The Agenda podcast by Lewis Silkin: Pay Attention

Pay Attention Episode 9: Liberté, Égalité… Transparency? France and the Pay Transparency Directive

Tom Heys: Hello and welcome to Pay Attention, a regular podcast coming to you from the Lewis Silkin offices in London. I'm Tom Heys.

David Lorimer: I'm David Lorimer.

Tom Heys: And once again, we've gathered around the table to talk about the Pay Transparency Directive (PTD). This time, we're crossing the channel to France, home of existential philosophy, artisanal cheeses, and the unshakable belief in the sanctity of a lunch break. With its approach to worker protections embodying a certain joie de vivre, the French legal system sets a high bar for égalité in the workplace.

From its 35-hour workweek to its robust collective bargaining systems, France has long been known among employment lawyers and in-house counsel as one of the most tightly regulated labour markets in Europe. Today we'll explore how the PTD aligns with France's existing reporting regime and what lessons the rest of Europe might take from La République. And with that, we'll say, bienvenue to Guillaume Bourdieu from Capstone.

Guillaume Bordier: Hello, thank you Tom.

David Lorimer: We're delighted to be joined by you, Guillaume, and thank you for taking time out of a busy schedule. So look, let's kick things off with what exists already. I think we know, and I'm sure our listeners will, that there's a reasonably complicated pay reporting regime that applies in France already, but I'm sure it is a bit different to what the PTD will require. Guillaume, could you just set the scene a little bit? How do things work at the minute, briefly?

Guillaume Bordier: Yes, I will try to be brief. But first of all, I must stress that equality is one of the three fundamental principles of the French Republic. So it's a fairly familiar subject in France and we have long had the anti-discrimination legislation. The first law was in 1983 on gender equality, and the aim was to move from the logic of protection to a logic of equality for women's rights in the workplace, and since then, France has gradually implemented increasing comprehensive legislation on gender equality, not just in terms of pay, but with a broader approach.

And in addition to that, and that's probably one of the major differences with many other countries, since 1996, the French Supreme Court has established a general principle of equal treatment for all employees, whether they are the same gender or not. And this principle is in addition to the principle of non-discrimination, which are linked to protected characteristics, so it's a very broad principle of equal treatment. And in practice, this principle of equal treatment implies that two employees placed in the same situation are entitled to the same benefits. So as you can imagine, this limits the possibility of hiding behind the discretionary nature of certain benefits such as discretionary bonuses.

And as regard remuneration, the French labour code already contains the principle under which every employer ensures that women and men receive equal pay for equal work or work of equal value, so we have already the same principle that is mentioned in the PTD about work of equal value.

So the existing…there are many obligations that already exist under French law. So firstly, employers with more than 50 employees must provide their employee reps with certain data on gender equality and include them in what we call the Economic and Social Database that is permanently available to works council members. And in addition to that, there is also an obligation to negotiate annually with trade unions, not only on remuneration and pay rises, but also on gender equality, work-life balance, and working conditions. And this, of course, includes gender pay and potential elimination of gender pay gaps. In the absence of an

agreement signed with the labour unions, the employer must run up an action plan to ensure gender equality and it must be based on clear, precise, and operational objectives. It's not just about setting some very generic principle. You must have very precise objective targets that the employer has to reach within a certain period of time.

Since 2019, companies have also reporting obligations, what we call the Gender Equality Index and it concerns all employers with more than 50 employees or less than the threshold of the PT, and all companies must report every year on the 1st of March. In practice, the companies have to measure four to five indicators depending on the size of the company. One of the indicators is the average pay gap by age category and job classification, but there are also other indicators, just like the gap in the distribution of individual pay increases, the number of female employees who receive the pay rise when returning from maternity leave, the gender balance among the top 10 earners, and the difference in the distribution of promotions - so very broad indicators. And once the index has been calculated, companies have an obligation to notify the results of the calculation to the Works Council, what we call the Social and Economic Committee, but also report the results to the Ministry of Labour, which publishes all the results on their website, so it means that any applicant to a role can have access to the data concerning their future potential employer. And we've heard that many applicants in France now use and go on the website of the Ministry of Labour to check what are the results of the gender equality in the company.

And finally, companies have to publish in a visible and legible manner on their company website the detailed results of the gender pay index. On top of that, in addition to these reporting obligations and publication obligations, there is also an obligation to comply. So the index is based on the system with a number of points, the maximum number of points is 100 points, and if the company doesn't reach the threshold of 75 points, the company must negotiate a company agreement with the trade unions or draw up an action plan in order to reach the threshold of 75 points within three years. And for companies which are already above 75 points but below 85 points, they have also to discuss with the trade unions or decide in an action plan some progress targets in order to be able to increase the level of compliance.

