



Equal pay and pay transparency 2023

Pay Transparency Directive and the amendment of the German Pay Transparency Act

Presentation & Agenda

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Agenda

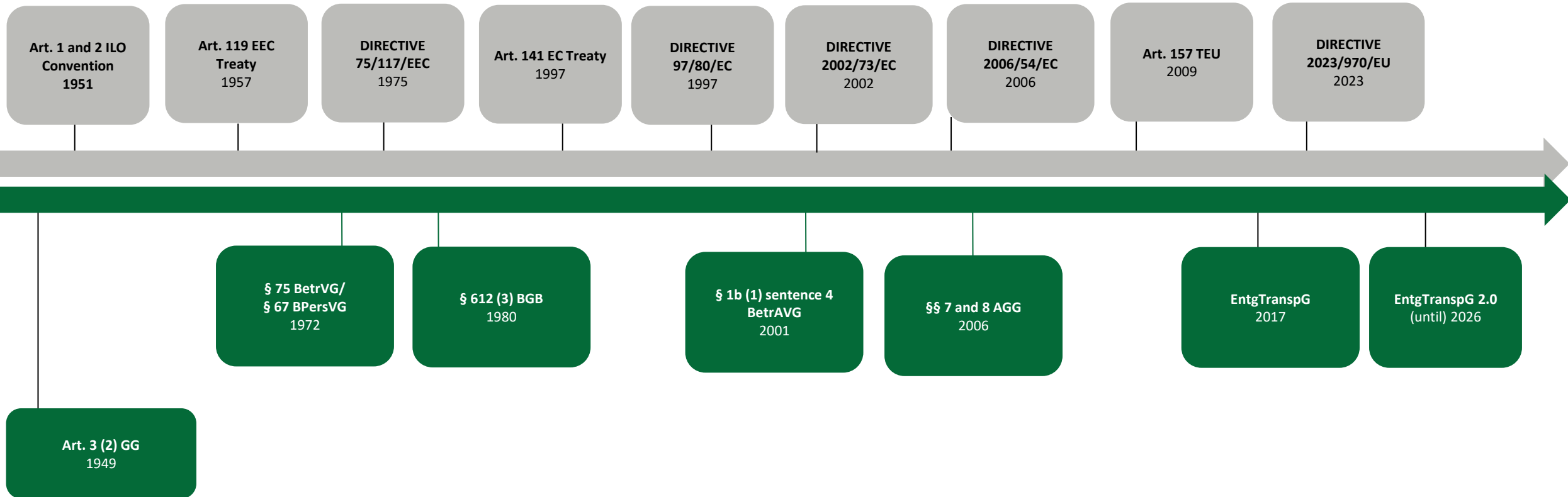
- I. Introduction: Status quo and telos of the legal framework
- II. Pay Transparency 2.0: Changes to the German Pay Transparency Act (EntgTransG) due to EU Directive 2023/970 (EntgeltT-RL 2023)
- III. Impulses for the current needs-based, gender-neutral design of remuneration systems
- IV. Suitable (compensation) instruments to ensure legally compliant and needs-based equal pay governance
- V. Q&A



