

Comments on the Draft of the New German Private Law Anti-Discrimination Act : Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law

By Florian Stork*

A. Introduction

European Directives impose upon Germany the obligation to incorporate anti-discrimination provisions in its civil law. The anti-discrimination legislation is intended to provide effective civil law remedies against discrimination in everyday life by private persons, e.g. access to housing, restaurants and education. For the purposes of this article, discrimination may generally¹ be defined as any treatment – including a refusal to deal with – by a private party that is less favorable than to another person and is conditioned upon a characteristic such as racial or ethnic origin, sex, etc.²

Since the current German legal system does not grant any explicit protection from discrimination by private entities, the European Directives basically result in the obligation to create a new piece of legislation. A corresponding draft is dated 15 December 2004³ and was controversially debated in German Parliament on 21 January 2005. Its entry-into-force is scheduled for the first half of the year 2005.

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¹ A technical definition will be given in C. II. 2.

² *Engert*, 4 German Law Journal No. 7 (1 July 2003), 685 (687), available at: <http://www.germanlawjournal.org/article.php?id=290> (31 Jan. 2005).

³ *Bundesministerium für Familie, Senioren, Frauen und Jugend, Projektgruppe EuRi* (Ministry for Family, Senior Citizens, Women and Youths, Project Group European Directives, BMFSFJ) Entwurf eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsvorschriften (Draft of a European Anti-Discrimination Provisions' Transformation Act, ADG.), 15 Dec. 2004, available at: <http://dip.bundestag.de/btd/15/045/1504538.pdf> (31 Jan. 2005); Initial reports and statements on the draft can be found in *Frankfurter Allgemeine Zeitung*, 12 Nov. 2004, 11; *Frankfurter Allgemeine Zei-*

B. European Background

The prepared draft legislation is intended to implement several Directives into German law.⁴ The transformation periods partly ended mid to end of 2003.⁵ Even though all European anti-discrimination Directives include pertinent provisions with regard to general civil law (as opposed to labor law), the Directives 2000/43/EC and 2004/113/EC⁶ are primarily relevant for the purposes of this article. They prohibit discrimination based on racial and ethnic origin, as well as discrimination based on sex. The Directive 2000/43/EC limits the prohibition to discriminate to the membership of and involvement in an organization whose members carry out a particular profession and to healthcare, social advantages and education. Its main focus, however, lies on the access to and supply of goods and services, which are available to the public, including housing. The prohibition of sex discrimination by the Directive 2004/113/EC merely applies to goods and services and private insur-

tung, 30 Nov. 2004, 11; Kölner Stadt Anzeiger, 17 Nov. 2004, 2 and Kölnische Rundschau, 21 Jan. 2005, 3, available at: <http://www.anti-diskriminierung.info>

⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180/22); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303/16); Council Directive 2002/73/EC of 23 Sept. 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 2002 L 269/15); Consolidated Version of Directive 76/207/EEC (non-official) at: <http://www.bmfsfj.de/Politikbereiche/Gleichstellung/eu-richtlinien.html> (31 Jan. 2005). In addition, the draft aims at implementing the newly published Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373/37), see *Begründung* (explanatory note) to the ADG, 31, 81. The Directive 2004/113/EC represents the final version of the Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, 5 Nov. 2003 (COM 2003 657 final).

⁵ The Directive 2000/43/EC had to be transformed into national law by 19 July 2003 (Art. 16) and the implementation of Directive 2000/78/EC was due by 2 Dec. 2003 (Art. 18 para 1). The failed transformation is not a genuine German phenomenon: other European countries have also experienced difficulties in the transformation process. For an overview on the progress of transformation in the EU Member States, see http://europa.eu.int/comm/employment_social/fundamental_rights/public/pubst_de.htm#Umsetzung (31 Jan. 2005). On the effect of the non-transformed Directives 2000/43/EG and 2000/78/EG: *Thüsing*, *Neue Juristische Wochenschrift* 2003, 3441 ff.; In general on the consequences of lacking or wrongful transformation of Directives, see *Gstaltmeyr*, *Bewehrung von EG-Richtlinien: Sanktionssysteme bei fehlender oder fehlerhafter Umsetzung durch die Mitgliedstaaten*, 1998; *Schroeder* in: *Streinz*, *EUV/EGV*, 2003, Art. 249 para 101 ff., 125 ff., *Gellermann* in: *Streinz*, *EUV/EGV*, 2003, Art. 288 para 36 ff.; *Bleckmann*, *Europarecht*, 6th Ed. 1997, para 431 ff., 1038 ff.; *Streinz*, *Europarecht*, 6th Ed. 2003, para 394 ff.