And finally, one thing which is important is the potential penalties.Unlike in many countries where companies just have to report, in France there is not only an obligation to report, but also an obligation to comply, which means that if within three years you don't comply, you don't reach the minimum number of points of 75 points, then the company may have to pay a fine to the French government, which can go up to 1% of the annual gross payroll. So significant penalty may apply, either if the company does not report or if the company does not reach the minimum threshold.

David Lorimer: Fascinating! So you can see from that that there's lots of already kind of underpinning principles are pretty well baked into French law, and that existing pay reporting is of course linked to collectivism, which is one of the key principles, of course, under the PTD, isn't it? So I'm sure we've got lots to glean from France when it comes to getting ready. One thing that you mentioned, Guillaume, was the current threshold of 50 workers for the gender index? Is that something that you think might be reflected in the PTD implementing legislation?

Guillaume Bordier: Yeah, absolutely. We don't imagine that the French government will increase the threshold. So probably the obligation will remain with 50 employees.

Tom Heys: So that's an important point for employers trying to prepare for the PTD. They can't just look at the headcount threshold in the Directive and see where they've got more than 150 employees because they've got to think about existing legislation and what thresholds are set there.

Guillaume Bordier: The only thing we can maybe expect is that there will be a progressive implementation of the new obligation depending on the size of the company. Maybe the companies with more than 250 employees will be immediately concerned by the new obligations and then progressively, maybe the year

after, with more than 100 and then the year after all companies with more than 50 employees. But only for the new obligations because of course the previous obligation will remain for all companies.

David Lorimer: We're delighted to hear, Guillaume, that you're getting off the fence and making bold predictions. So in that spirit, we've heard some rumblings a little while ago that January 2025 was the target date for implementing legislation in France. There's been some, it's fair to say, I think political turmoil since that announcement. So can you bring us up to speed? When do you expect to see something? When can we set our diaries and get excited for?

Guillaume Bordier: So in October 2023, the Ministry of Labour announced the transposition of the implementation of the of the PTD in France within 18 months, so by April 2025. But in March 2024, the new Ministry of Labour spoke about a new law in 2025. And however, since 2024, France has experienced, as you know, a period of political instability with four successive prime ministers, each struggling to form a stable coalition with the parliament divided into three blocks following the parliamentary elections in June 2024. So as the result, it is very likely that there will be a delay in the transposition of the Directive as there are other more urgent matters such as the vote of the Social Security Finance Bill for 2025 or re-discussing the pension reform, and this will probably take precedence. So we can still expect implementation in 2025, but probably not during the first part of 2025.

Tom Heys: And is it likely when it will be implemented, employers will get a good amount of notice as to how it will be implemented? Or is it the case that laws get sprung on employers and they just start...

Guillaume Bordier: No, we have a parliamentary process as in many countries. So it means that everything starts with prior consultation with employers, organization and trade unions at national level, so usually we have a first idea of what the government has in mind. Then the government prepares the bill, which is submitted to the parliament and we have two chambers so we will be able to follow the public discussions before the Senate and the National Assembly, which can last two to three months, so of course the provisions can, of course, evolve during the discussion before the Parliament, but we will already have a pretty good idea of the final version of the bill during this period. So I think probably employers will... will know three to four months what they can expect.

David Lorimer: Great, okay, so we'll of course be across all of this and keeping all of our audience updated as to how things progress in France, but lots to look out for this year. Let's move on and focus on some of the PTD's key requirements and themes and maybe think through how they will affect employers in France. The first one is of course this issue of categorisation, putting your workers in buckets of people who do the same work or work of an equal value - that tried and tested equal pay threshold. How much of a challenge do you see that being in France, Guillem, or are you well set on that?

Guillaume Bordier: Yeah, I think it would be a big challenge for companies, because as I said, we have already the concept in the French labour code of work of equal value, and at the same time, we already have the concept of categorizing workers. It's a concept which is well known. We have collective bargaining agreements, which cover a large proportion of the workforce and all collective bargaining agreements at industry-wide level include detailed job classification with associated minimum wage and specific rights or benefits depending on the category.

However, the Directive will threaten these practices by requiring greater transparency and criteria for job categorisation, so we are not sure that it will overlap the existing categories.