Introduction: Status quo and telos of the legal framework

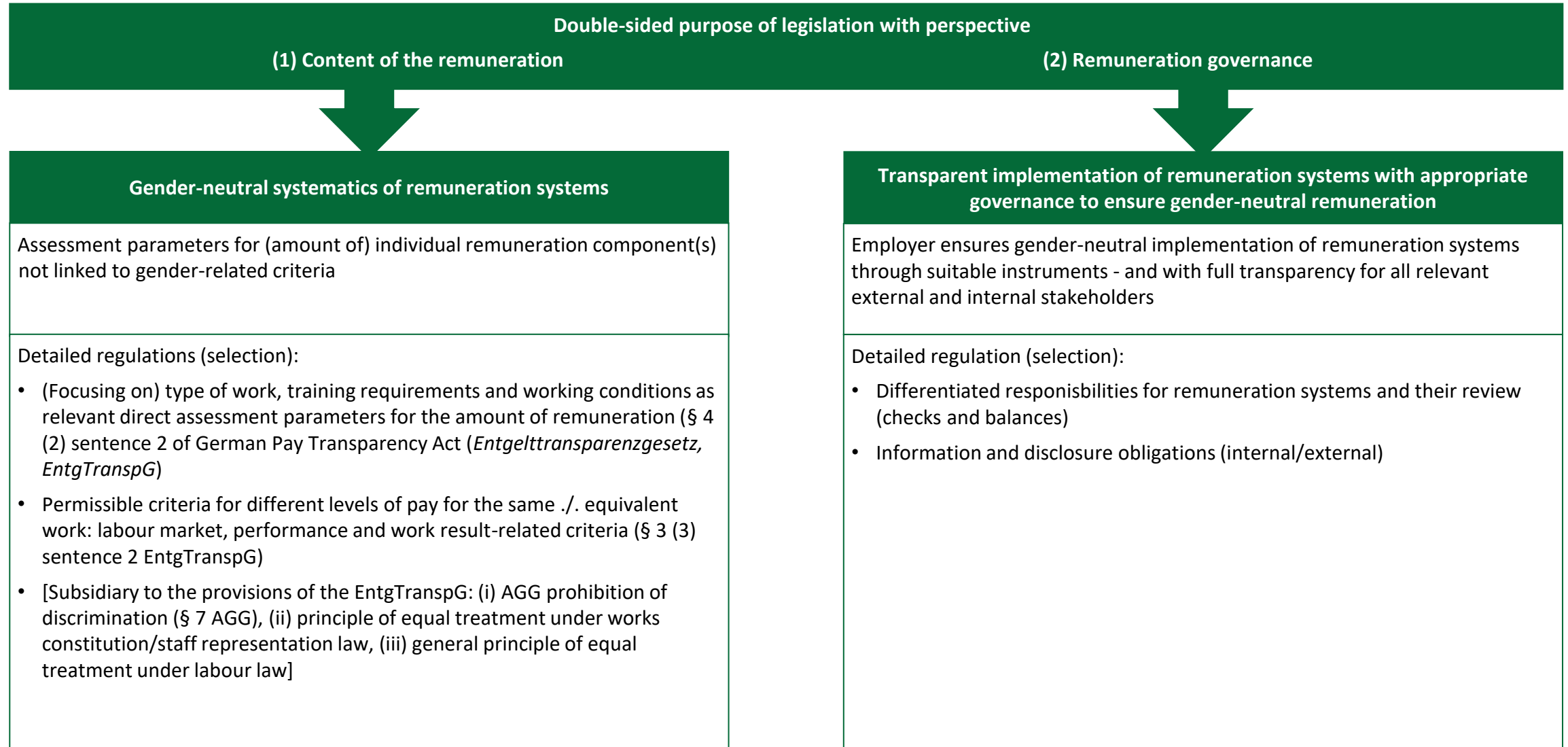
Introduction: The journey of the legal framework to date

... to be continued



Introduction: Telos of the legal framework

The two-dimensional approach



Pay transparency 2.0: Changes to the German Pay Transparency Act due to EU Directive 2023/970 (EntgeltT-RL 2023)

Pay transparency 2.0

Necessary amendment of the EntgTranspG due to EU Directive 2023/970 (EntgeltT-RL 2023), among other things: Seven core topics