⁶ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373/37).

ance. With regard to goods and services, the sex Directive 2004/113/EC will have a broadly equivalent scope as Directive 2000/43/EC.⁷

C. German Draft Legislation

After two earlier drafts had been presented and again withdrawn in the years 2001⁸ and 2002⁹, the BMFSFJ prepared another draft¹⁰ by May 2004. This draft legislation was not made available to the public, as political negotiations on its content were still taking place.¹¹ Especially the scope of anti-discrimination legislation remained the centre of lengthy disputes. While *Bündnis 90/DIE GRÜNEN* (Green Party) insisted on including all grounds mentioned in Art. 13 EC¹², i.e. sex, racial or ethnic origin, religion or belief, disability, age and sexual identity, the *Sozialdemokraten* (Social Democrats, SPD), who form the major part of the German government coalition, insisted on a word-for-word implementation of the Directives 2000/43/EC and

⁷ Art. 3 para 1 will provide: “Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned ... and which are offered outside the area of private and family life and the transactions carried out in this context.”

⁸ Bundesministerium der Justiz (Federal Ministry of Justice, BMJ), *Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierungen im Zivilrecht* (Discussion Draft of an Act to Prevent Discrimination in Private Law, DiskE 2001), 10. Dec. 2001.

⁹ Bundesministerium der Justiz (Federal Ministry of Justice, BMJ), *Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierungen im Zivilrecht – Überarbeitung auf Grund der Besprechungen und Stellungnahmen* (Revised Discussion Draft of an Act to Prevent Discrimination in Private Law, DiskE 2002), 17 Feb. 2002.

¹⁰ BMFSFJ, *Entwurf eines Gesetzes zum Schutz vor Diskriminierungen* (Draft of an Act for the Protection from Discrimination in Private Law, ADG), 6 May 2004. The ADG consisted of three independent laws, the *Gesetz über die Stelle des Bundes zum Schutz vor Diskriminierungen* (Act on the Federal Body for the Protection from Discrimination, AD SG), the *Gesetz zum Schutz vor Diskriminierungen in Beschäftigung und Beruf* (Act on the Protection from Discrimination in Employment and Occupation, AADG) and the *Gesetz zur Änderung des Bürgerlichen Gesetzbuchs – Regelungen zum Schutz vor Diskriminierungen im Zivilrecht* (Act on the Amendment of the German Civil Code – Regulations on the Protection from Discrimination in Private Law, ZADG).

¹¹ These centered mainly on the question, if the Directives should be transformed the way they existed or if additional grounds of discrimination should be banned in German law, i.e. the scope of an anti-discrimination code.

¹² Art. 13 EC was inserted into the EC Treaty at the intergovernmental conference of Amsterdam to combat racism, xenophobia and other discriminatory practices. It provides that “without prejudice to the other provisions of this Treaty and within the limits of the powers conferred upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

2004/113/EC, limiting the scope of the draft to discrimination on the grounds of racial or ethnic origin and sex.

By November 2004 the government coalition seemed to have reached consensus on the open issues. The most recent draft was published on 15 December 2004. It will form the basis of upcoming legislation and reveals the concept of the new German anti-discrimination law. Many elements can already be found in earlier drafts.¹³

I. Present legal situation

According to Art. 3 para 1 of the *Grundgesetz* (German Basic Law, GG), all human beings are equal before the law. Art. 3 para 3 GG prohibits discrimination based on sex, parentage, race, language, homeland and origin, belief, religious or political opinions. The primary aim of Art. 3 para 3 GG is to protect individuals against discrimination by public authorities. It is well established that the fundamental rights in the German Constitution do not apply directly to the private sphere of citizens; they do not have *direkte Drittwirkung* (direct horizontal effect). However, these rights lay down an objective value system, which influences not only legislative, executive and judicial authorities, but also civil law.¹⁴ Therefore, mandatory general provisions such as sections 138¹⁵, 826¹⁶ of the *Bürgerliches Gesetzbuch* (German Civil Code, BGB), which constitute part of the *ordre public*, have to be interpreted in light of the objective value system established by the fundamental rights contained in the *Grundgesetz*.¹⁷ Understood like that, they are supposed to be a sufficient base to

¹³ With regard to these drafts, see the contributions by *Baer, Mahlmann* and *Nickel* in 1 Annual of German & European Law 2003, 323, 334, AND 353 (RUSSELL MILLER/PEER ZUMBANSEN, EDS., 2004) and, very instructive, *Engert*, 4 German Law Journal (1 July 2003), 685, available at: <http://www.germanlawjournal.org/article.php?id=290> (31 Jan. 2005), who argues that there is an economic case for anti-discrimination legislation. With regard to the DisKE 2001, see the debate in 3 German Law Journal (2002) with contributions by *Vennemann, Ladeur*, and *Winkler*, available at: <http://www.germanlawjournal.org/article.php?id=137>, <http://www.germanlawjournal.org/article.php?id=152> and <http://www.germanlawjournal.org/article.php?id=158> (31 Jan. 2005). See also *Picker*, 5 German Law Journal (1 Aug. 2004), 771, available at: <http://www.germanlawjournal.org/article.php?id=298> (31 Jan. 2005); *Mahlmann*, 5 Zeitschrift für Europarechtliche Studien (2002), 407 and *Selbmann*, 2 European Yearbook of Minority Issues (2002/03), 675.

¹⁴ *Bundesverfassungsgericht* (German Constitutional Court, BVerfG) E 7 (1958), 198, 205.

¹⁵ Section 138 para 1 BGB provides: "A legal transaction which is against public policy is void." (transl. by author)

¹⁶ Section 826 BGB provides: "A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage." (transl. by author)

¹⁷ BVerfGE 7 (1958), 198 (206); *Selbmann*, 2 European Yearbook of Minority Issues (2002/03), 675 (677).

remedy any grievances in connection with discriminatory practices in civil law, e.g. if goods or services are denied because of the ethnic origin of the applicant.¹⁸

In contrast to many other EU Member States such as the UK or the Netherlands, in Germany there still is no act dealing exclusively with non-discrimination. In civil law, there only remain several scattered provisions that may be used to combat severe acts of discrimination. Some have already been mentioned: For example, section 826 BGB stipulates the right to compensation for damage suffered from an intentional, immoral injury. In German Case law, section 826 BGB has already served as a tool for the granting of compensation for discrimination on the grounds of sexual identity.¹⁹ Other general *bona fide* and equity clauses of civil law are also to be interpreted in the light of the constitutional provision of equal treatment. There is, however, very little case law dealing with discrimination in civil law.²⁰ Explicit regulations providing the right to equal access and treatment can be found in section 611a BGB in terms of sex and section 81 of the *Neuntes Buch Sozialgesetzbuch* (Ninth Book of the Social Act, SGB IX) in terms of disability. Both tackle, however, exclusively discrimination related to employment.²¹

II. Contents of the upcoming German Anti-Discrimination Act

According to the December 2004 draft, the anti-discrimination provisions are no longer going to be incorporated into the BGB. This is a major change in comparison to earlier drafts. Instead, the authors prefer the creation of a specific Anti-Discrimination Act under the title: *Gesetz zur Umsetzung europäischer Anti-*

¹⁸ *Mahlmann*, Executive Summary – Discrimination on the ground of race or ethnic origin – Germany, 23 June 2004, at http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/aneval/race_de.pdf (31 Jan. 2005).

¹⁹ The *Landgericht* (Regional Court) Karlsruhe, *Neue Juristische Wochenschrift – Rechtsprechungsreport* 2002, 111, has interpreted section 826 BGB as giving the claimant a right of access to the federation in question. In comparison, the *Kammergericht* (Higher Regional Court Berlin), *Neue Juristische Wochenschrift – Rechtsprechungsreport* 1993, 183, that dealt with a similar case a few years earlier was more hesitant. See *Vennemann*, 3 *German Law Journal* (2002), para 13 (*supra* note 13) and *Begründung* (explanatory note) to the DiskE 2001, 18.

²⁰ *Mahlmann*, Executive Summary – Discrimination on the ground of race or ethnic origin – Germany, 23 June 2004, 6.

²¹ A more detailed overview is given in *Mahlmann*, *Anti-Discrimination Legislation in EU Member States – A Comparison of National Anti-Discrimination Legislation on the Grounds of Racial or Ethnic Origin, Religion or Belief with the Council Directives – Germany*, Report prepared by Matthias Mahlmann under the guidance of Migration Policy Group, (Jan Niessen/Isabelle Chopin, eds.) on behalf of the European Monitoring Centre on Racism and Xenophobia (Vienna, 2002), 15-22 at http://eumc.eu.int/eumc/material/pub/Art13/ART13_Germany-en.pdf (31 Jan. 2005). and *Vennemann*, 3 *German Law Journal* (2002), para 7 et seq. (*supra* note 13).

diskriminierungsvorschriften (European Anti-Discrimination Provisions' Transformation Act, ADG). It includes general provisions (part 1, sections 1-5)), provisions on employment (part 2, sections 6-19), provisions on the protection in civil law (part 3, sections 20-22), provisions on remedies and enforcement (part 4, sections 23-24), special provisions on public-law contracts of employment (part 5, section 25), provisions on a body for the promotion of equal treatment (part 6, sections 26-31) and final provisions (part 7, sections 32-34). In what follows, this paper will deal exclusively with the protection from discrimination in civil law, i.e. parts 1, 3 and 4 of the ADG.

1. *Scope of civil law protection*

All contractual obligations "*typically concluded in many cases under comparable conditions irrespective of the person concerned*", as well as private insurance and the membership in professional organizations, have to be, according to sections 19 para 1 No. 2, 20 para 1 No. 1 and 2 ADG, carried out irrespective of one's sex, racial or ethnic origin, religion or belief, disability, age and sexual identity. This constitutes a basic protection against discrimination for all disadvantaged groups.

Furthermore, the ADG contains specific provisions to deal with discrimination on the grounds of racial or ethnic origin: thus, sections 2 para 1 No. 5-8, 20 para 2 ADG additionally prohibit such discrimination with regard to healthcare, social advantages, education and the access to and supply of goods and services which are available to the public. Such special protection that goes beyond the basic provisions is necessary in order to comply with the obligations imposed upon Germany by Directive 2000/43/EC.

a. Massengeschäfte (bulk contracts)

The so called *Massengeschäfte* are legally defined by section 20 para 1 No. 1 ADG as contractual obligations which are "*typically concluded in many cases under comparable conditions irrespective of the person concerned or in which the special characteristics of a person are of inferior importance with regard to the nature of the contractual obligation.*"²² This legal term represents an innovative approach in anti-discrimination legislation, newly developed by the drafters of the ADG. The German delegation also tried to insert it into the provisions of the Directive 2004/113/EC, but could only

²² Section 20 para 1 No. 1 ADG provides that a different treatment is unlawful in „*Schuldverhältnisse[n], die typischerweise ohne Ansehen der Person zu vergleichbaren Bedingungen in einer Vielzahl von Fällen zustande kommen (Massengeschäfte) oder bei denen das Ansehen der Person nach der Art des Schuldverhältnisses eine nachrangige Bedeutung hat und die zu vergleichbaren Bedingungen in einer Vielzahl von Fällen zustande kommen...*“.

convince the other delegations to adopt the formulation “irrespective of the person concerned”.²³ Nevertheless, the notion of *Massengeschäfte* is about to reach a prominent place in German anti-discrimination law and is bound to have effect on European legislation as well.

b. Goods and services which are “available to the public”

Section 2 para 1 No. 8 ADG constitutes a word-for-word implementation of the underlying Art. 3 para 1 lit. h of the Directive 2003/43/EC. This protection only applies to people who are discriminated against because of their racial or ethnic origin. Just as the Directive 2000/43/EC, the ADG fails to provide a definition of what actually is “available to the public”. The answer is left to the courts and, eventually, to the European Court of Justice (ECJ).²⁴

Nevertheless, recitals 4 respectively 13 of the Directives 2000/43/EC and 2004/113/EC show that transactions carried out in the context of private and family life are not supposed to be “available to the public”.²⁵ The more a contract affects the *Kernbereich der persönlichen Freiheitssphäre* (personal sphere of the individual), the more the admissibility of arbitrary different treatment by private persons must be accepted.²⁶ In other words: Discrimination in the personal environment may be instrumental in the development of one’s own personality.²⁷ Still, these preliminary conclusions remain too broad to be successfully legally applied.

²³ Art. 3 para 1 provides: “...goods and services which are available to the public irrespective of the person concerned...and which are offered outside the area of private and family life and the transactions carried out in this context”. While the first part stems from the proposal of the German delegation: “...goods and services which are available to the public, and which are typically made available in many cases under the same conditions irrespective of the person concerned...” (Council document 12841/04, 30 Sept. 2004, 16 Footnote 13), the second part takes up the wording of recital 13 of the Directive 2004/113/EC. The *Begründung* (explanatory note) to the ADG, 82 innocently suggests, that by using the term *Massengeschäfte*, the draft would simply implement Art. 3 para 1 of the Directive 2004/113/EC.

