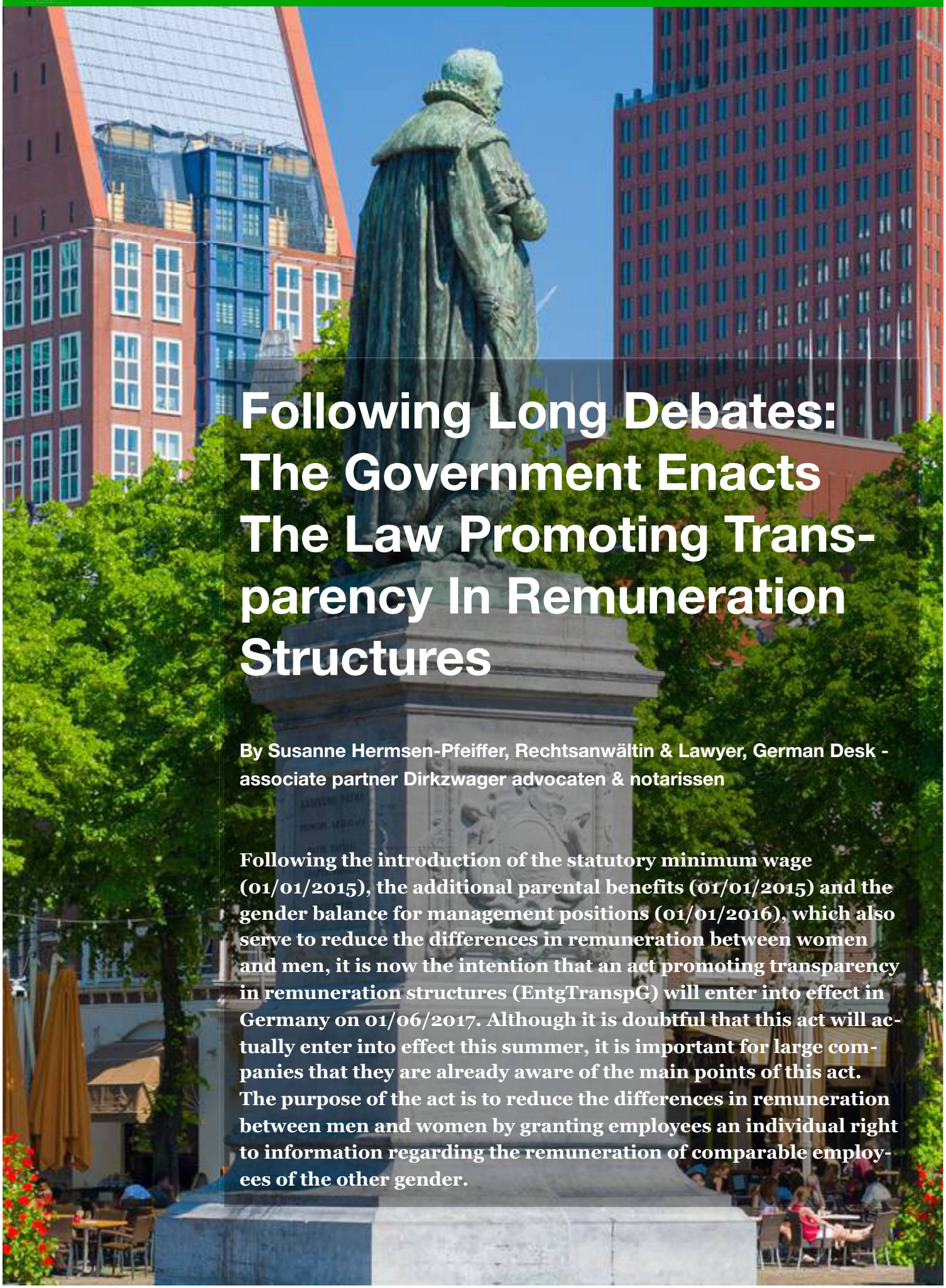

Following Long Debates: The Government Enacts The Law Promoting Transparency In Remuneration Structures

By Susanne Hermsen-Pfeiffer, Rechtsanwältin & Lawyer, German Desk - associate partner Dirkzwager advocaten & notarissen

Following the introduction of the statutory minimum wage (01/01/2015), the additional parental benefits (01/01/2015) and the gender balance for management positions (01/01/2016), which also serve to reduce the differences in remuneration between women and men, it is now the intention that an act promoting transparency in remuneration structures (EntgTranspG) will enter into effect in Germany on 01/06/2017. Although it is doubtful that this act will actually enter into effect this summer, it is important for large companies that they are already aware of the main points of this act. The purpose of the act is to reduce the differences in remuneration between men and women by granting employees an individual right to information regarding the remuneration of comparable employees of the other gender.

The intention is based on the findings of the Federal Statistical Office of Germany that showed that in case of equal formal qualification and otherwise similar characteristics, there is a 7% difference between the remuneration for women and the remuneration for men.

To which companies does the new act apply?

It was initially intended to have the act also apply to small and medium-sized enterprises, but it was decided later that the new act only applies to large employers. An employee has an individual right to information concerning the average wage towards an employer who generally has more than 200 employees. Moreover, companies with generally more than 500 employees have to indicate how they promote employment of women and how they guarantee equal pay for men and women.

Main regulations in the new act
Individual right to information

If an employee has indications that at least six colleagues of the other gender receive higher pay in case of identical or similar management, such an employee will have a right to information regarding the average income towards the employer. This applies to remuneration schemes that apply within the same company at the same employer. If the relevant employer has companies in different regions, it will remain allowed to apply a different remuneration from one region to the next for equal or equivalent activities. The term remuneration should be interpreted broadly and comprises all basic or minimum remuneration for work as well as all other allowances that are granted on the basis of employment, directly or indirectly in cash or as payment in kind. The employer is obliged to provide the relevant information within three months. This means that the employers involved are required to already start preparing information concerning their remuneration so that they are able to provide the relevant information on time. Unequal treatment will be assumed if the employer fails to comply on time with a request for information. The employer will carry the full burden of proof in the event legal proceedings are initiated. Employees are required in principle to direct their request for information to the works council if a works council has been formed. Employers that are bound by a CLA or that apply a CLA may limit themselves to mentioning the remuneration schemes included in the relevant CLA and with reference to the place where these schemes can be inspected.

In principle, the right to information cannot be exercised again until two years have passed after the relevant information has been provided. An exception applies if the employee is able to argue within reason that the conditions have changed considerably since the last time information was provided. For the time being, a waiting period of three years applies as transitional period after the new act has entered into effect.

Definition of the terms equal and equivalent activities

The new act also defines the terms equal and equivalent activities. According to the act, female and male employees perform equal activities if they perform identical or similar activities in different workplaces or the same workplaces after each other.

They perform equivalent activities if it may be assumed on the basis of the full set of factors that they are in a comparable situation. The factors that should be taken into account in this connection include inter alia the type of activities, the training requirements and the terms of employment.

However, this does not mean that the employer is no longer allowed to make a distinction when granting remuneration: there is no violation of the equality principle as long as the difference in remuneration for equivalent activities is not determined directly or indirectly by the employee's gender.

Internal assessment procedure

An appeal is made to employers with generally more than 500 employees to check on a regular basis by means of internal assessment procedures whether their remuneration schemes and the various pay components that are paid and the application thereof comply with the requirements of the equality principle. This internal assessment procedure is voluntary. It is therefore not expected that this internal assessment procedure will have appreciable relevance in practice. The representatives of the employees within the company must be involved in the performance of an internal assessment procedure. However, the works council does not have the right to initiate an internal assessment procedure.

Reporting obligations

Companies with generally more than 500 employees that are obliged to report pursuant to § 264 and § 289 of the German Commercial Code (Handelsgesetzbuch – HGB) are obliged to draw up a report concerning the equality of women and men and the equality of remuneration, in which measures to promote the equality of women and men and the effects thereof as well as the measures to guarantee the equality of remuneration for women and men have been laid down. If a company does not implement measures to promote the equality of women and men or to guarantee the equality of the remuneration for women and men, such a decision must be substantiated in the report. Employers that are bound by a CLA or that apply a CLA are required to publish such a report every five years, employers that are not bound by a CLA and do not apply a CLA have to report every three years. The report must always concern the last five or, as the case may be, three years. Such a report will have to be drawn up for the first time in 2018 if the act enters into effect before the end of 2017.

Consequences

Pursuant to the new act it is not allowed to award or pay certain employees a lower remuneration for equal or equivalent activities on the basis of their gender. Employees have a right towards their employer to payment of the remuneration that should be paid if there had been no disadvantaging on the basis of their gender when granting the remuneration. This right prescribes after three years, which means that a payment obligation with retroactive effect may apply for employers. Schemes in employment contracts or CLAs reducing this term are invalid.

Sanctions in case of infringement of this right are not included in the new act (with the exception of reputational damage and the obligation to subsequent payment of salary).