- (1) **Assessment parameters for work of equal (value) and remuneration re-adjusted:** Readjustment of the substantive assessment parameters for the amount of the individual remuneration component
- (2) **Comparable employees extended:** Extension of the group of comparable employees with regard to the same/equivalent work
- (3) **Persons entitled to information extended:** Extension of the personal scope of the right to information on pay to include job applicants and employees in ongoing employment relationship regardless of the size of the company
- (4) **Employers obliged to report extended:** Extension of the reporting obligation on equality and equal pay to all companies with at least 100 employees
- (5) **Judicial enforceability extended:** Readjustment of the principles on the reversal of the burden of proof to facilitate the enforceability of employee rights in the event of non-application of the principle of equal pay and to the employee's claims for damages in this regard
- (6) **Consultation duty with works council/staff council extended:** Extension of the obligation to conduct a company audit to all employers subject to reporting requirements in the event of a difference in average pay of more than 5%
- (7) **Sanctioning of violations of the EntgTranspG:** (First-time) introduction of (fine) sanctions against the employer for non-compliance with the provisions of the EntgTranspG on gender-neutral remuneration and transparency obligations

Pay transparency 2.0

Assessment parameters for equal work and pay re-adjusted and comparable employees extended

EntgTranspG 2017

§§ 3 et. seq. EntgTranspG:

- **Assessment of the equivalence of work I - Catalogue of standard examples of § 4 (2) actually applied:** with criteria (1) type of work, (2) training requirements, (3) working conditions; which are independent of the employees performing the work and their performance
- **Assessment of the equivalence of work II - Legal function of equivalence for employers bound by collective agreements/applying collective agreements:** Presumption of equivalence of activities in the same pay group (§§ 4 (5), 11 (3))
- **Permissible differentiation criteria for different pay levels for equal/equivalent work - catalogue of standard examples in § 3 (3):** with reference to (1) labour market, (2) work performance, (3) work result
- **Comparable employees:** Only employees in the same legal (employment) relationship (§ 4 (3))

Extended requirements of the EntgeltT-RL 2023

Art. 4, 19 EntgeltT-RL 2023:

- **Assessment of the equivalence of work - Further catalogue of sample rules:** with criteria (1) skills, (2) workloads, (3) responsibilities, (4) working conditions.
- **Comparable employees:** All employees whose remuneration is based on a *single legal source* for the relevant remuneration components (e.g. collective agreement, Group reference in the case of Group matters); temporary employment not required (Art. 19 (1) and (2))

Notes

- **No fiction (any more) of equivalence of activities in the same collective agreement pay group for employers bound by collective agreements/applying collective agreements according to EntgeltT-RL 2023:** But classification in identical pay group still possible as an indication of equivalence

Pay transparency 2.0

Persons authorised and obliged to provide information extended

EntgTranspG 2017

§§ 10 et. seq. EntgTranspG:

- **Employees' right to information:** Right to information in relation to comparable activities to be specified by the employee: (1) average monthly gross remuneration and up to two individual remuneration components with regard to the remuneration regulations in the same employer's company, (2) time limit to two-year information cycle (§§ 10 et seq.)
- **Persons obliged to provide information:** Employers with generally more than 200 employees (§ 12 (1))
- **Assertion of the right to information:** (1) For employers bound by collective agreements: via works council, (2) direct claim only against employers not bound by collective agreements (§§ 13 et.)

Extended requirements of the EntgeltT-RL 2023

Art. 5 et. seq. EntgeltT-RL 2023:

- **Job applicants' right to information:** Right to information regarding starting salary and applicable collective agreement provisions (Art. 5)
- **Employees' right to information:** Right to information with regard to individual income and average income, (1) broken down by gender and for groups of employees performing the same or equivalent work, (2) no limitation to individual remuneration components, (3) no time limit (Art. 6, 7)
- **Persons obliged to provide information:** All employers (regardless of company size)
- **Assertion of the right to information:** Employees' right to vote: vis-à-vis (1) employer, (2) via works council, (3) via equal treatment body (Art. 7 (1) and (2))
- **Instrument to ensure that the right to information is exercised:** Employers must actively inform employees annually about the right to information and the procedure for submitting applications (Art. 7 (3))

Notes

- **Compliance with other information obligations of the employer in relation to remuneration components/other benefits**
Other benefits: including (1) information on existing holiday entitlements for the respective calendar year, (2) information on remuneration parameters (especially variable remuneration) in institutions (§ 13 IVV)
- **Side view from practice: Report of the Federal Government of 23 August 2023:** (Only) 4% of employees surveyed as part of the evaluation of the EntgTranspG have asserted their right to information under the EntgeltTranspG

Pay transparency 2.0

Employers subject to reporting requirements extended

EntgTranspG 2017

§§ 21 et. seq. EntgTranspG

- **Employers subject to reporting requirements:** Employers (1) with generally more than 500 employees who (2) are obliged to prepare a management report in accordance with §§ 264 and 289 HGB (corporations and partnerships with legal entities as shareholders, § 21)
- **Reporting cycle and reporting period:** (1) Employers covered by collective agreements: every five years with a five-year reporting period, (2) Employers not covered by collective agreements: every three years with a three-year reporting period (§ 22)
- **Report content:** Presentation of (1) measures to promote equality between women and men, (2) measures to achieve equal pay for women and men, (3) quantitative data (separated by gender) on the average total number of employees and the average number of full-time and part-time employees (§ 21)

Extended requirements of the EntgeltT-RL 2023

Art. 9 EntgeltT-RL 2023

- **Employers subject to reporting requirements:** Employers with generally more than 100 employees (regardless of legal form, Art. 9)
- **Reporting cycle and reporting period:** (1) annual reporting obligation for employers with more than 250 employees, (2) triennial reporting obligation for employers with between 100 and 249 employees
- **Report content:** Presentation of data in accordance with Art. 9 (1): (1) gender pay gap for the individual remuneration components, (2) mean gender pay gap for the individual remuneration components, (3) proportion of employees receiving supplementary or variable components, (4) proportion of employees in each remuneration quartile, (5) gender pay gap between employees in groups of employees, broken down by normal basic wage or salary and by supplementary or variable components.

Notes

- **Transitional periods for implementing the reporting obligation:** Depending on size, for the first time (1) until 7 July 2027 for employers with more than 150 employees, (2) until 7 July 2023 for employers with between 100 and 149 employees
- **Side view from practice: Report of the Federal Government of 23 August 2023:** (1) approx. 30% of the companies surveyed have reviewed their company pay structures since 2019, (2) 10% of companies not bound by collective agreements and 30% of companies bound by collective agreements/applying collective agreements have reported on equality and equal pay to date

Pay transparency 2.0

Judicial enforceability extended and (for the first time) sanctioning of breaches of pay transparency

EntgTranspG 2017

No explicit legal regulations to date

- **Enforceability in court:** BAG (judgement dated 21.01.2021, 8 AZR 488/19): § 22 AGG
- **No sanctioning of violations of pay transparency**

Extended requirements of the EntgeltT-RL 2023

Art. 16 et seq. EntgeltT-RL 2023

- **Enforceability in court:** Easier to prove for the employee concerned: It is sufficient to provide prima facie evidence of facts that may give rise to a presumption of direct or indirect discrimination (Art. 18)
- **Sanctioning:** (1) Right to compensation for employees who are subject to gender-based pay discrimination (including back pay and associated bonuses or benefits in kind as well as interest on arrears), (2) Necessary implementation of specific sanctions for violations of the principle of equal pay in accordance with the Effet Utile principle (Art. 16)

Notes

- **Side view from practice: Report of the Federal Government of 23 August 2023:** Sanctions may be a suitable instrument for ensuring the implementation of legally binding requirements for pay transparency in remuneration systems and remuneration governance

Impulses for the current needs-based, gender-neutral design of remuneration systems

Impulses for the current needs-based gender-neutral design of remuneration systems

Starting point: BAG judgement dated 16.02.2023 (8 AZR 450/21) and its "correct classification" in the equal pay context

Facts of the case

- As of 1 March 2017, K worked for B as a sales representative as a replacement for employee E, who left the company on 31 January 2017 and most recently earned a gross basic salary of EUR 3,875. Her agreed gross basic salary was initially EUR 3,500. From 1 August 2018, it was based on a company collective agreement (HTV) and amounted to EUR 4,140 gross according to the relevant pay group, whereby it could increase by a maximum of EUR 120 gross/year in each of the years 2018 to 2020 in accordance with the cover clause regulated in the HTV. K was able to earn a sales-related commission from 1 November 2017.
- B hired the male sales representative A on 1 January 2017 as a replacement for the female employee U, who was leaving the company on 31 October 2017 for reasons of age and who most recently earned a gross basic salary of EUR 4,140. During the contract negotiations, A rejected the gross basic salary of EUR 3,500 offered (plus a sales-related commission from 1 November 2017) and demanded a gross round salary of EUR 4,500 for the period up to 31 October 2017, which B accepted. From 1 November 2017, the remuneration consisted of the sales-related commission and a monthly gross basic salary of EUR 3,500, which increased to EUR 4,000 from 1 July 2018 and to EUR 4,120 from 1 August 2018. The same classification was applied in the HTV as for K.
- K sued for, among other things, the payment of outstanding differential remuneration as well as for compensation pursuant to § 15 (2) AGG, as she performed the same work as A. B countered that it had been able to freely agree the higher remuneration with A, also taking into account the remuneration most recently received by E and U. In addition, K and A worked for different customers and had different professional qualifications (Diplom-Kaufmann vs. certified technician), whereby B was unable to substantiate that these criteria were decisive for determining the remuneration.

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Decision

- The BAG upheld the claim.
- The gender-related discrimination in relation to the different amount of the basic salary is based on the presumption of conformity pursuant to § 22 AGG.
- B had not succeeded in rebutting the presumption in a substantiated manner. The mere fact that the hires were made to replace workers who had left or were being paid differently was not sufficient to rebut the presumption of gender-based discrimination in pay.
- The argument that the higher basic salary of the male colleague is not based on gender, but on the fact that he - in exercising his freedom of contract under civil law - successfully negotiated a higher basic salary, does not invalidate the presumption.
- The arguments put forward by B regarding different customers and different training could not be taken into account due to B's unsubstantiated submission in the legal dispute.
- In addition to the back pay, the BAG also awarded K compensation of EUR 2,000 in accordance with § 15 (2) AGG for discrimination on the grounds of gender.

Consequences for practice

- **"Correct classification"** of the judgement in the equal pay principle: Contrary to the mood in the market, particularly in the immediate aftermath of the press release in February 2023, the BAG's judgement does not result in any material change to the labour law framework for the remuneration system and remuneration determination in remuneration systems. A different level of remuneration for work of equal value can continue to be granted regardless of gender if, in particular, the differentiation criteria are in line with §§ 3 et seq. EntgeltTranspG.
- **Consistent remuneration system and its stringent application - in a needs-based "paper trail"**: The judgement clearly demonstrates the importance of a consistent remuneration system for the actual determination of remuneration and its stringent application.

Impulses for the current needs-based gender-neutral design of remuneration systems

Needs-based assessment parameters for the remuneration system and for specific remuneration determination

Consistent remuneration system and its stringent application

Consistent remuneration system... in relation to the specific position

Holistic remuneration-related evaluation of the individual job/function:

With regard to the basic remuneration

- (1) with initial (core) parameters ("from within the company"):
 - Type of work
 - Specialist requirements and necessary professional experience
 - Concrete working conditions
- (2) with additional parameters relating to the job applicant/employee:
 - Labour performance
 - Labour performance
 - Work result
- (3) Good tool: Criteria for the appropriateness of Management Board remuneration (§ 87 AktG)

With regard to other remuneration components (the requirement of gender-neutral remuneration applies to each individual remuneration component)

Stringent application of the remuneration system in practice

Compensation governance:

Systematisation of needs-based responsibilities and processes:

- (1) Needs-based responsibilities on the employer side: with control questions
 - Responsibility for determining the remuneration-related parameters for the specific job/function
 - Function/involvement of HR (both in the tendering process and in the remuneration-related decision-making process)
 - Responsibility for specific tendering/hiring (incl. any decision-making chains with relevant authorisations)
- (2) Involvement of the works council/staff council in accordance with the law and requirements:
 - With regard to the system
 - With regard to the specific setting

Stringent application: Paper track

Impulses for the current needs-based gender-neutral design of remuneration systems

Principle of gender-neutral remuneration in the sound compensation environment (§ 5 (1) No. 6 IVV)

Dimensions of the regulatory requirement for gender-neutral remuneration (EBA-GSR 2.0)

- (1) **Content design:** Institutions must ensure that all aspects of the remuneration policy are gender-neutral, including the conditions for awarding and paying out remuneration
- (2) **Evidence:** Appropriate documentation of the remuneration-related evaluation of the individual job function (standard example (no. 26): Documentation of the criteria to be used for the specific job evaluation and labelling of the jobs to be considered equal/equivalent)
- (3) **Monitoring:** Establishment of suitable control processes for effective monitoring of compliance with the content organisation (in particular: Dual control principle, § 12 IVV audit, (needs-based) audit procedures of the Remuneration Officer) and information of the supervisory body by management

BaFin draft FAQ IVV 06/2023: n.n.

(For the time being) content-related filling of the dimensions based on the established legal framework

- (1) **Content organisation:** System according to slide 16
- (2) **Evidence:** Proper and consistent documentation of the specific pay determination in the individual case as an instrument for rebutting the presumption of gender-based pay discrimination
- (3) **Monitoring:** In particular gender pay gap analysis (including defined catalogue of measures), job profile analysis (and its application, especially for new hires), analysis of performance/other assessment criteria for variable remuneration components

Suitable (compensation) instruments to ensure legally compliant and needs-based equal pay governance

Suitable (compensation) instruments to ensure legally compliant and needs-based equal pay governance



- **Job architecture** as infrastructure for job evaluation, salary structure and salary progression
- The job architecture makes it possible to group employees by category for reports
- Building a **career development** programme that includes skills, efforts, working conditions, soft skills and educational, professional and training requirements
- **Analysing the risks** of the current salary structure
- Development of a **salary structure** and **guideline** with objective, gender-neutral criteria
- **Plan** the future state and **budget** for adjustments
- **Guideline for salary development** with objective, gender-neutral criteria
- Consideration of individual performance, skills development and length of service
- **Risk analysis** of the current **Total Rewards strategy** with regard to the remuneration transparency policy
- **Development of a total rewards strategy** that supports remuneration transparency
- Ensuring transparency by enabling every employee to **view** their **remuneration**
- **Simplifying and automating processes** reduces the risk of inequality
- Support fair, equitable compensation by **providing a clear overview** of the company's entire compensation structure
- **Reliable data source** for reporting purposes

Q&A



**Thank you very
much**
for your attention

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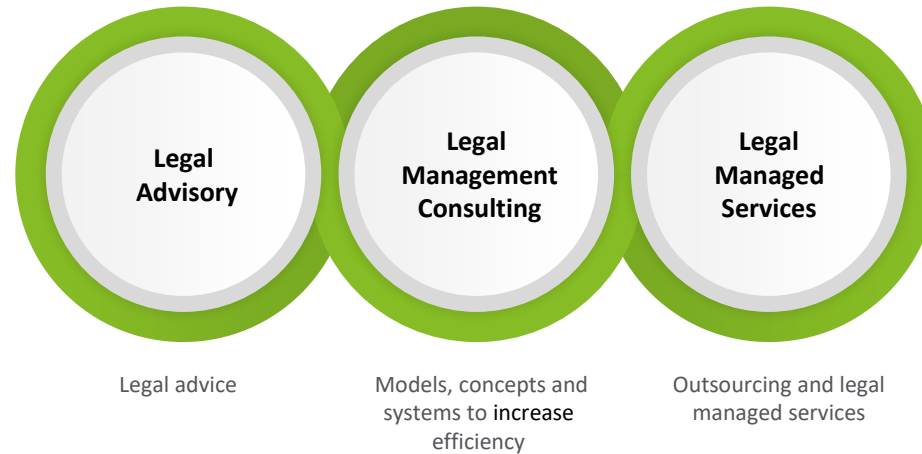
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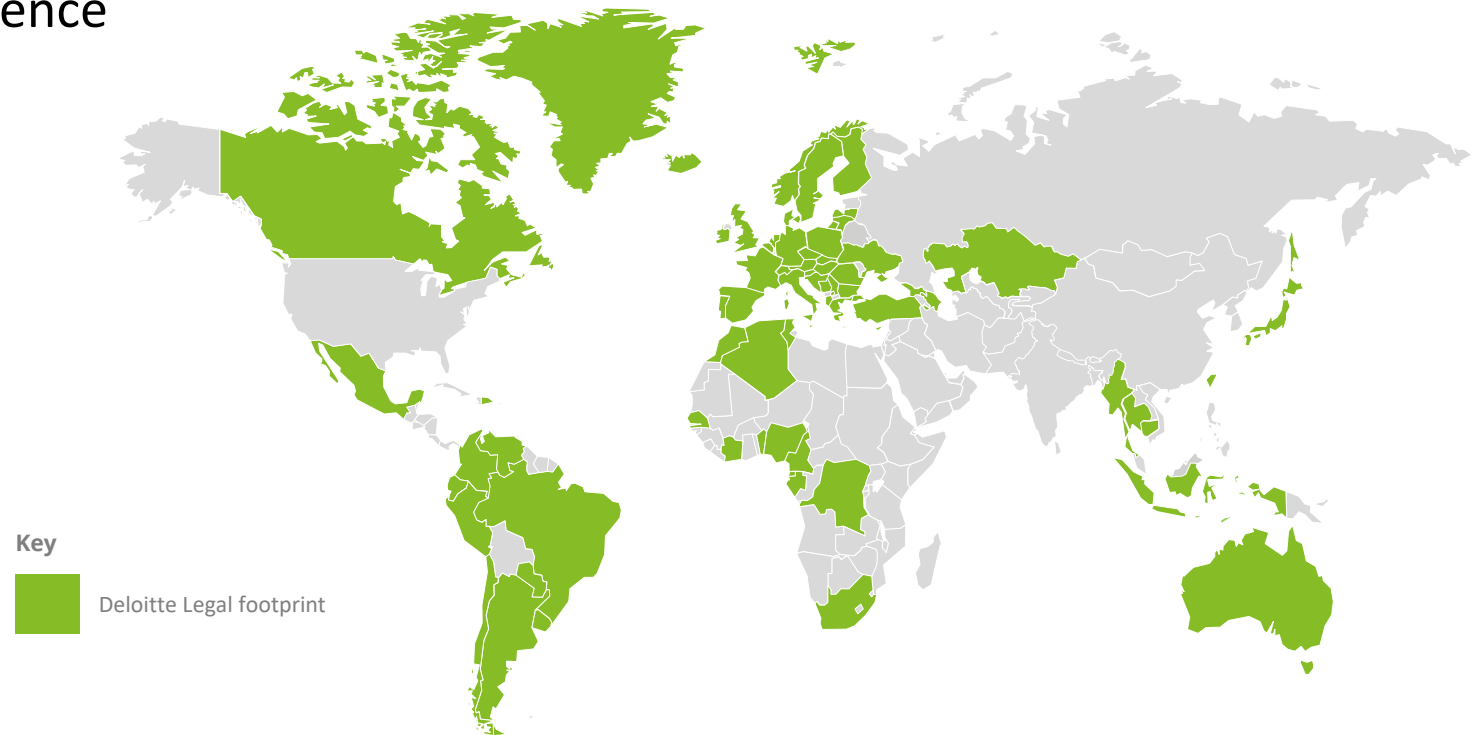


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