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The Transposition of EU Antidiscrimination Legislation into German Labour Law

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The Transposition of EU Antidiscrimination Legislation into German Labour Law*

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I. Anti-discrimination as a fundamental element of German law

Before I get down to the main focus of my topic, the transposition of European anti-discrimination directives into German labour law I would like to give a short overview of the legal situation that existed before the German legislator transposed the directives. There are two reasons for this. Firstly, we will be able to retrace the extent to which the German legislator had been in a position to make an effective contribution to combating discrimination before Art. 13 was included in the EC Treaty by the Treaty of Amsterdam, which was the basis for then enacting the anti-discrimination directive. Secondly, even after the enactment of this directive it was generally believed in Germany that no transposition was in fact necessary as its essential elements were already anchored in German law.

1. The rejection of discrimination in Basic Law

It is not so long ago that the 60th anniversary of the end of the Second World War was celebrated. The 8th May, as the date of the official end of German Nazism, is most certainly relevant to the topic under discussion here. The National Socialist regime was one in which human peculiarities played a decisive role, serving as the basis for discrimination the extent of which today still cannot be comprehended by any feat of the imagination. So it is not surprising that the explicit rejection of discrimination was given constitutional status in the Basic Law of the Federal Republic of Germany as early as 23rd May 1949. Art. 3 of Basic Law states

(1) All humans are equal before the law.

(2) Men and women are equal. The state supports the effective realisation of equality of women and men and works to towards abolishing present disadvantages.

(3) No one may be disadvantaged or favoured because of his sex, parentage, race, language, home land and origin, his faith, or his religious or political opinions. No one may be disadvantaged because of his handicap.

and thus constitutes the central norm of German anti-discrimination legislation. A comparison with Art. 13 EC indicates that the German constitutional norm demonstrates the same approach, despite the fact that no mention is made of age or sexual orientation. Art. 3 par. 2 and 3 of Basic Law prohibit both direct and indirect discrimination providing there is no objective justification for discriminative practices in individual cases. In as far as equal treatment of men and women is

concerned, Art. 3 par. 2 of Basic Law recognises not only the equal treatment precept. Sentence 2 of the provision includes an additional constitutional obligation to promote equality in the treatment of women. Art. 3 par. 3 sentence 1 Basic Law, that postulates the ban on unequal treatment founded on certain characteristics, was included most especially because of the persecution and discrimination of minority groups under the Nazi regime and is closely linked with the basic principle of human dignity anchored in Art. 1 Basic Law. Unfortunately, no majority was found in the German Parliament for an inclusion of sexual identity in the catalogue of Art. 3 par. 3 at the time this article came up for amendment in the year 1994. It was generally believed that this was already sufficiently protected by the basic principles of human dignity, general freedom of action and personal rights (Arts. 1 and 2 Basic Law). A majority was, however, found for the inclusion of a ban on discrimination against the disabled in Art. 3, aimed at strengthening the position of disabled people in law and society.

2. Direct effect of fundamental rights?

A simple reading of Art. 3 Basic Law could lead to the impression that this constitutional norm represents a ruling prohibition of discrimination that encompasses all spheres of life. This assumption is not true, however. It is necessary here to be acquainted with the discussion of the so-called direct effect or – as it is more clearly termed in the European context – the horizontal effect of fundamental rights that has been going on in Germany since the 1950s and still has not been concluded. The problem concerned in this context is whether or not fundamental rights pertain solely to the state-citizen relationship (vertical effect) or also to private relationships between citizens (horizontal effect). General opinion today postulates a so-called indirect effect of fundamental rights. In particular this indirect effect has evolved via the general clauses and other indefinite legal terms of civil law. For this reasons civil courts are obliged to take the system of values predetermined in the fundamental rights into consideration when applying or interpreting norms under private law. One opinion that is gaining ground, one that does not necessarily contradict majority opinion, assumes that the state has so-called protective obligations that arise from the fundamental rights. According to this opinion the obligation on the part of the state for the benefit of the fundamental rights of those subject to the norms leads to the necessity of a consideration of the values in the sense of creating a practical concordance. In other words, even in the case of a relationship between two private persons the state must guarantee a certain minimum floor of protection for the object of

legal protection in question. This shall apply not only to the fundamental rights of freedom but also the fundamental rights of equality, in other words to Art. 3 Basic Law.

II. The position of the Federal Labour Court (BAG)

In contradiction to prevailing opinion, the Federal Labour Court upheld the precept of direct applicability of fundamental rights in labour law in the 1950s and 1960s. This standpoint had practical consequences, in particular in the case of collective agreements. The question arose as to whether parties to a collective agreement were bound by the fundamental rights. The Federal Labour Court affirmed this, on the grounds that the parties in collective agreements had been given the right to enact legal norms by the state. As the state itself was bound by the fundamental rights it must then follow that this applied equally to the partners of collective agreements exercising their authority to conclude contracts. The Federal Labour Court justified such direct application with the change in the meaning of the fundamental rights with the effect that "a series of significant fundamental rights in the constitution, albeit not all, guarantee not only rights of freedom against the authority of the state, ... but (are) in fact regulatory principles for social life, that have a direct effect even on the private legal relationships between citizens, this arising from fundamental rights to an extent still to be developed more closely." The practical consequences of such a legal conception are obvious. As the Federal Labour Court was called upon to decide on a clause in a collective agreement whereby married men, but not married women, were entitled to an additional allowance for their spouses, this was seen as a violation of the equality principle of Art. 3 Basic Law which, due to the direct application of this provision, rendered the regulation null and void for the collective agreement parties.

The present situation is characterised by the fact that no chamber of the Federal Labour Court, nor of the Federal Constitutional Court either, has stated its position on the theoretical controversy of direct or indirect applicability of fundamental human rights. However, the fact remains that with regard to Art. 3 Basic Law this provision is called upon as the authoritative guiding principle for the application and interpretation of regulations crucial for deciding civil disputes. The following will touch upon several significant judgments which indicate that the discrimination prohibitions or rather equality of treatment precepts included in Art. 3 Basic Law have proved important instruments in the prevention of discrimination. So it was that the Federal Constitutional Court held the ban on night work for women that existed at that time as a violation of Art. 3 paragraph 2 Basic Law and declared it unconstitutional. In many of

its judgements the Federal Labour Court has objected to cases of open discrimination against women that were intended for inclusion in collective agreements on the grounds that they violated Art. 3 Basic Law and has thus made a significant contribution to these formulations of open discrimination being excluded for the most part from collective agreements. Moreover, the Federal Labour Court has been called upon in many cases to rule on questions of discrimination with regard to such characteristics that are subject to prohibition under Art. 3 par. 3 Basic Law. A few exemplary cases can be cited in this context. The first concerns the beliefs and religious views of an employee. The ban on discrimination for these reasons in Art. 3 par. 3 Basic Law is further strengthened by the formulation of the fundamental right in Art. 4 paragraph 1 Basic Law in which freedom of faith and of conscience, and freedom to profess a religious or philosophical creed is declared inviolable. On many occasions the judgements of the Federal Labour Court were concerned with situations characterised by the fact that an employee declared a faith, religious convictions or matters of conscience that were objectively, or in the opinion of the employer, inconsistent with the proper execution of the work to be performed. Three striking cases shall serve to illustrate the complex of problems. In one case the head of the research department of a pharmaceutical company had refused to work on the development of a new drug because the substance could also be used for military purposes so that the employee opposed its production on medical-ethical grounds. The employee was warned once and then given notice by the employer. The Federal Labour Court put high store by the fundamental right anchored in Art. 4 Basic Law and declared a dismissal to be lawful only if it had not been possible to give the person concerned another adequate work assignment. A second case, that not surprisingly attracted great public attention, concerned a sales assistant in a department store who wore a headscarf. The Federal Labour Court granted the religious creed precedence over the interests of the employer provided there was no specific real danger to the success of sales. The question of sexual orientation – as mentioned above – is not included in the attributes listed in Art. 3 Basic Law. Despite this the Federal Labour Court declared a dismissal as invalid that had been based solely on the homosexual inclinations of an employee. Its reasoning was based primarily on the fundamental right in Art. 2 par. 1 Basic Law (personal freedoms) and stated that the principle of good faith anchored in civil law (§ 242 Civil Code) " constitutes an intrinsic definition of content for all rights, legal situations and legal norms within whose scope the fundamental rights of freedom of contract must be balanced on the one hand with the right of respect for human dignity and the freedom of

development of personality on the other. It would therefore constitute an abuse of legal rights should the employer exploit his private autonomy to dismiss the employer during the probationary period solely on the basis of his personal (sexual) behaviour.

In addition the Federal Labour Court has developed a so-called general principle of equality of treatment from Art. 3 paragraph 1 Basic Law, which the employer is obliged to observe with regard to all working relationships. It states that an employer may not exclude one or individual employees from benefits nor make any impositions on them without objective reasons.

III. The ban on discrimination – the principle of equality of treatment in German labour law

We have seen that Art. 3 and other fundamental rights of the German Basic Law have played an important role in the fight against discrimination in the area of labour law. Beside this contribution of labour law courts, especially of the Federal Labour Court, we need now to consider statutory law and its contribution to the prevention of discrimination and the realisation of the principle of equality of treatment.

1. Sex equality provisions

a) The transposition of Directive 76/207/EEC and 75/117/EEC

Fulfilling its obligations under Directive 76/207/EEC and 75/117/EEC the German legislator enacted in 1980 equality of men and women as a central principle of labour law. This was done by the insertion of respective provisions into the Civil Code. Section 611 a paragraph 1 of the Civil Code provides that an employer may not discriminate against any worker on grounds of sex in connection with an agreement or the adoption of a measure, particularly as regards establishment of the employment relationship, promotion, the giving of instructions or dismissals. A difference in treatment on grounds of sex is, however, permissible if an agreement or the measure concerns an activity which, owing to its specific nature can only be performed by workers of a particular sex. With regard to sanctions section 611 a paragraph 2 is shaped along the lines of the traditional law of damages. In other words, liability for damages is dependent on the proof that the employer was at fault. And liability for damages was only in respect of the loss incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by a breach of the principle of equal treatment. As a

consequence, as was shown by the case 14/83 (von Colson and Kamann), the regular award of damages comprised only travel expenses and postal charges.

Here we meet a typical German problem in the transposition of European antidiscrimination directives. Since the realisation of the equality of treatment principle was effected through civil law channels, breaches of the principle had to be remedied in the same way as other breaches of contractual duties or wrongdoing under tort law. Every other outcome would have met with heavy resistance by the advocates of German civil law doctrine. This was shown in the wake of the judgment of the ECJ in the case von Colson and Kamann in which the ECJ laid the foundation stone for the principle of effectiveness of sanctions. This judgment met with strong criticism.

b) Positive action

Germany not only provided for a ban on discrimination of men and women, but also tried to make a contribution to what is normally called positive action. The German legislator was conscious of Art. 2 (4) of the Equal Treatment Directive which provided that the Directive shall be "without prejudice to measures which promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities" (current version of Art. 2 (8): "Member states may maintain or adopt measures within the meaning of Art. 141 (4) of the Treaty with a view to ensuring full equality in practice between men and women.").

A special obligation was also placed on the legislator in Art. 31 of the Treaty on the establishment of German unity between the Federal Republic of Germany and the German Democratic Republic. § 1 states: "It shall be the task of the legislator of united Germany to further develop legislation on equal rights for men and women". It was generally believed that an improvement in the situation of women could not be achieved solely with bans on discrimination, that indeed additional targeted measures were required. The Law on Equal Rights from 1994 reflects the legislator's desire to implement this perception. This law was a combination of three individual laws that all had different aims. The first law, the Act on the Promotion of Women, applied only to the federal public services and the federal courts. Whereby women were to be promoted taking into consideration the precedence of ability, qualification and professional accomplishment. A side effect of the promotion was to be an increase in the percentage of women, in as far as fewer women than men were employed in certain categories. The most remarkable

measure was the compilation of promotion plans for women. Each department was to set up flexible targets in order to increase the representation of women in recruiting policies and professional advancement. A large number of federal states have also enacted similar equality laws for their state authorities. These became a matter of European public attention after the provisions concerning the preferential treatment of women in the filling of vacant positions became the subject of legal disputes, which in the cases of Kalanke, Marshall and Badek led to preliminary rulings by the ECJ whose judgments effectively clarified the controversial issues.

In contrast, the second law - the so-called Act on the Protection of Employees - applied to all employees in both the private and the public sector. Its aim was the prevention of sexual harassment. This aim had been achieved in Germany long before the European legislator was able to rectify a similar concern in the amended Directive 76/207/ECC.

2. Positive action in favour of severely handicapped persons

Beginning after the end of the First World War and in the course of the last century a fully-fledged system of employment promotion in favour of severely handicapped persons was developed. Severely handicapped persons are those whose capacity for work is diminished by at least 50 per cent. It is a kind of positive action consisting of a bundle of measures, in part requiring employers to hire a certain quota of severely handicapped persons and to equip workplaces with facilities suited to persons in question, in part providing financial means to employers and handicapped employees in order to facilitate their integration into the labour market.

3. Equality of treatment of atypical work

Germany was one of the first countries in Europe to create comprehensive legislation concerning atypical work. In 1985 the Act on Promotion of Employment was passed in which fixed-term contracts, part-time work, job on call and job splitting got at least a rudimentary regulation. Part of the regulation was a provision which prohibited discrimination of part-time workers. But under section 6 of this Act it was possible to opt out of the statutory provisions on part-time work through a collective agreement even when the effect of this is to the disadvantage of the employee. With this provision, the legislature was continuing in a tradition of German labour law. As in many other areas, it was intended that here, too, priority was to be given to the autonomy of collective agreements. The assumption is that the parties to such agreements are better able than the legislature to arrive at objectively permissible

deviations from statutory provisions and, moreover, that these parties are also sufficiently able to protect the interests of employees. In practice, therefore, collective agreements in Germany included numerous provisions confining particular payments and other benefits and advantages exclusively to full-time workers. Since many women part-timers objected to such discriminatory rules in collective agreements, numerous cases were brought in which the subject-matter of the proceedings was the review of such provisions. The ECJ was therefore presented with many such cases in the form of references for preliminary rulings. Having once determined that the principle of equal treatment contained in Art. 141 (ex-Art. 119) EC also applied to collective agreements, the Court had to overturn numerous provisions in collective agreements relating to the exclusion of part-time workers from particular benefits on the basis of principles which it had developed in the context of ex-Art. 119 EC. The jurisprudence of the ECJ has without question had a decisive influence on the regulation of part-time work in the Federal Republic of Germany. The Federal Labour Court followed the lines established by the ECJ and embarked on this approach in the interpretation of the anti-discrimination rule in the Act on Employment Promotion. As a consequence at the latest since the second half of the 1990s discrimination of part-time workers has practically disappeared.

4. Protection of elderly workers

For many years securing the access of the elderly to the labour market and safeguarding their rights has been one of the most urgent and difficult problems to be solved. The size of the problem is illustrated by the fact that only 40 per cent of German shops employ at least one worker older than 50. Many steps were taken to get people back into the labour market, especially in the field of social security and employment promotion by the Federal Labour Agency, without great success. As far as labour law is concerned both legislation and labour courts made sure that employment contracts did not automatically terminate at a certain age level fixed by individual employment contracts or collective agreements. Setting a compulsory retirement age is acknowledged only when there are objective reasons for this (for example termination of employment contracts of aircraft pilots for security reasons). With regard to fixed-term contracts entered into by elderly persons it may suffice to the well-known case Mangold (C-144/04). In its judgment the ECJ held the German law pursuant to which a fixed-term employment shall not require objective justification if when starting the fixed-term employment relationship the employee has reached the age of 58 (until December 2006: the age of 52) incompatible with EU law. Since the facts of the case and the

argumentation by the court are well-known I avoid detailing again the background of the case. In the following I shall concentrate on the impact which the judgment has had upon the developments in my country.

It is small wonder that the judgment met – as in many other European countries – with heavy criticism. I cannot outline in detail the manifold arguments put forward by the critics. Certainly the most central target of the critics was the assumption by the court that the principle of non-discrimination on grounds of age is a general principle of Community law. Apart from particular arguments to characterize the common tendency of the critics one might say that – as one author has put it – the ECJ uses the principle of proportionality and its link to the principle of equality as a weapon to put through its own social policy concept thus denying the competence of member states for shaping their social policies of their own ideas.

Against this critical reception of the ECJ line of reasoning it may seem astonishing that the Federal Labour Court in a judgment of 26 April 2006 obediently followed the ECJ decision in the Mangold case. It was not blind obedience, on the contrary it defended the ECJ position deliberately with admirable clarity. I single out two aspects of the decision. Firstly with reference to the statement by the ECJ in which the national judge is called upon for setting aside section 14 par. 3 of the German law on fixed-term contracts although the period prescribed for transposition of the directive has not yet expired, the Federal Labour Court rightly underlines that this statement is in full harmony with consistent case-law of the ECJ and may not be confounded with the recognition of horizontal direct effect of directives which the ECJ continuously has denied. The second point to be referred to concerns that most contested statement according to which the principle of non-discrimination on grounds of age can be found in the constitutional traditions common to member states. Some critics had challenged this opinion by stating that only in the constitutions of two member states (Finland and Portugal) a ban on age discrimination is set down. In this context the Federal Labour Court reminds the critics of the famous judgments of the German Constitutional Court (Solange I and II). In the first decision of 29 April 1974 this Court stated that in the present state of evolution of the Community it would not renounce its right to uphold German fundamental rights. And only due to the fact that the ECJ elaborated on and developed a fully-fledged system of protection of fundamental rights the Constitutional Court twelve years later declared its willingness to no longer examine the compatibility of Community legislation with German fundamental rights. Quoting from this latter judgment the Federal Labour Court puts emphasis on that passage in which it is said that where certain rights are

protected to differing degrees and in different ways in member states, the ECJ will look for some common underlying principle to uphold a part of Community Law. Even if a particular right protected in a member state is not universally protected the ECJ will strive to interpret Community Law so as to ensure that the substance of the right is not infringed.

As far as the answer to the ECJ judgment by the German legislator is concerned at the end of last year the Ministry of Labour presented a Bill which comprises a bundle of measures to improve occupational opportunities for the elderly people. And one of the provisions of the proposed law is aimed at meeting the requirements of the ECJ judgment in the Mangold case. An amendment is envisaged pursuant to which fixed-term contracts between an employer and an employee who has reached the age of 52 can be entered into if he has been unemployed for a period of at least four months or has received a special benefit which is awarded in situations of restructuring or if he has taken part in vocational training. The fixed-term may amount to up to a maximum of five years. Up to this time limit successive contracts of employment are allowed.

IV. The transposition of EU discrimination law in Germany

As you probably know, Germany has missed nearly every deadline provided for in the European directives combating discrimination. And it was only in August 2006 that Germany discharged its duties under European law. In the following I shall present the various attempts made in my country to transpose the directives and to show the difficulties and hurdles which could not be overcome. It is a story of the clashes between different legal orders, the European legal order and the domestic German legal order, clashes I would say, between different legal mentalities.

On 1 December 2001 the Federal Ministry of Justice presented the draft of an Act on the prevention of discrimination in civil law. The title of this law already tells much about the approach taken by the Ministry. The ban on discrimination should become a central element of German civil law or at least of selected areas of civil law. Therefore a special provision was enacted to be inserted into the Civil Code. The proposed article 319 a of the Civil Code read:

There shall be no discrimination on grounds of sex, race, ethnic origin, religion or belief, disability, age or sexual orientation in relation to the conclusion, contents and termination of contracts

- a) which are offered publicly
- b) the subject matter of which is employment, medical assistance or education.

From the explanatory memorandum we can gather that the proposed law was intended to transpose Directive 2000/43. With regard to employment contracts the memorandum announced the creation of a special law implementing Directive 2000/78. Nevertheless the proposed article 319 a extended the ban on discrimination to include all reasons of discrimination contained in Directive 2000/78.

In choosing this approach the ministry hit a raw nerve. And in hindsight one can say that the choice of this strategy accounts for the shelving of the transposition of the directives for nearly five years. The publication of the bill was the beginning of one of the fiercest ideological battles among academic scholars, practical lawyers and politicians. It was mainly the voices of influential civil law scholars which characterised the discussion. To cut a long story short, the crucial argument was dedicated to the defence of one of the most cherished principles of civil law, private autonomy, or the right of the parties to enter into contracts of their own free will.

The critics did not question that the fight against discrimination was needed and that it should be waged with determination. But the command not to discriminate should be restricted to the state, not to private citizens. Civil law therefore – they said – is not an area in which the state is allowed to dictate its morality to its citizen in order to create a morally better world. On the contrary, the law of contract is governed by the dominance of the free will of the people. It is an area of freedom in which everybody is free to determine their private life according to their subjectively defined interests and preferences. "*Stat pro ratione voluntas*" – is the anthem of private autonomy. In contrast to this, the bill in question follows the guideline "*Pro voluntate stat ratio*". Against this background it is small wonder that one author formulated: "Discriminations are systematically inherent to societies and economies based on freedom. As a consequence, bans on discrimination represent in the area of private law – as opposed to the area of public law – a dangerous foreign element".

This position was widely accepted among private law scholars, opposite points of view were voiced mainly by public law experts. And the battle was won, at least for the coming years by the private law community. The government withdrew the bill, whereby the coming election in 2002 certainly played a role.

Not until December 2004 did the then competent Ministry for Families, Elderly, Women and Youth present a new bill, called the Act on the transposition of European anti-discrimination directives. The discussion about this new draft got underway in 2005. On 28 April 2005, during the ongoing debate, the ECJ delivered its judgment in an action

brought against Germany by the Commission under article 226 EC. It held that by failing to adopt Council Directive 2000/43/EC within the prescribed period, Germany had failed to fulfil its obligations under that directive.

The further fate of the bill was sealed by the political circumstances in mid-2005 when chancellor Schröder, in a hitherto unheard of procedure, successfully dissolved parliament and as a consequence the parliamentary treatment of the bill came to a standstill. In spring 2006 the new coalition of Christian Democrats and Social Democrats presented a new bill which, apart from some minor changes, followed along the lines of the 2004 bill. After a relatively hasty debate in both chambers (Parliament / Federal Council) the act now called "*Allgemeines Gleichbehandlungsgesetz*" (General Act on Equality of Treatment) was passed and came into force in August 2006.

V. The new Act on Equality of Treatment

I do not wish to outline the new law in detail. It is to a certain extent a compound copy of the single European directives. This is true for the scope of the Act (one section is dedicated to employment contracts, another one to civil law contracts in order to implement Directive 2004/113), the definition of direct and indirect discrimination, the creation of bodies which should oversee the functioning of the Act. A few words may be said on the provisions which allow exceptions to the ban on discrimination. We have made use of the occupational requirements clause contained in article 4 of Directive 2000/78/EC, which states that a difference in treatment does 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. The wording of this article 4 has been chosen in section 8 of the Act. In addition according to article 4 paragraph 2 of the Directive 2000/78/EC, section 9 of the Act maintains the existing legislation pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference in treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities and of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This exception clause includes the right of churches and similar organisations to require individuals working for them to act in good faith and with

loyalty to the organisation's ethos. As a consequence the jurisprudence by the Federal Labour Court and backed by the Constitutional Court which justifies dismissals of employees for having violated Catholic or Protestant canon law is being maintained. For example if an employee working with a church employer gets divorced and remarries, he can be dismissed for this reason. And the justification of the dismissal does not depend on the hierarchical position of the employee. In other words, the same standard of good faith or loyalty is required from the director of a church school or of the housekeeper.

A brief remark should finally be made on the justification of differences in treatment on grounds of age. You know that article 6 of Directive 2000/78/EC gives wide discretion to member states in this area by stating that differences in treatment on grounds of age shall be objectively and reasonably justified by a legitimate aim including legitimate employment policy, labour market and vocational training objectives if the means of achieving that aim are appropriate and necessary. With reference to this article section 10 of the German Act has provided for a long catalogue of exceptions consisting of eight items which more or less reflect, what was accepted by legislation or jurisprudence in the past. It is not certain whether these practices can be upheld in the future. I am thinking especially of those provisions which govern the access to employment, especially in the public sector. For example, in principle you cannot become a civil servant over the age of 32, sometimes the age level is even lower. As time is pressing I cannot continue discussing these kinds of exceptions. But I am sure that many practices cherished in the past will not survive.

Instead of further detailing of the Act, I would prefer to sort out a few aspects of the Act which reflect the typical German-ness of the solutions chosen and the difficulties linked to them, difficulties for which one day we shall probably face problems with Community law before the ECJ.

1. Exclusion of dismissals from the scope of the Act

The new Act does not cover dismissals of workers. Section 2 par. 4 of the Act reads: "Dismissals are exclusively subject to the provisions on the general and particular protection against dismissals". Why this exemption from the ambit of the Act although article 3 of Directive 2000/78 which defines the scope of the directive refers to employment and working conditions including dismissals? Some authors have defended the solution chosen by saying that German dismissal legislation itself does not allow discrimination although this is not expressly said. But the existing norms and inherent principles, especially those developed by

labour courts, impede dismissals on grounds listed in section 1 of the Act. Others have argued that the current legislation and its application by the courts may impede discriminatory dismissal for the bulk of the cases, nevertheless situations remain in which indirect discrimination, which cannot be ruled out by the current law, may take place. This is not the place to comment on who is right and who is not. More important is to ask why this exemption clause, which was not provided for in the original version of the bill, was put through by the Federal Council, the representation of the German *Länder* in the last minute of the legislative procedure. We do not know exactly. In my eyes the answer has to be found in – and recent experience shows it – the widely nurtured fears by academic scholars, but of course also within the ranks of political representatives, that too strong an intrusion of European anti-discrimination law could compromise the normal functioning of labour laws which have proven effective and are accepted by both sides of the employment relationship. Any further opening of the floodgate could threaten the equilibrium of the status quo. The exemption clause in question reminds us of the debate in the wake of the first bill of 2001, where not few authors voiced the opinion that due to the current state of law there was not much need for further implementation of European anti-discrimination law and as a consequence advocated only minor changes and amendments to the existing law.

2. The regulation of sanctions

As we have seen above, Germany has opted with regard to sanctions for a civil law solution. The original version, as it was enacted in 1980, was a clear-cut damages model based on the fault principle and the recovery of compensatory damages. The ECJ taught us another lesson and therefore the German legislature adapted to it. We eliminated the fault principle, allowed for the recovery of pecuniary damages suffered from violation and provided for general damages (non-pecuniary damages). In the wake of the judgment of the ECJ in the case *Draehmpaehl* we differentiated in the definition of the amount of damages between job applicants who, because the successful applicant had superior qualifications, would not have obtained the position, even if the selection process had been free of discrimination and those who would have obtained the position if the selection process had been carried out without discrimination. The damage suffered by an applicant belonging to the first category may not exceed a ceiling of three months' salary. In this way we had established rules which fully stuck to the requirements under European law. We could have used these rules as a model for shaping the sanctions under the new Act which comprised not

only gender discrimination, but extended to many other grounds of discrimination. But we did not do this. Why not?

In the past much criticism was put forward against the existing system of damages in cases of discrimination on the grounds of gender. Critics argued that the existing provisions were not in tune with fundamental principles of German civil law which is based with regard to recovery of damages on the fault principle and the recovery of only those pecuniary damages the existence of which is proven. Within contracts this scheme works as follows. The party to a contract who has done damage to the other party is obliged to make the damage good because the law presumes the fault of the wrongdoer. But the wrongdoer has a defence, he can be exculpated by proving that the damage was not caused by violation of his duties. If the defendant is not exculpated, he is liable to restore the person damaged to the position he would have been in, had he not been damaged. The assessment is individualised to suit the actual position of the particular person and is therefore related to the actual loss suffered. Beside the compensation of financial harm, non-pecuniary losses may be awarded for impairment of the plaintiff's body or health, his freedom of movement or his sexual self-determination.

It is exactly this damages scheme which the new Act on equality of treatment wanted to put into practice. Section 15 par. 1 of the Act is the mere transfer of the responsibility rule from the law of contracts into the area of sanctions for discrimination. This means only actual damages may be awarded and the employer can defend himself by showing that discrimination was not a breach of duty on his part and therefore he cannot be blamed for fault. Section 15 par. 2 provides for the compensation of non-pecuniary damages which is not based on the fault principle. Evidently the German law wanted to meet the requirements established by the ECJ to guarantee real and effective judicial protection which means compensation must have a real deterrent effect on the employer. No ceiling is fixed for the amount that may be awarded save in the situations described above in which the victim of the discrimination would not have obtained the job due to superior qualifications of the successful applicant. In this case the maximum amount of damages is three months' salary.

Here again, we can detect the dominance of German civil law. Emphasis was laid on safeguarding the traditional model for recovery of damages. Sanctions for discrimination should not be shaped differently from other forms of breaches of contracts or torts. The only concession made was the award of non-pecuniary losses without fault of the employer, a concession due to the consistent jurisprudence of the ECJ. It remains to be seen whether the ECJ will accept the fault requirement for

recovery of pecuniary damages. Some German authors expect such an outcome, reasoning that the otherwise no-fault-principle for the award of non-pecuniary losses constitutes an effective and deterrent sanction in the sense of the consistent jurisprudence of the ECJ.