttransparenzgesetz* – ‘EntgTranspG’) which came into force on 6 July 2017. It is quite similar to the solution of the Swiss government. The aim is to establish the principle of equal pay for equal work in Germany. The key points of the EntgTranspG are:

Right to information: The Act stipulates that on request employers with more than 200 employees must explain to their employees according to which criteria they are paid.

Operational monitoring system: Private employers with more than 500 employees are required to regularly review their pay structures for compliance with equal pay. In order to

support the affected companies with the implementation of the monitoring system, a free online tool was made available by the federal ministries.

Obligation to report: Employers with more than 500 employees who are subject to management reporting must also report regularly on the status of equality and equal pay. These reports can be viewed by all.

However, it remains unclear whether the aims pursued by the EntgTranspG will actually be achieved. A study by the Institute of Economic and Social Sciences (WSI) at the beginning of 2019 indicated that the EntgTranspG has had no significant impact even after two years. According to information from the WSI, the majority of companies have not yet started implementing the law. The WSI assumes that less than 12% are really on to it. It therefore remains to be seen whether and which measures will be taken in the future to ensure the full application of the principle of equal pay between women and men and which of these measures will actually be successful.

United Kingdom (Richard Lister, Lewis Silkin LLP): There is clearly a developing trend in Europe towards addressing inequality through pay transparency and gender pay gap reporting. In addition to Switzerland, measures of this type have been (or are being) implemented in contrasting ways in countries including Germany, France, Norway and the UK.

In the UK, mandatory gender pay gap reporting for employers with more than 250 employees came into force in April 2017, requiring publication of their first reports within one year. These had to include four main things:

- the overall gender pay gap figures, calculated using both the mean and median average hourly pay;
- the proportion of men and women in each of four pay bands, based on the employer's overall pay range;
- information on the employer's gender bonus gap; and
- the proportion of male and female employees who received a bonus.

Although there have been a number of problematic issues for employers to grapple with in making the relevant calculations under the relevant regulations, there is no doubt that the mandatory reporting requirements have pushed the issue of workplace inequality for women up the corporate agenda and prompted many employers to take action to address it. As gender pay gap reports must be produced annually, attention will increasingly shift to whether the

published gap has narrowed since the previous year's reporting, and what action the organisation is taking in response to improve it.

The UK's government regards its gender pay gap reporting regime as a significant public policy success and has since launched a consultation on whether to legislate for ethnicity pay gap reporting as well. However, given the low percentage of BAME (Black, Asian and minority ethnic) employees and the lack of reliable data in many organisations, this poses a number of additional challenges.

1 Communication from the Commission to the European Parliament, the Council and the European economic and social committee, EU action plan 2017–2019 tackling the gender pay gap of 20 November 2017, com(2017) 678 final.

2 See footnote 1, above.

3 Directive 2006/54/EC.

4 See the Commission 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 (recast), COM(2013) 861 final, as well as the Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, COM(2014) 1405 final.

5 386 individuals or organisations completed the questionnaire among which were a large majority of EU citizens (60%) including also companies and employer/business associations (18%), trade unions (6%), NGOs (6%), academic/research institutions (2%) and public authorities (3%). Respondents originated mainly from Germany (23%), Spain (12%), Italy (10%) and Belgium (7%). As regards company size, the answers were almost evenly split between large, medium, small and micro companies; cf. European Commission Summary report – public consultation Spring 2019 entitled *Evaluation of the EU legal framework on 'equal pay for equal work or work of equal value'*, pp. 3-25.

6 European Commission Summary report – public consultation Spring 2019, pp. 5-6.

7 <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal->

[pay/combating-pay-discrimination_en#measuringthegenderpaygap](#).

8 The Swiss Federal Council wanted to set the threshold at 50 employees but the Parliament raised it to 100. Consequently, the obligation applies to less than 1% of Swiss companies but to 46% of the employees working in Switzerland.

9 <https://www.ebg.admin.ch/ebg/en/home/services/equal-pay-self-test-tool-logib.html>; this model Logib can be usefully used by companies employing at least 50 employees.

10 https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/tools-and-actions-more-gender-equality_en.

Verdict at:

Case number: