

# **‘New Developments in Employment Discrimination Law’**

## **- Country Report: Germany**

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## **A. Introduction**

German law on employment discrimination has changed fundamentally as a consequence of recent EC-legislation in this area<sup>1</sup>. The concept of discrimination as such is not new in Germany. But due to the European influence on the German legal system, discrimination law has taken a completely different shape and, in addition to that, has gained far more importance. This paper will give a brief historic overview of the development of employment discrimination law (B.). It will then describe the sources of discrimination law in Germany and give an outline of their content (C.). Subsequently a couple of general questions of employment discrimination law will be addressed (D.) before arriving at some conclusive remarks (E.).

## **B. Historic overview**

As already said, EC-law has immensely influenced German law with regard to the prevention of job discrimination. Because of this influence, a short historical retrospect will first aim at the European level, before having a closer look at the legal developments in Germany themselves.

### **I. Employment discrimination law at the European level**

From the very start the idea of equal treatment formed one of the basic concepts of EC-law. Most national laws traditionally have their focus on protecting the interests of employees (who are typically regarded as being the weaker party to a contract of employment). In opposition to that, the EC is based on the fundamental idea of establishing a common market. And this means, almost logically, that all employees must be integrated in this market equally. This is why the freedom of movements of workers, as guaranteed in Article 39 EC-Treaty contains the principle of non-discrimination which forms one of the basic elements of the Treaty. Apart from that,

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<sup>1</sup> Job discrimination law in all Member States of the EU is largely based on according Directives. As a consequence all national legal orders share many features. Still, many differences exist; see *Bell/Chopin/Palmer*, Developing anti-discrimination law in Europe – The 25 EU Members States compared, Brussels, 2007. This report, in any event, will try to highlight the aspects which may be characteristic for Germany.

the principle of equal treatment between men and women played a major role in EC-labour law right from the start. It must be said, however, that this was largely due to the fact that the French law at that time already provided for equal pay between men and women<sup>2</sup> and the French simply did not want to face competition from countries which did not know the principle. The prevention of employment discrimination formed not only part of primary law, but was an essential element of secondary law<sup>3</sup>. In particular, a Directive concerning the principle of equal pay for men and women was adopted in 1975<sup>4</sup>. The Directive transferred the principle of equal pay as laid down in the EC Treaty into European secondary law. In 1976 a Directive on the implementation of the principle of equal treatment for men and women followed<sup>5</sup>. That Directive aimed at access to employment, working conditions, vocational training and promotion. In the recent past, however, employment discrimination law of the EC has extended its scope considerably. This is largely due to two Directives: Directive 2000/43/EC<sup>6</sup> aims to prohibit any discrimination because of race or ethnic origin by an employer (Art. 1 of that Directive). Directive 2000/78/EC<sup>7</sup>, which is even more important, establishes a general framework for equal treatment in employment and occupation. It thereby aims at prohibiting any discrimination on the grounds of religion or belief, disability, age, and sexual orientation (Art. 1 of that Directive). Both Directives work in a similar way. They contain grounds on which discrimination must in principle not be based and they aim at establishing a coherent set of rules in the area of employment discrimination.

## **II. German employment discrimination law**

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2 Article 141 EC Treaty demands that 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.

3 Primary law within this meaning is essentially composed of the EU-Treaty and the EC-Treaty. The secondary law, on the other hand, has its roots in the treaties and contains all kinds of feasible acts, in particular Regulations (whose provisions are immediately binding for all citizens) and Directives (which, in principle, are binding on Member States only). The European employment discrimination law so far has been regulated by the latter, which means that member states are bound as to the result to be achieved, but are in principle free to choose the forms and methods it takes to achieve those results.

4 Council Directive 75/117/EEC of 10 February 1975, Official Journal L 045, 19/02/1975, p. 19.

5 Council Directive 76/207/EEC of 9 February 1976, Official Journal L 039, 14/02/1976, p. 40.

6 Council Directive 2000/43/EC of 29 June 2000, Official Journal L 180, 19/07/2000, p. 26.

7 Council Directive 2000/78/EC of 27 November 2000, Official Journal L 303, 02/12/2000, p. 16.

German law has been providing for a certain prevention of discriminatory practises in employment even before the more recent developments on the EU-level took shape. For instance, provisions of the German Civil Code, which on their part implemented according EU-law, banned employers from discriminating against employees on the ground of their gender. Apart from that the so-called labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) exists. This principle, which was developed by the courts and has deep roots in German law<sup>8</sup>, puts every employer under an obligation not to differentiate between comparable employees for reasons that must be regarded as not being appropriate.

Only after the coming into force of Directives 2000/43/EC and 2000/78/EC, however, the idea of employment discrimination has been starting to play a more central role. In this context it is worth noting that at the time when a political consensus had been reached on the two Directives in Brussels, quite a few observers were of the opinion that the duty to implement those Directives on the national level did at least in some areas not require an amendment of the pre-existing rules<sup>9</sup>. This early assessment has been proven wrong by subsequent events. After a long and often agonising process the so-called General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) was enacted on 18 August 2006<sup>10</sup>. And there is still a debate among scholars, whether or not its provisions are fully in line with the requirements fixed by European law. The result of all this is an ever increasing uncertainty among employees and, in particular, employers with regard to this area of the law.

## **C. Current law on discrimination**

### **I. German Constitution**

The principle of non-discrimination forms an essential element of the legal order in Germany and is even enshrined in the German Constitution, the so-called Basic Act (*Grundgesetz*). Article 3 (1) of the Basic Act provides that ‘all persons are equal before the law’. Article 3 (2) sentence 1 states, that ‘men and women enjoy equal rights’.

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8 It was ‘invented’ not later than in 1938; see Reich Labour Court 19.1.1938 ARS 33, 172.

9 Some observers referred in this regard to provisions like section 138 of the Civil Code (according to which a legal transaction that violates public policy is invalid) and provisions of the German law of tort.

10 The Act had to be amended only months after its coming into force, however.

3 (3) sentence 1 adds to this, that ‘no one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith or his religious or political opinions’. In addition to that Art. 3 (3) provides in sentence 2 that ‘nobody may be put at a disadvantage on the ground that he or she is disabled’. Though the constitutional principle of non-discrimination is far-reaching, it must immediately be said that its impact on individual employment relationships is limited. Article 3 of the Basic Act is applicable on the relationship between an individual and the state (so-called defensive function, *Abwehrfunktion*). Moreover, it contains a certain obligation of the legislator itself not to discriminate unlawfully (so-called protective function, *Schutzfunktion*). Article 3 of the Basic Act is, however, not immediately applicable on the relationship between employer and employee<sup>11</sup>. This limited effect of Article 3 of the Basic Act<sup>12</sup> may explain why the labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) is so important: While the former cannot be applied to individual employment relationships, the latter is fully applicable in this regard.

## II. Prohibitions of discrimination on the statutory level<sup>13</sup>

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11 The legal situation is different with regard to discrimination between trade union members and persons who do not belong to a trade union: According to Article 9 (3) of the Basic Act ‘the right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades and professions. Agreements which restrict or seek to hinder this right are null and void; measures directed to this end are illegal’. That is understood to mean that Article 9 (3) has direct, ‘horizontal’ effect on the relationship between employer and employee.

12 Another matter is the indirect effect Article 3 of the Basic Act can have by means of influencing how a provision of statutory law is to be understood. This effect of Article 3 is important when it comes to the interpretation of ‘general clauses’ like section 242 of the Civil Code which enshrines the principle of good faith.

13 There are non-discrimination provisions on the statutory level that will not be discussed in this paper in detail. One of those provisions is section 1 of the Federal Equal Opportunities Act (*Bundesgleichstellungsgesetz*) according to which men and women are to be treated equal. Another is section 75 and in particular 75 (1) sentence 1 of the Works Constitution Act (*Betriebsverfassungsgesetz*). According to section 71 (1) ‘the employer and the works council shall ensure that every person employed in the establishment is treated in accordance with the principles of law and equity and in particular that there is no discrimination against persons on account of their race, creed, nationality, origin, political or trade union activity or convictions, gender or sexual identity. They shall make sure that employees do not suffer

There are a number of statutory provisions in Germany on the basis of which employers are prevented from discriminating against employees.

### **1. Prohibition of discrimination with regard to part-timers and workers employed under a fixed-term contract**

Section 4 of the Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz*) of 2000 enshrines a far-reaching principle of non-discrimination in the area of atypical employment.

According to section 4 (1) sentence 1 of the Act ‘a part-time employee may not be treated worse due to his part-time work than a comparable fulltime employee, unless there are objective grounds justifying different treatment’. In particular, according to section 4 (1) sentence 2, ‘a part time employee shall be paid remuneration for work ... at least to a degree corresponding to the proportion of his working time to the working time of a comparable fulltime-employee’ (so-called pro rata-principle).

Essentially the same applies to fixed-term contracts. According to section 4 (2) sentence 1 of the Act ‘an employee employed under a fixed-term contract may not be treated worse due to his limited term than a comparable employee employed for an unlimited term unless there are objective reasons justifying different treatment’. Section 4 (2) sentence 2 establishes a pro rata-principle along the lines of the according principle applying to part-time workers. Section 4 (2) sentence 3, finally, states that ‘if certain employment conditions are dependant on the seniority of the employee in the same establishment or company, then for employees employed under a fixed-term contract the

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any prejudice because they have exceeded a certain age’. According to section 73 (2) of the Act ‘the employer and the works council shall safeguard and promote the untrammelled development of the personality of the employees of the establishment. They shall promote the independence and personal initiative of the employees and working groups’. Apart from that, section 80 (1) No. 2a of the Act in fixing general duties of the works council states that the works council is obliged ‘to promote the implementation of actual equality between women and men, in particular, as regards recruitment, employment, training, further training and additional training and vocational advancement’. According to section 3 (3) sentence 1 of the General Equal Treatment Act, whose provisions will be discussed later, these provisions will not be affected by the General Equal Treatment Act.

same time periods shall be taken into consideration as for employees employed for an unlimited term, unless there are objective reasons justifying different treatment’.

Both prohibitions of discrimination originate from European law. To be more concrete about it, section 4 implements according provisions of a Directive on part-time work<sup>14</sup> and another Directive on fixed-term contracts<sup>15</sup>. In addition to that, section 4 must be seen in the light of rulings of the European Court of Justice. According to the court, a discrimination of part-timers may constitute unlawful (indirect) discrimination of women on the ground that, because part-timers are mostly women, a differentiation between part-timers and employees working full time regularly amounts to a differentiation between women and men<sup>16</sup>. Discrimination between part-timers and full-timers therefore does not only violate a specific statutory provision of non-discrimination with regard to part-timers, but is regularly contrary to the principle of non-discrimination between men and women as well<sup>17</sup>.

## **2. Principles of equal pay and equal treatment with regard to hired-out workers**

A so-called principle of equal pay can be found in the area of labour only-subcontracting. According to section 9 no. 2 of the Act regulating the Commercial Hiring-out of

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14 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work, Official Journal L 14 of 20.1.1998, p. 9.

15 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, Official Journal L 175 of 10.7.1999, p. 43.

16 See, in particular, ECJ 31.3.1981, Case 96/80, Official Journal 1981, 911 – Jenkins.

17 By way of illustration see, for instance, ECJ 27.5.2004, Case 285/02 – Elsner, in which case the Court made it clear that a national rule which provides that both full-time and part-time teachers do not receive any remuneration for additional hours worked when this work does not exceed three hours per calendar month, is potentially indirectly discriminatory. See also the more recent case ECJ 10.3.2005, Case 196/02 – Nikoloudi, where it was held, that a rule under which only women could be taken on for particular part-time work, did not of itself constitute direct discrimination on grounds of sex against women, but that it could be indirect sex discrimination against women that part time workers were excluded from benefits for which only full time staff are eligible, if by definition the part timers were women. The significance of the difference is that discrimination in indirect, but not direct, discrimination cases is capable of being objectively justified.



Employees (*Arbeitnehmerüberlassungsgesetz*), agreements shall be invalid ‘under which the essential working conditions for the hired-out employee during the period of the lease are worse than those applying to a comparable employee in that clients’ establishment, including with respect to remuneration’. Section 9 no. 2 is obviously based on the idea that hired-out employees must in principle enjoy the same working conditions as regular employees of the hirer-out and must, in particular, be paid the same wages as permanent employees. Deviations from equal pay are possible only through the provisions of collective agreements<sup>18</sup>.

The enactment of the equal pay and equal treatment principles in 2002 was sort of a legislative quid pro quo. On the one hand, the German legislator made use of agency workers easier by, for instance, abolishing the 24-months limit on placements that formerly applied. On the other hand, the legislator made the law more protective and, by doing so, tried to make agency work more attractive for employees<sup>19</sup>.

### **3. Principle of non-discrimination with regard to disabled persons**

A specific non discrimination-provision is applicable in Germany to severely disabled persons. According to section 81 (2) sentence 1 of the Social Security Code IX ‘employers may not discriminate against severely disabled persons on the grounds of their disability.’ In addition to that, section 81 (2) sentence 2 of the Act expressly states that the provisions of the General Equal Treatment Act shall apply to those persons.

### **4. The so-called labour law principle of equal treatment**

In addition to prohibitions of discrimination that form part of some statutes, the

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18 Apart from that a deviation from the principle of equal pay is allowed for workers during their first six weeks of temporary employment. During this time, hired-out workers must be paid a net wage which is at least equivalent to what they would receive in unemployment benefits. The purpose of this legal measure is to improve the labour market entry prospects of unemployed people who have difficulties finding job placements. It is applicable to all formerly unemployed people irrespective of the length of their unemployment and their qualifications.

19 See *Waas*, Temporary Agency Work in Germany: Reflections on Recent Developments, in: *The International Journal of Comparative Labour Law and Industrial Relations* 2003, p. 387 – 404.

so-called labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) has always to be taken into account in Germany when dealing with issues of discrimination. As already pointed out, this principle is one of the most important principles of German labour law. And though it is an example for judge-made law, it fully enjoys the legal dignity of a statute. According to the principle an employer is prevented from treating comparable employees in his establishment differently without an objective reason for doing so. If, for example, an employer grants general benefits on a voluntary basis and if employees (or groups of employees) are treated unequally in comparison to other employees with no objective reason, they can claim the withheld benefit under the principle of equal treatment. Only if the benefit in question is based on a separate agreement with an individual employee, other employees are not in a position to make a claim to the benefit.

### **III. In particular: The new General Equal Treatment Act**

Though the provisions that were outlined above, will remain to be important, the so-called General Equal Treatment Act forms the centre-piece of legislation in the area of employment discrimination law in Germany by now. When it came to implementing Directives 2000/43 and 2000/78, the German legislator had a difficult choice to make. One option was, to tackle the problems where they arise. By way of illustration: EC-law prevents employers from discriminating against employees with regard to dismissals. An obvious approach of transposing that prohibition would have been to amend the German Act on Dismissal Protection (*Kündigungsschutzgesetz*). EC-law also makes provisions for certain powers of employees' representatives regarding the enforcement of employment discrimination rights and duties. The German legislator could have dealt with them by amending the Works Constitution Act (*Betriebsverfassungsgesetz*). Instead of doing so, the German parliament, though in the face of strong criticism from many labour lawyers<sup>20</sup>, opted for implementing all provisions of the Directives on the basis of one single statute. What is even more, the German legislator chose for the most part for a 'word-by-word-implementation' of the Directives. By using often almost the language

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20 Many of whom argued that labour discrimination law did not constitute a separate area of law in the first place, but consisted of provisions which could better dealt with by amending existing statutes; see in this regard, for instance, *Reichold, Hahn, Heinrich: Neuer Anlauf zur Umsetzung der Antidiskriminierungs-Richtlinien: Plädoyer für ein Artikelgesetz*, in: *Neue Zeitschrift für Arbeitsrecht* 2005, 1270.

employed in the underlying Directives the legislator obviously tried to escape criticism over either having been too ‘narrow-minded’ (and as a consequence falling short of the demands of EC-law) or too ‘generous’ (and as a consequence granting employees more than is foreseen in EC-legislation).

## **1. Purpose of the Act**

According to section 1 of the General Equal Treatment Act the purpose of the Act is ‘to prevent or eliminate discrimination on the grounds of race or ethnic origin, gender, religion<sup>21</sup> or secular belief, a disability<sup>22</sup>, age or sexual identity<sup>23</sup>’. By describing the legal purpose the legislator clearly wanted to fix guidelines for the construction of the substantial provisions of the Act. In order to achieve that purpose, the Act establishes several specific prohibitions to discriminate. It has to be noted that this is a different approach from what is common practice with regard to the labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) according to which an employer is prevented from treating any employee worse than another without good cause. While the General Equal Treatment Act establishes particular prohibitions of discrimination in the sense that those prohibitions are expressly fixed in a statute, the labour law principle of equal treatment establishes a general duty not to differentiate between employees at will. While the former has a strong relationship to human dignity, the latter is essentially related to the idea of distributive justice.

## **2. Personal and material area of application**

### **a) General questions**

According to section 6 (1) of the General Equal Treatment Act the law is applicable on

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21 The manifestation of religious beliefs through dress is likely to become an important issue all over Europe.

22 See ECJ 11.7.2006, Case C-13/05 – Chacón Navas, in which case the Court provided its first decision on the meaning of ‘disability’.

23 This is understood to reach beyond sexual orientation and also encompasses protection from discrimination for transsexual people.

employees<sup>24</sup>, apprentices and so-called ‘employee-like’ persons, the latter including persons working at home (so-called *Heimarbeitnehmer*)<sup>25</sup>. While an ‘employee’ under German law is a person who is subordinated to another person and subordinated to the power of that person to direct (so-called *Direktionsrecht*), an ‘employee-like’ person is economically dependant on another person only. Though ‘employee-like’ persons do not have to obey the orders of another person, some labour law statutes are applicable to them on the ground that the ‘economic dependency’ of those persons justifies making labour law protection partially available to them<sup>26</sup>.

Adverse treatment on one of the grounds fixed in section 1 of the Act (race or ethnic origin, gender, religion or secular belief, a disability, age or sexual identity) is not permissible, inter alia, with respect to ‘conditions for access to employment ... , including selection criteria and recruitment conditions’ (section 2 (1) no. 1); ‘employment and working conditions, including pay and dismissals, in particular in individual and collective (bargaining) agreements and measures for the execution and termination of an employment relationship as well as with respect to promotions (no. 2); ‘access to all forms and all levels of vocational training’ (no. 3); ‘membership of or involvement in an organisation of employees or employers’ (no. 4). The provision in section 2 (1) no. 1 makes it clear that the application of the principle of non-discrimination does not require an existing employment relationship. The principle is applicable to a mere pre-contractual relationship, a fact that leads to severe restrictions of the freedom of the employer to conclude a contract of employment. As for section 2 (1) no. 2, the area of application of this provision is conceivably wide. The provision, for instance, covers not only the terms of an existing employment

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24 The Act is equally applicable to employers (section 6 (2) sentence 1 of the Act). According to section 6 (2) sentence 2 ‘if employees are being leased to a third party for the performance of work, such third party shall also be deemed to be an employer within the meaning of the Act’. It has to be noted that the General Equal Treatment Act applies to all employers with no exceptions established for, for example, small employers.

25 That means that, in particular, civil servants (*Beamte*), judges and soldiers are not within the area of application of the Act.

26 As far as the conditions for access to employment and promotion are concerned, the major provisions of the Act are essentially also applicable to self-employed persons and members of organs of companies, in particular managing directors and members of the management board (6 (3) of the Act). It is doubtful, however, whether that at the same time means that in terms of the examination of a possible discrimination less rigid criteria apply to such persons.

relationship but is also applicable to rights that originate from a former contract of employment.

## **b) Job interviews and discrimination**

With regard to the provisions of the Act that apply to ‘access to employment’ the problem arises to which extent an employer is prevented from certain inquiries. With regard to pregnancy it has been settled for a long time that the employer is not allowed to ask an employee whether she is pregnant<sup>27</sup>. In the future this will apply not only to pregnancy but to all other possible grounds of discrimination. That means that even if an employer in principle has a legitimate interest in learning about certain facts he is prevented from asking the employee if the answer could provide him with the possibility of discriminating against the employee.

## **c) Discriminatory dismissals**

With regard to dismissal protection, specific provision has been made. According to section 2 (4) of the General Equal Treatment Act, ‘dismissals shall be governed exclusively by the provisions on general and specific protection against unfair dismissals’<sup>28</sup>. Dismissal protection in Germany, in particular regarding dismissals that are within the area of application of the Act on Protection against Unfair Dismissals (*Kündigungsschutzgesetz*), is relatively rigid. This applies both to the requirements an employer has to fulfil and to the sanctions that are applicable in case that a dismissal is unlawful. If a dismissal is illegal, it is null and void. And because such dismissal did not affect the employment relationship, the employee can claim full pay from the day when the employer stopped paying him. These circumstances may have prompted the German

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27 ECJ 3.2.2000, Case C-207/98 – Mahlburg. In that case it was confirmed that an employer discriminates against a job applicant even if the applicant concerned could not perform the job initially because she is pregnant. The ruling also illustrates the fact that an employer cannot justify treating a pregnant woman less favourably by claiming that he acted with the purpose of protecting the health and safety of the woman concerned; Federal Labour Court (*Bundesarbeitsgericht*) 6.2.2003 – 2 AZR 621/01. Similar questions arise in the context of inquiries with respect to a possible disablement of an employee.

28 According to an earlier draft version of the Act, which was heavily criticised, the Act on Protection against Unfair Dismissals should *primarily* (?) apply to discriminatory dismissals.

legislator to try to ensure that dismissal protection is not duplicated by the General Equal Treatment Act.

Section 2 (4), however, raises serious doubts as to its conformity with European law<sup>29</sup>. Dismissals clearly form part of the underlying Directive<sup>30</sup>. Therefore it is highly problematic to put dismissals outside the scope of application of a statute which aims at implementing the provisions of the Directive into national law. It would be different if the legislator could claim that the mere application of the Act on Protection against Unfair Dismissals leads to sufficient protection of employees even from the perspective of employment discrimination law. This case, however, would be very hard to make. First, a dismissal can be discriminatory without being unlawful under the Act on Protection against Unfair Dismissals. Second, the Directive may require damages to be awarded as an effective sanction of discriminatory treatment. Such sanction, however, is not foreseen under the Act on Protection against Unfair Dismissals<sup>31</sup>. In order to bring section 2 (4) into line with European law, that provision therefore must at least be interpreted in the light of the underlying Directive. The upshot of all that is that the courts, in applying the principle of good faith in particular, must ensure that discriminatory dismissals are sanctioned sufficiently (meaning in conformity with European law).

### **3. Possible grounds of discrimination**

Section 1 of the Act contains a list of grounds on which a differentiation between

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29 On 31 January 2008, the European Commission the Commission sent a letter of formal notice to Germany such letter forming the first step of an infringement procedure. Germany has two months to respond. Among the concerns of the Commission are that national legislation does not cover the area of dismissal protection. Apart from that the Commission is of the opinion that people with disabilities are not sufficiently protected and that the deadline of two months to file a complaint is too short.

30 ECJ of 11.7.2006, Case 13/05 – Chacon Navas.

31 The matter is even more complicated because general statutory dismissal protection in Germany is dependant on, first, the employment relationship with the employee lasting at least six months and, second, the employer employing a certain number of employees. Against this background the problem arises whether employees outside the scope of application of statutory dismissal protection are treated more favourable than others because only the former may be in a position to claim compensation under the General Equal Treatment Act in the case of a discriminatory dismissal.

employees must not be based. The list must be understood to be exhaustive. That means that, if a differentiation is based on another ground as mentioned in section 1 (if, for instance, a job applicant is refused for the simple reason that the employer does not find him or her sympathetic), the Act does not apply. The same would go, for instance, for an employer who prevents employees from smoking. A different treatment of smokers and non-smokers may lead to various legal questions. But such treatment is in any event not forbidden under the General Equal Treatment Act<sup>32</sup>.

The criterion that triggered the most heated debates so far is 'age'. It is important to note that the word 'age' in this context means any age and not only old age. In other words: A young employee may invoke the legal protection afforded by him by the General Equal Treatment Act quite in the same way as an older worker.

#### **4. Forms of discrimination**

Discrimination may arise in different forms.

##### **a) Direct discrimination**

According to section 3 (1) sentence 1 of the General Equal Treatment Act direct discrimination exists 'if, based on one of the grounds set forth in section 1<sup>33</sup>, a person is treated less favourable than another is, has been or would be treated in a comparable situation'<sup>34</sup>. It becomes immediately clear from this wording that a mere hypothetical discrimination is sufficient. In addition to that it constitutes discrimination if one of two employees at the time of the treatment of the other already had left the firm.

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32 Though the General Equal Treatment Act prohibits unequal treatment on the ground of race or ethnic origin, it is not applicable with regard to the nationality. This, however, is in line with European law because Articles 3(2) of both Directives provide that 'the Directive does not cover difference of treatment based on nationality'. Irrespective of that, unequal treatment which is based on nationality, almost certainly violates the labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*).

33 If an employer treats employees unequally for various grounds, it is sufficient, that one of those grounds is prohibited.

34 According to section 3 (1) sentence 2 direct discrimination on grounds of gender „also exists ... where a woman is treated less favourably due to her pregnancy or maternity“; see Art. 2 (3) of Directive 76/207/EEC and ECJ 8.11.1990, Case 177/88 – Dekker.

## **b) Indirect discrimination**

Indirect discrimination exists according to section 3 (2) of the General Equal Treatment Act 'if on the basis of one of the grounds set forth in section 1, an apparently neutral provision, criterion or practice may put certain persons at a particular disadvantage compared with other persons, unless such provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. This definition mirrors the according provision of the underlying Directive (Art. 2 (2) of the Directive). It essentially aims at preventing employers from discriminating employees behind the smoke-screen of what at first sight may look as non-discriminatory treatment. By way of illustration: If an employer treats part-timers in his establishment differently from full time employees and if the former group consists predominantly of female employees, such behaviour constitutes indirect discrimination<sup>35</sup>. It must be stressed, however, that there is no indirect discrimination in the first place, if the unequal treatment serves a legitimate aim and must be judged as appropriate and necessary<sup>36</sup>. The point can be illustrated by referring to a recent ruling of the European Court of Justice. In the underlying case an employer had used continuity of service as a criterion for treating employees differently. A female employee took him to the court claiming that this amounted to indirect discrimination on the ground of sex, for women regularly did not have the same length of service. The Court held that employers are allowed to pay male workers more than female workers purely on the length of their service without being obliged to take into account absences for having and bringing up children. In some cases, however, discrimination based on experience would not be permitted without a detailed justification from employers<sup>37</sup>.

Apart from direct and indirect discrimination the Act contains so-called harassment as a separate form of discrimination (section 3 (3) of the Act)<sup>38</sup> and states furthermore that

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35 It should be noted, however, that there may be other than statistical means to assess indirect discrimination.

36 See in this regard, in particular, ECJ 26.6.2001, Case C-381/99 – Brunnhofer; 13.5.1986, Case 170/84 – Bilka; 1.7.1986, Case 237/85 – Rummler.

37 ECJ 3.10.2006, Case C-17/05 – Cadman.

38 According to that provision harassment constitutes discrimination 'where unwanted conduct related to one of the grounds set forth in section 1 occurs with the purpose or effect of violating the dignity of the



‘instructions to treat a person adversely on the basis of one of the grounds set forth in section 1 shall be deemed to constitute discrimination’ as well (section 3 (5) sentence 1 of the Act)<sup>39</sup>.

## **5. Prohibition of discrimination**

The central provision of the General Equal Treatment Act is section 7. According to section 7 (1) employees may not be discriminated against on the basis of one of the grounds set forth in section 1 (race or ethnic origin, gender, religion or secular belief, a disability, age or sexual identity). According to section 7 (2) provisions in agreements that violate the prohibition of discrimination shall be invalid. Section 7 (1) applies not only to employers but to all persons who are in a position to discriminate, including line managers, colleagues and third parties (for instance, clients of the employer). Even parties to a collective agreement (including trade unions as well as works councils) are addressees of the provision. That means that if a collective agreement contains a discriminatory provision such provision is null and void<sup>40</sup>. In case that either a collective agreement or the individual contract is partially invalid the problem arises how to fill the according lacuna. Though the matter is far from entirely clear, it can be said that, at least in principle, the employee who was discriminated against must be put on an equal footing with employees who were treated more favourably<sup>41</sup>.

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affected person and of creating an intimidating, hostile, degrading, humiliating or offensive environment’. Section 3 (4) contains a specific definition of ‘sexual harassment’ which is a bit more extensive. Without going into the details here it should be said that realising protection against harassment by means of an equal treatment requirement is a relatively recent feature of European law. The Directives on discrimination against women, in any event, originally contained no such provisions.

39 The latter provision essentially aims at cases where the employer orders line managers or other employees to discriminate against another employee.

40 It should be noted in this regard that, in principle, trade unions and employers or employers associations who conclude a collective agreement are regarded in Germany as enjoying a certain amount of discretionary power on the ground that the power to bargain collectively is part of the freedom of association which is a fundamental right, protected by Article 9 (1) of the German Constitution. Regarding grounds for discrimination as race, ethnic origin etc., however, such discretionary power, as far as it is acknowledged, is a limited one.

41 ECJ 13.12.1989, Case 102/88 – Ruzius-Wilbrink; 7.2.1991, Case 84/89 – Nimz; 27.6.1990, Case 33/89 – Kowalska.

## 6. Justification

One of the most important questions to be answered when examining a possible case of discrimination is the question of whether or not the unequal treatment of employees can be justified.

### a) Justification of direct discrimination

Section 8 (1) of the General Equal Treatment Act deals with a possible justification of direct discrimination. According to section 8 (1) a difference of treatment based on race, ethnic origin etc. shall be permissible, if 'due to the nature of the activity to be performed or the conditions of the performance, such grounds constitute a material and determining occupational requirement, when the objective is legitimate and the requirement proportionate'<sup>42</sup>. The key words are 'material and determining occupational requirement'. Unequal treatment can by no means be justified on the ground that it may be appropriate or practical only. If, however, a black actor is required for reasons of authenticity, the employer may legitimately choose a black applicant. And a Chinese restaurant may legally insist that its waiters are of Asian origin<sup>43</sup>. To be sure, 'borderline-cases' exist which are difficult to decide upon. For instance, it may be due to a certain entrepreneurial concept that employees are employed in a given undertaking. The owner of a shop that offers trendy fashion may prefer employment of young people. Such preferences are likely to be legitimate if entrepreneurial success is clearly dependant on employing certain employees and performance of the job duties of the employee is closely related to certain characteristics of the employee. This may be so

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42 Article 8 (1) implements Article 4 (1) of Directive 2000/78/EC which reads: 'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.

43 According to the Federal Labour Court (*Bundesarbeitsgericht*) 15.2.2005 – 9 AZR 653/03 the ability to type at a certain speed is a genuine and determining occupational requirement for a secretary and justifies not recruiting a disabled person who does not have this ability.

with regard to selling clothes. It might, however, not be the case with regard to the employment of a cabin crew by an airline. In such case the airline might be prevented from not hiring people who have surpassed a certain age. To sum it all up, it can be said, that unequal treatment can regularly not be justified by referring to 'public taste'.

### **b) Exceptions to the principle of equal pay**

With regard to the principle of equal pay section 8 (2) of the Act contains a specific provision. According to section 8 (2) an agreement on lower remuneration for equal or equivalent work shall not be justified by the fact that special protective provisions are applicable to the persons in question. It has to be noted that this provision, by applying to all possible grounds of discrimination, far exceeds the principle of equal pay between men and women, fixed in Article 141 (1) of the EC-Treaty. Essentially, it aims at preventing employers from justifying unequal treatment of employees on the ground that some of them (for instance, disabled persons) are the subject of legislative protective measures that make their employment more expensive than the employment of others.

Section 8 (2) may serve as an illustration of the problems caused by the fact that the principle of non-discrimination has been extended to new grounds for discrimination. The main purpose of Article 141 (1) of the EC-Treaty is to ensure that women who are employed in 'typical women occupations' are not paid less than men whose occupations are comparable. The extension of this concept to discrimination based on other grounds, however, is problematic because there are no 'typical occupations' of, for instance, members of a certain church or youngsters.

### **c) Justification of discrimination in the area of unequal treatment based on age**

Justification of unequal treatment in the area of age discrimination has been specifically provided for<sup>44</sup>.

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44 The same holds good for Directive 2000/78/EC. Article 6 of the Directive reads: 'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a

## **aa) Content of section 10 General Equal Treatment Act**

According to section 10 sentence 1 of the Act ‘apart from the cases set forth in section 8 differences in treatment on grounds of age shall also be admissible if they are objectively and reasonably justified by a legitimate aim’. According to sentence 2 ‘the means of achieving that aim must be proportionate and necessary’. In addition to that, sentence 3 states that ‘such differences in treatment’ may, for instance, include ‘fixing minimum requirements of age, professional experience or seniority for access to employment or to certain advantages linked to employment’.

Section 10 takes into account the specific structure of a discrimination based on age—which is that everybody has a certain age and every employee in the course of his life is at a certain stage at a ‘critical age’ (for instance, a youngster who is about to enter the labour market, or an older person who is approaching retirement). As regards section 10 of the General Equal Treatment Act the major problem is that it is phrased in quite general terms. This makes it difficult in an individual case to decide whether unequal treatment is justified or not. What, for instance, is a ‘legitimate aim’? Does it refer to a public interest only<sup>45</sup> or is it sufficient that, for example, an individual employer has a legitimate interest in treating older and younger employees unequally<sup>46</sup>? Because the provision is so extensively framed, there are doubts as to the conformity with EU-law. In addition to being quite general, however, it is criticised that the legislator abstained from deciding which aspects may justify a possible discrimination and authorised others (in particular, individual employers and partners to collective agreements) to do so instead. Again the question is whether that is in conformity with the demands of EU-law.

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legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’.

45 See in this regard the reference in Article 6 of the Directive to ‘employment policy, labour market and vocational training objectives’.

46 See in this regard Article 6 (2) no. 1 of the Directive, according to which differences of treatment may include, among others, ‘the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement’.

## **bb) Recent Rulings of the European Court of Justice**

It will be the task of the European Court of Justice to further shape to concept of justification with regard to age discrimination. With regard to seniority rules the Court recently held that a pay system under which employees with long service and more experience get higher pay than those with short service and less experience does not, save in 'inappropriate cases' infringe the equal pay principle (even though most of the shorter service, less experienced, employees are female and most of the longer service, more experienced, employees are male)<sup>47</sup>. In addition to that the court<sup>48</sup> held that a provision of the German law, according to which it was made easier for employers to enter into fixed-term contracts with older workers, was not in conformity with EU-law on the ground that it did not meet the requirements of the principle of proportionality<sup>49</sup>. Finally, in respect of statutory age limits, the Court ruled in a Spanish case, that the Spanish law allowing mandatory retirement ages to be set as part of collective

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47 ECJ 3.10.2006, Case 17/05 – Cadman.

48 ECJ 22.11.2005, Case 144/04 – Mangold. The ruling of the ECJ has given rise in Germany to a heated debate about the power of the Court and its limits; see *Schiek*, The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation, *Industrial Law Journal* 2006, pp. 329-341. Most German scholars are highly critical of the judgment. There are essentially two reasons for that. First, the Court, in the eyes of many, did not more than pay lip service to the discretionary power of the national legislator. Even if a piece of legislation is intended to make it easier for older employees to be retained in the workplace, the means used to achieve that objective must always be appropriate and necessary with the Court itself deciding upon the fulfilment of those requirements at the end of day. Second and even more important, the Court declared that it could deal with age discrimination claims even before the obligation to implement the Directive came into effect. The reason according to the Court was that the principle of non-discrimination did form part of the EC-Treaty itself, the effect being that it had to be obeyed independent of the coming into force of the Directive.

49 By responding to the ruling of the ECJ and an according ruling of the Federal Labour Court (*Bundesarbeitsgericht*) – 7 AZR 500/04, the German legislator recently amended section 14 (3) sentence 1 of the Part-Time and Limited Term Employment Act, the provision in question. It now reads: 'The limitation of the term of a contract of employment to up to five years where no objective reasons exists is admissible if the employee is 52 years of age and was unemployed ... for at least four months prior to the commencement of the fixed-term contract'. Thus age does not form the sole criterion anymore. Instead, the fact that the person concerned has been unemployed has got equal relevance.

bargaining agreements could be justified and was therefore not incompatible with EU law. Apparently retreating a bit from the more ‘offensive’ stance taken in the German case, the Court was of the opinion, that the Spanish law in its context was an appropriate and necessary way of achieving the legitimate aim of regulating the national labour market and in particular fighting unemployment among younger workers<sup>50</sup>.

### **cc) Major ‘problem areas’ in German law with regard to age-discrimination**

In the context the German law the possible justification of discrimination based on age poses specific problems. Though it may be relatively clear by now that statutory mandatory retirement age limits and age limits based on collective agreements are in conformity with EU-law, it is in doubt whether the same can be said about age limits an employer may individually agree on with his employee. Even more doubtful is the legal situation in respect of agreements that come in the form of, what is called in Germany, a *Bezugnahme Klausel* (meaning that the parties do not more than referring in their agreement to a provision of a collective agreement which fixes an age limit)

Another major problem in Germany regards so-called ‘social selection’. If an employee is dismissed due to compelling business reasons the dismissal is null and void under German law if, in selecting the employee, the employer has no, or not sufficiently considered the employee’s seniority, age, duties to support dependant persons and severe disability (section 1 (3) sentence 1 of the Protection against Unfair Dismissals Act, *Kündigungsschutzgesetz*). Though the provision of the German law as such may be in line with the requirements of Community law, it is not entirely clear what the requirements are for an individual employer who in a concrete case has to make a selection among employees for dismissal. Most lawyers in Germany advise employers, in any event, not to be too schematic when selecting employees for dismissal in the case of redundancy. In particular, they are of the opinion that employers should, if any possible, abstain from using a scheme according to which the selection is made by awarding each employee one point for one year of age (so-called *Punkteschema*)<sup>51</sup>. All in all, there is a widespread consensus that employers in the future should be reluctant in using the criterion of age<sup>52</sup>.

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50 ECJ 8.12.2007, Case C-411/05 – Palacios de la Villa.

51 Such schemes up till now have been widely in use in Germany.

52 See also the recent decision of Labour Court (*Arbeitsgericht*) Osnabrück 5.2.2007 – 3 Ca 724/06.

Another area of concern is the German law on notice periods in the case of dismissals. According to section 622 (1) of the Civil Code an employment relationship can be terminated unilaterally by observing a four-week period of notice. According to section 622 (2) sentence 1 of the Civil Code the notice period is gradually extended in proportion of the length of the employment relationship. However, a period preceding the employee's 25<sup>th</sup> is not be taken into account when determining the duration of employment (section 622 (2) sentence 2). This latter provision is likely not to be in line with EU-law because it lacks a purpose being strong enough to bear up against the prohibition of discrimination based on age<sup>53</sup>.

As those examples illustrate, the implementation of the prohibition of age discrimination is a major challenge for the national legislator (as well as to the partners to collective agreements<sup>54</sup>) and has potentially a lot of repercussions in the national legal orders.

#### **d) Positive Action**

Irrespective of sections 8 and 10 of the General Equal Treatment Act<sup>55</sup>, unequal treatment may constitute a so-called positive action<sup>56</sup> and may for that reason be regarded as being legal. According to section 5 'a difference in treatment shall ... be

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53 According to a judgement of the Land Labour Court (*Landesarbeitsgericht*) Berlin LAG 24.7.2007 – 7 Sa 561/07 the provision is not in conformity with EU-law and must therefore not be applied. The Land Labour Court Düsseldorf 21.11.2007 has recently asked the ECJ for a preliminary ruling in this regard.

54 Many collective agreements in Germany have been providing for seniority rules with regard to pay, extra holidays for older workers and the like. Many of those provisions will come under close scrutiny in the light of possible age discrimination.

55 In addition to them section 9 makes specific provision for religious communities and institutions on the ground that they enjoy more freedom with regard to unequal treatment because they can refer to specific protection under the German Constitution. It is, however, subject to doubt whether section 9 of the Act is fully covered by the Directive.

56 Article 7 (1) of Directive 2000/78/EC states with regard to such action: 'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1'.

admissible if suitable and appropriate measures are taken to prevent or compensate for existing disadvantages resulting from race, ethnic origin etc<sup>57</sup>. The concept of ‘positive action’ raises the question, under which circumstances a certain measure can be regarded as trying to aid certain disadvantaged groups and therefore as legally treating such employees differently from others. There is little doubt that it must be lawful to boost the chances of people who are disadvantaged. The key question, however, remains to which extent such positive (or affirmative) action justifies leaving the principle of non-discrimination aside. The concept of affirmative action is certainly far more developed in, for instance, the US than in Germany. At least the European Court of Justice has been trying to make it more manageable<sup>58</sup>. In particular, the Court underlined the importance of the proportionality between positive action advancing certain groups and putting others on a disadvantage<sup>59</sup>.

## 7. Obligations of the employer

By section 12 of the General Equal Treatment Act a number of obligations are established that the employer has to fulfil<sup>60</sup>. In particular, the employer is obliged to

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57 The provision illustrates that the General Equal Treatment Act really is no piece of art: How can it be that *existing* disadvantages still can be *prevented*?

58 See, in particular ECJ 19.3.2002, Case 476/99 – Lommers; 29.6.2004, Case 319/03 – Briheche. Particularly instructive, with regard to the latter case, is the Advocate General's opinion (because it explains in detail the principles under which positive discrimination is admissible). In the Briheche-case the Court held that a provision, under which an age limit for obtaining access to public-sector employment is not applicable to certain categories of women while it is to men in the same situation as those women, is not admissible under Article 2(4) of Directive 76/207. It further held that the measures could not be justified under Article 141 (4) EC-Treaty either as they were disproportionate. Interestingly, the Court stressed that the aim of Article 2 (4) is to achieve substantive, rather than formal, equality; see in this regard also ECJ 6.7.2000, Case 407/98 – Abrahamsson.

59 For a more detailed discussion of the concept see *de Vos*, Beyond formal Equality – Network of legal experts in the fields of employment, social affairs and equality between men and women, Brussels, 2007.

60 According to section 12 (3), if employees discriminate against colleagues „the employer shall take the measures that are necessary, appropriate and suitable for the individual case’ including a warning, transfer, relocation or dismissal of the employee. According to section 12 (4), if employees are discriminated against by third parties in the context of their employment, ‘the employer shall take the measures that are necessary, appropriate and suitable for the individual case in order to protect the employees’. It is unclear,



take the necessary steps to protect employees from discrimination and to take, if necessary preventive measures (section 12 (1) of the Act). If the employer has trained the employees appropriately for the purpose of preventing discrimination, he shall be deemed to have met his obligation to protect employees from discrimination (section 12 (2) sentence 2 of the Act). In practice, the latter provision is double-edged. On the one hand, if the employer can refer to appropriate training measures, he does not have to bother too much about the danger of violating the provisions of the General Equal Treatment Act. Section 12 (2) sentence 2 could therefore be described as being sort of an insurance policy for employers. On the other hand, because the provision establishes a clear incentive for training, it has triggered a whole industry of firms offering seminars on non-discrimination and is partly responsible for the fact that compliance with the General Equal Treatment Act has become a costly affair for employers. According to a recent study<sup>61</sup> the costs of complying with the provisions of the General Equal Treatment Act so far amount to more than 1,7 billion Euro.

## **8. Legal consequences of discrimination**

An employee who was discriminated against can claim damages or compensation<sup>62</sup> from his employer<sup>63</sup> on the basis of section 15 (1) and (2) of the General Equal Treatment Act<sup>64</sup>. According to section 15 (1) an employer, who has discriminated against an employee unlawfully, ‘shall be obliged to pay damages for the resulting loss’. Where the damage does not involve a financial loss, the employee may demand an

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however, what the duties exactly comprise in the latter case. Related to this is another problem: Is the employer obliged to address his measures primarily to the third party or is he allowed, for instance, to move the employee who was discriminated against to another job?

61 *University of Dortmund*, Kurzbericht des Lehrstuhlprojekts im Auftrag der Initiative Neue Soziale Marktwirtschaft GmbH zum Thema: Erhebung der Gesetzesfolgekosten aus dem Allgemeinen Gleichbehandlungsgesetz (AGG), 2007. The findings of that study, however, are criticised in some quarters for being influenced by a bias towards employers.

62 According to section 15 (6) a violation of the prohibition of discrimination shall in any event not create a claim to the formation of an employment relationship, unless such claim arises on other grounds.

63 The General Equal Treatment Act is silent on sanctions in case that one employee discriminates against the other. In such case a claim may be based on general civil (contract or tort) law.

64 Apart from the sanctions mentioned by section 15, the employee has a right to complain (section 13) and is under certain circumstances entitled to stop working if made the subject of discrimination.

appropriate monetary compensation. If it was a failure to hire a certain person which constituted unlawful discrimination, the compensation must not exceed three months' pay if the employee would not be hired had the selection been free of adverse treatment<sup>65</sup>. However, if the employee suffers economic loss, he or she can claim damages only if the employer has acted on purpose or at least negligently. Only in case of immaterial loss no such requirement exists. Though the underlying Directive leaves it essentially to the Member States to decide upon the available sanctions in case of infringements of the principle of non-discrimination<sup>66</sup>, it is debatable whether section 15 of the General Equal Treatment Act fully conforms to Community law. There are, in any event, a considerable number of lawyers in Germany<sup>67</sup>, who are of the opinion that the basic requirement of the employer being guilty contravenes EU-law and that the unrestricted availability of a claim for compensation in the case of immaterial loss cannot change this assessment.

Many more legal problems with regard to the sanctioning of discrimination exist, however. One of those problems arises in the context of section 15 (3) of the General Equal Treatment Act. According to this provision an employer who does not more than implementing collective bargaining agreements shall only be obliged to pay compensation if he acted 'with intent or gross negligence'. Obviously, that provision tries to solve a dilemma an employer may face, for he may feel to be legally bound to a discriminatory provision in a collective agreement. Though this rationale seems convincing at first sight, it becomes far less so, when thinking twice: As far as a collective agreement contains discriminatory provisions that are not in line with Community law, they do not form a viable part of the national legal order with the consequence that the employer is not obliged to obey it. Against this background the conformity of section 15 (3) with Community law is at least doubtful.

## **9. Burden of proof**

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65 The latter provision tries to avoid legal uncertainty but is criticised by some lawyers on the ground that the extent of immaterial loss is not dependant of the workers pay.

66 Article 17 of Directive 2000/43/EC states in this regard that 'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive'.

67 See, for instance, *Thüsing, Arbeitsrechtlicher Diskriminierungsschutz*, 2007, p. 223.

The existence of unlawful discrimination is often extremely difficult to prove. For that reason Directive 2000/43/EC tries to make the task easier for employees suffering from discriminatory practices<sup>68</sup>. In terms of German law the division of the burden of proof between the parties concerned is dealt with in section 22 of the General Equal Treatment Act. According to section 22 ‘if one party to a dispute proves the existence of indications that would give rise to assuming discrimination based on one of the grounds set forth in section 1, it shall be for the other party to prove that no violation of the provisions for the protection against adverse treatment occurred’. In other words: If an employee feels that he or she was discriminated against by the employer, it is sufficient to show for that person that facts exist on the basis of which discrimination can be presumed. In this case the burden of proof shifts to the employer. It is now he who has to prove that no discrimination has taken place. The upshot is the following: It is up to the employee to prove that he was treated unequally. In addition to that, the employee has at least to prove the existence of facts that strongly point to a causal link between the unequal treatment on the one hand and his or her belonging to a certain group (for instance, being disabled). If the employee has proven such facts, the employer has to prove that he did not discriminate.

The key question obviously is which facts can be the basis of a presumption as to the occurrence of discrimination. The fact that an employee belongs to a certain group of employees as such is in any event no viable basis for such presumption. Additional facts must exist. The most prominent example may be that a job applicant was discriminated against and the job advertisement already pointed to the existence of unlawful motives on the part of the employer<sup>69</sup>.

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68 Article 10 (1) of the Directive: ‘Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment’.

69 According to section 11 of the General Equal Treatment Act a job position may not be advertised in violation of section 7 (1) of the Act. That means, for instance, that the employer is prevented from addressing only employees of a certain sex. If he does so, a job applicant who belongs to the other sex, can point to the existence of facts according to which a discrimination can be presumed; see Federal Labour Court (*Bundesarbeitsgericht*) 5.2.2004 – 8 AZR 112/03 (regarding section 611 a of the Civil Code,

## **10. Procedural requirements and legal protection**

A claim on the basis of section 15 (1) or (2) must be brought before the court in writing within a period of two months (Art. 15 (4) sentence 1)<sup>70</sup>. Parties to a collective agreement may agree otherwise.

Apart from that it should be noted that the General Equal Treatment Act in its Article 23 provides for the establishment of so-called anti-discrimination organisations whose task is to represent the special interests of victims of discrimination or groups of such persons. Such organisations are, within the scope of their purpose, authorised to appear in court proceedings as a legal advisor to victims of discrimination where representation by an attorney is not legally required (section 23 (2) sentence 1).

### **D. General questions**

#### **I. Merits and demerits of the legal concept of ‘discrimination’**

A full discussion of the merits and demerits of the legal concept of ‘discrimination’ would take this paper outside its possible boundaries. Instead of trying to enter into such discussion, the focus should be on shedding light on along which lines the question is perceived by German lawyers who are by necessity judging them against the backdrop of German law.

Labour law in Germany has in essence always been based on the idea that the employee must be protected from the employer, who is typically superior to him and whose powers should therefore be restricted. This idea has not only influenced legislation but also the courts which have extended workers’ protection on a step-by-step basis. A case

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a provision that preceded the according provision of the General Equal Treatment Act); see also Federal Constitutional Court (*Bundesverfassungsgericht*) 16.11.1993 – 1 BvR 258/86, according to which an employer is precluded from claiming that a certain job applicant did not meet certain requirements if those requirements did not play any role during the selection process and were put forward by the employer only afterwards.

<sup>70</sup> The conformity of that provision with Community law is doubtful.

in point is dismissal protection. The German Act on Dismissal Protection (*Kündigungsschutzgesetz*) contains severe limitations of the power of employers to dismiss employees. In addition to that, however, the courts have developed principles which restrict the prerogative of employers even more: According to those principles, dismissals must not be based on facts of the past (sickness of an employee or faulty performance) but are legitimate only, if the underlying circumstances may repeat themselves (so-called prognosis principle)<sup>71</sup>; unilateral termination by way of dismissal is only allowed as a means of last resort (so-called ultima ratio-principle)<sup>72</sup>; each and every dismissal must be based on an all-embracing weighing of the interests of both parties concerned. The stance taken by the legislator and the courts could be described as being vertical: looking at a quasi-hierarchical relationship between employer and employee and trying to safeguard the latter by bestowing certain rights to him.

To this the principle of non-discrimination in employment adds a completely new perspective. Instead of looking exclusively at the relationship between employer and employee the question is asked, whether the employer treats one employee different from another. It should be emphasised again that this ‘horizontal’ perspective is not completely new in German labour law. It has, however, become immensely more important due to the fact that so much emphasis is laid on this aspect in EC-law. The fear now shared by many in Germany is that far-reaching concept of employment discrimination could lead to shifting the balance too much in favour of employees, putting employers under too much pressure to comply and making German labour law even more complicated than it already is. Employers, in particular, refer in this context to the fact that the existing body of German labour law is already be characterised by various protective layers: Individual employment law rights (partly being statutory or judge-made, partly being based on collective agreements); co-determination at the individual undertaking (works councils); and, finally, co-determination at the enterprise level (employees’ representatives as members of the supervisory board).

Whether the critics are right is not here to decide. One thing, however, is difficult to deny: The import of an extensive prevention of non-discrimination in the area of employment has added a fair amount of complexity to German labour law. A case in

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71 A dismissal due to sickness, for instance, is legal only in so far as a past sickness indicates that the employee will be sick in the future as well.

72 This is why the employer always has to examine whether there are employment opportunities in another part of the undertaking before dismissing an employee for redundancy.

point is the problem of age discrimination. The according prohibition has triggered a wide debate in Germany whether German law is still in line with the requirements of European law. As already pointed out, this debate affects, inter alia, statutory and collectively agreed age-limits; the rules of selecting employees for dismissal in case that the decision to dismiss is based on business reasons which apply to more than one employee; periods of notice; and the possibility to make it easier for employers to offer fixed-term employment if the prospective employee has reached a certain age. In almost all of those areas the prohibition of discrimination on the ground of age meets with pre-existing rules of German law which already are fairly sophisticated and complex. It only adds to the problems which arise in this context that the concept of non-discrimination itself is (necessarily) a relatively vague one<sup>73</sup>. A legislator can by no means determine whether discrimination between employees of different age is justified in an individual case. Instead the legislator has to employ general clauses to be substantiated further by the courts. Against this background it becomes clear why the judgements of the European Court of Justice are being watched so carefully in Germany. Only in light of those rulings it can be said with some certainty to which extent the German legislator still has to bring parts of the German law in line with the requirements of EC-law.

Though the introduction of a far-reaching principle of non-discrimination raises a number of questions and is not fully embraced in some quarters of German labour law, it is difficult to argue with the fact that a horizontal perspective on employment relationships adds important value<sup>74</sup>. This is all the more so in light of German constitutional law. As pointed out earlier, the German constitution expressly states in Article 3 (1) of the Basic Act that ‘all persons shall be equal before the law’. Apart from that, Article 1 (1) of the Basic Act expressly mentions that ‘human dignity shall be inviolable’ and immediately adds, that ‘to respect and protect it shall be the duty of all state authority’. If the prohibition of unlawful discrimination is closely related to human dignity – which certainly is the case – there is basically no way of not applying this principle to employment relationships.

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73 As for the justification of discrimination based on age, Article 6 (1) sentence 1 of Council Directive 2000/78/EC states that ‘... Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’.

74 And may even make some employment decisions ‘more rational’.

## **II. Discrimination law and the promotion of employment of specific groups of employees**

There is a potential conflict between the promotion of employment of specific groups of employees and discrimination law. Legislative measures that aim at such promotion may fall foul of the prohibition of non-discrimination. However, the promotion of employment may constitute positive action which is lawful under the principle of non-discrimination if the measures taken can be judged as being proportional.

Another question is whether the purpose of promoting employment of specific groups of employees as such justifies discrimination. Can a mandatory retirement age be justified on the ground that it improves the chances of youngsters of getting access to the labour market? In the light of a recent judgement of the European Court of Justice the 'right' answer seems to be yes<sup>75</sup>. Can the partial abolishing of labour law protection with regard to specific groups of employees be justified on the ground that such a measure makes it more attractive to offer employment to employees belonging to that group? In the light of another relatively recent judgement of the European Court of Justice the answer seems no<sup>76</sup>. It will clearly take time for the courts to develop guidelines in this regard. The only thing that can be said with certainty is that there is very little certainty at present.

It should be added in this context, finally, that the application of the principle of non-discrimination as such may promote the labour market chances of certain groups of employees. For instance, the prohibition of age discrimination may oblige partners to collective agreements to do away with privileges that older workers have been enjoying in the past. As a consequence, employing such workers (who are often less productive than younger ones) may become less expensive for employers and thus the chances are that employers are more willing to offer them (further) employment<sup>77</sup>.

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75 ECJ 8.12.2007, Case C-411/05 – Palacios de la Villa.

76 ECJ 22.11.2005, Case 144/04 – Mangold

77 For a more detailed discussion *Waas*, Die Beschäftigungssituation älterer Arbeitnehmer als Herausforderung für den arbeitsrechtlichen Gesetzgeber, Zeitschrift für Rechtspolitik 2006, 118.

### **III. Practical questions and the future direction of discrimination law**

As outlined above, though the prohibition of discrimination is not completely new in Germany, it is clearly a concept that has deeper roots in other legal orders, in particular in the UK and the US: One of the most important questions therefore is which effect it will have in practice. At present empirical studies point to a rather limited effect of the General Equal Treatment Act<sup>78</sup>. Because the Act is fairly new it remains to be seen, however, how things will work out in the longer run. Apart from that another quantity should not be left aside, namely the quantity of damages which are available under the new Act. With regard to this question at least some anecdotic evidence exists: Recently, a German employer has been taken to the court on the ground that he discriminated against an employee on various grounds with the employee claiming no less than 500.000 Euro in damages<sup>79</sup>. Such sums may not trigger much interest in the US. In German terms, however, they are astronomic. It remains still to be seen, however, whether claims like this will be successful, for German law does not know punitive damages and, though employee in principle can claim compensation for pain and suffering, the courts regularly are reluctant in this regard.

Trying to look into the future of discrimination law in Germany it seems highly likely that the issue of age discrimination will have the strongest impact. This is due partly to demographics and partly to the fact that many provisions of labour law directly or indirectly refer to the age of the employer. To solve the problems that arise in this context will not be easy, however. One of the major reasons for that is, that age is a criterion which is quite specific when compared to others. Every employee is of a certain age. And every employee is according to the 'European concept' of age discrimination potentially subject to the legal protection which originates from the prohibition of age discrimination.

### **E. Conclusion**

The prohibition of discrimination is a concept that still has to be elaborated. This will

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78 According to one of the most recent studies, only 400 cases out of a total number of 30.000 that were looked into related to the General Equal Treatment Act; see Frankfurter Allgemeine Zeitung 21.1.2008, p. 13.

79 See Frankfurter Allgemeine Zeitung 28.1.2008, p. 13.



predominantly be the task of the courts. The legislator can do not more than fixing some rough guidelines. Because the principle of non-discrimination is for a big part based on European law, it will be the European Court of Justice instead of the national courts that will play the leading role in this regard. It will depend largely on the Court in Luxemburg which distant-effects the principle of non-discrimination will have on the German legal order.