And for the gender equality index, it's easier for the moment because employer can decide to categorize employees to calculate the gender equality index either by applying the four main legal categories, which are in France, blue-collars, white-collar employees, technicians and supervisors and executives, or they can decide to apply the CBA job classification, which is usually used by employers because it's more detailed and it's based on several criteria. Or the employers can use another grading method, which of course comply with the objective to measure pay between men and women and should not result in the constriction of

categories by function because it's important for the concept of work of equal value that you compare people from different departments, as soon as the work is of equal value, even if it's not for the same kind of duties. So trying to look ahead, the Ministry of Labour has already indicated in May 2024 that the industry-wide CBA job classification systems may be used in the future to guarantee compliance with the PTD, but only provided that these job classification include all the criteria defined in the PTD. And as you know, these criteria, there are six criteria, skills, the efforts, the responsibility, working conditions, and other factors which are relevant to specific job positions. And the assessment now is that many collective bargaining agreement job classifications do not use this kind of criteria. So we have job classification, but probably they will not meet the criteria under the PTD. So currently, there is a lot of efforts which is made within the collective bargaining agreements at national level, negotiations with employer associations and trade union organisations to re-discuss job classification and try to adapt their job classifications and for some of them, they are 5 or 20 years old and really needs to be modernised and especially to reflect the appropriate criteria.

So we have very good example of CBAs where they have adopted very modern job classification, which are based usually on several criteria. For instance, the metal industry CBA, which cover thousands of companies in France have now a very comprehensive job classification based on six criteria, the complexity of job, knowledge, autonomy, contribution, management, cooperation, communication, and the employer is supposed to assess every job to allocate the appropriate level in the job classification. And based on this kind of job classification, I think we will be able to have a good idea of work of equal value. But a lot of CBAs will still have to make some efforts to modernize their job classification.

David Lorimer: That's really interesting. And of course, time is running out, especially for employers, multinationals who want to get ahead of this. One thing that we get asked a lot is, you know, most of those big multinationals will have and hopefully apply in a consistent way across their whole European workforce, existing systems of levelling. Do you think, Guillaume, there's a chance that the French government will legislate to say that those systems can't work and you must adopt sectoral CBA type classification systems or do you think they can coexist?

Guillaume Bordier: No, I think they will coexist and probably employers will be able to choose between the CBA job classification and internal classification, provided that of course the internal classification meets the criteria set by the Directive. And this is already what the Ministry of Labour has indicated - when the CBA job classification will not meet the criteria, then they say that employers will have to adapt the classification if it's not adequate. So they already admit that the CBA job classification may not be relevant, and employer can use another classification.

Tom Heys: Okay, I'd like to talk about worker representatives because the PTD sets out a pretty clear and also pretty big role for representatives in some countries, and we've talked about this on previous podcasts, that will have a really big impact in places like Ireland. I was wondering how big an impact you think the new rights and obligations for worker representatives will have or is it the case that there's already a pretty good system of representation in place and it's more of an evolution rather than a revolution?

Guillaume Bordier: I would say it would be a mix between evolution and revolution. Now, employee representatives already have a certain right of access to information and the right to negotiate with employers on gender pay and more broadly on a vast range of topics. But clearly these rights will be threatened with the PTD and they will obviously play a key role in the future. So there are currently obligations to provide information to the employee representatives, to negotiate company agreement on gender equality, to consult with the Works Council, for instance, if the employer has to draft an action plan to close the gap or to take corrective measures or improve or to decide improvement targets. But at the end of the day, currently, there is no need to agree.

And with the PTD, there is still some uncertainty about exactly the role of the employee representative. Is it on your consultation? Do we need to reach an agreement with the employee representatives? In France, for

the moment, there is no obligation to reach an agreement, but we don't know in the future how the PTD will be implemented and if there will be an obligation to reach an agreement with the unions or with the works council. And the new obligation to have a joint pay assessment with employee representatives is already something new, even if we had the obligation to negotiate an action plan or a company agreement when the results of the gender equality index was not as good as it should be. Clearly, the new provisions will be more demanding than those currently applicable and joint pay assessment will be much more demanding for companies.

One thing which is important to know also about France is that Works Councils, so the Social Economic Committee, can appoint external experts. The external experts are paid by the employer or paid by the Works Council on their operational budget, which is by the way financed by the employer. And there is no doubt that these experts will play a very important role in educating the employee representative about the obligations and their application by the company. So we can expect a greater role of the Works Council and the trade unions, but assisted by external experts. And these external experts will probably also train employee representatives on these new obligations to help them to assist them during the negotiation of a gender equality agreement or in the context of the joint pay assessments.

Tom Heys: So we've talked before on the podcast about how worker representatives will need to have quite a deep level of statistical knowledge to have sensible conversations with employers about their gaps and the reasons for that. It's quite interesting to see that that is already the practice in France that workers representatives have resources and access to experts to be able to have sensible conversations with employers.

David Lorimer: Yeah, absolutely, and I'm sure those experts are dusting off their pricing menus and budgeting for lots of fee income next year. I look forward to that. Let's move on and have a look at some of the - what we're calling the kind of - individual transparency rights. So things like the right for workers or workers representatives to ask for transparency around the average male and female pay in their category, things like the right for applicants to have initial pay or pay range before they accept a job. The overall direction of travel there seems to be to try and move on the discussion, remove taboos around talking about pay and open up a more kind of transparent culture when it comes to pay. How much do you think that's likely to be achieved in France, Guillaume, or is there already lots of transparency in French workforces?

Guillaume Bordier: No, employee representatives have access to a significant level of information, but not at the individual level. So I think the main difference would be that individual employees will have access to information on their individual pay levels and on the average pay levels broken down by gender for categories of workers doing the same job or having work of the same value as theirs. So I think it will be much easier for employees to, of course, gain access to the information regarding their own situation, but also being prepared to start a negotiation they are not happy about the results and the information and their own situation.

And also the employees and the employee reps will have the right to ask employers for clarification and further details about any data communicated with an obligation for the employer to answer within a reasonable period of time and providing a detailed reply, and I think that it will be a challenge. This is something we have already experienced with the right of access regarding data privacy and personal information. And I think it will be the same here with French companies not really prepared to respond in a reasonable period of time.

David Lorimer: I'm delighted to hear you say that. I've been trying to cast this right as the right of access to pay transparency for some time and I'm pleased it's gaining traction at least with you, Guillaume. Okay, let's, look, we can't have a discussion about French Labour legislation without talking about enforcement, the prospect of fines and penalties and all other sorts of things.

We think Guillaume that this whole new kind of regime of radical transparency is probably going to lead to an uptake in collective equal pay claims as a direct result. Are there other implications? I mean, is that your expectation as well? Or do you expect to see a robust fining regime as well in France, for example?

Guillaume Bordier: We will probably keep the existing regime with the potential penalty of up to 1% of the gross payroll if the company does not comply with the obligation to report, to publish. I think it will be extended to other new obligations, like if the company does not comply with the new obligations, I think the same penalty will probably apply because it's a penalty which is getting more usual in other topics, in other subjects, the 1% potential fine is something which is now frequently used by the French government. So probably we will keep this penalty.

And regarding individual litigation, clearly, absolutely, it's likely that the Directive will lead to an increase in pay-related litigation, because pay gaps will be more visible and it will be easier for employees to enforce their right with the new law. Maybe not immediately, but I think in a couple of years, I think we will have to face more and more litigation. We know that employees' lawyers tend to find any potential claim to, especially in case of termination of the employment contract by the employer, because we have a cap on damages for unfair dismissal, we see a clear trend. A trend to try to make other types of claims for the employees to be able to obtain a significant amount of money. So I think that pay gaps will also become something which will be used by employees' lawyers to try to obtain additional damages.

And again, we've seen this happening with the employee's right of access to their personal data and we don't see why we would not be the same, we would not have the same trends regarding pay related litigation. So employers will need to be prepared to face individual or collective claims regarding unjustified pay gaps. And also because the French Supreme Court has already upheld a request by employees to be provided with the pay slips of their colleagues placed in comparable positions in the context of a dispute over equal treatment. So the French Supreme Court has already set the scene to facilitate employee litigation around equal treatment and providing employees with the documents that would be helpful for the employee to prove a gender gap or pay gap with their colleagues.

So I think employers will need to be proactive in complying with the new requirement to mitigate the risk of litigation and manage their new obligation. And I think we should also recall that the PTD provide that if the employer has not complied with its pay transparency obligation, then the burden of proof will be on the employer only. So it will not be a shared burden of proof, but the employer will have alone the burden of proof to explain the pay gap between employees.

David Lorimer: Fascinating. It's bombshell after bombshell on this podcast. Thank you, Guillaume.

One other potential sanction that's caught my eye is the idea that organizations might be excluded from public procurement processes if they breach the equal pay principle or breach certain obligations of the PTD. Is that the kind of thing that's often seen in France in practice?

Guillaume Bordier: Not on this topic but on other topics for instance all the legal provisions regarding hosted workers or illegal work, one of the potential sanction is the ban from public tenders so it's quite usual so we can expect that we will find the same kind of potential sanction in the pay transparency obligations and sanctions.

Tom Heys: Thanks for that very definitive answer, although I'm sure it's perhaps likely to alarm one or two of our listeners.

David Lorimer: Absolutely. Well, fantastic and fascinating insights, Guillaume. All that remains for me to say is merci beaucoup for all your time and for your contributions and for bringing us up to speed on France. We'll be back soon with another Pay Attention podcast and with more insights on the PTD both there and on our website in writing. In the meantime, please do feel free to reach out to us or any of your usual contacts to talk more about the PTD.

Tom Heys: Au revoir!