²⁴ For a detailed description of what is “available to the public”, taking into account the drafting history, the international background and the experiences in different EU Member States, see *Schöbener/Stork*, 7 ZEuS (2004), 43 (65 et seq.), available at: <http://www.jura.uni-sb.de/projekte/Bibliothek/texte/SchoebStork.pdf> (31 Jan. 2005). See also *Schöbener/Stork* 8 ZEuS (2005), soon to be published.

²⁵ In this context, the Commission mentions as examples the renting of a holiday home to a family member or the letting of a room in a private house (COM 2003 657, 13).

²⁶ *Otto*, *Personale Freiheit und soziale Bindung*, 1978, 148 ff.; *Bezzemberger*, AcP 196 (1996), 395 (415); *Delbrück* in: *Schneider/Götz* (Eds.), *Festschrift für Werner Weber*, 1974, 223 (238).

²⁷ *Neuner*, *Juristenzeitung* 2003, 57 (63).

However, the Commission proposal for the sex Directive 2004/113/EC provides additional information: The Commission states that the concept of goods and services available to the public has the same meaning as in Council Directive 2000/43/EC. It could therefore include:²⁸ access to premises into which the public are permitted to enter; all types of housing, including rented accommodation and accommodation in hotels; services such as banking, insurance and other financial services; transport and the services of any profession or trade.

These examples and the profound need to respect the private sphere of any individual suggest a general exception from the prohibition to discriminate as far as *consumers* are concerned.²⁹ This legal term is defined in several EU Directives³⁰ and has been implemented in German civil law by section 13 BGB: A natural person who, under a contract, is acting for purposes which are outside his trade, business or profession would therefore not be bound by the prohibition to discriminate. On the other hand, the *seller/supplier*, in Germany defined by section 14 BGB, must generally comply with the anti-discrimination provisions. This legal term comprises any person who, under a contract, is acting for purposes relating to his trade, business or profession or rather in his commercial or professional capacity when selling goods or services. Such a distinction between *consumers*, on the one hand, and *seller/suppliers*, on the other, would ensure legal security and system consistency by making use of well established notions of European law. This would allow a clear and comprehensible definition of who actually offers goods and services that have to be provided in compliance with the anti-discrimination principles because they are “available to the public”. Clear terms, thus, create clear law.

The formulation “goods and services which are available to the public” should therefore be understood in the sense that only *seller/suppliers* are bound by anti-discrimination law. *Consumers*, on the other hand, are excluded from its scope.³¹

2. Discrimination

The definitions of discrimination in section 3 ADG are word-for-word implementations of the underlying Art. 2 of the Directives 2000/43/EC and 2004/113/EC. All

²⁸ COM 2003 657, 13; The Commission’s explanation refers to the earlier wording of Directive 2004/113/EC. Similarly to Directive 2000/43/EC, discrimination was initially deemed unlawful, when the goods and services in question were “available to the public”.

²⁹ *Thüsing*, *Juristenzeitung* 2004, 172 (174).

³⁰ See the Directives 85/577/EEC, 87/102/EEC, 93/13/EEC, 94/47/EC, 97/7/EC, 1999/44/EC.

³¹ *Heinrichs* in: Palandt (ed.), BGB, 64th ed. 2005, Anh nach § 319 para 6, does not use these terms explicitly, however, his interpretation of the formulation corresponds to this article’s suggestions.

definitions – except for the one on sexual harassment – recur on section 1 ADG where the prohibited grounds of discrimination are listed. They include sex, racial or ethnic origin, religion or belief, disability, age and sexual identity.

*a. Discrimination in Community law*³²

“*Leitmotiv*”³³ of the whole Treaty has always been the prohibition of discrimination on grounds of nationality, laid down in Art. 12 EC and the fundamental freedoms, Art. 23, 39, 43, 49, 56 para 1, 57 EC. But soon, the principle of equal pay for male and female workers in Art. 141 EC developed from an economically motivated principle into a socio-political provision.³⁴ This formed the basis for a new concept of anti-discrimination law, leaving behind the limitation to nationality, but at first solely covering different treatment on grounds of sex in employment. Nevertheless, sanctioning of discriminatory practices began to reach the social sphere. Together with the continuous lobbying of numerous non-governmental organizations,³⁵ ways were paved for the insertion of Art. 13 EC into the Treaty. This provision is the foundation for an evolving anti-discrimination law of the European Union to combat different forms of discrimination in areas such as labor, economic and private life.

b. Direct and indirect discrimination

According to section 3 para 1 ADG, direct discrimination occurs where one person is treated less favorably than another is, has been or would be treated in a comparable situation.³⁶

³² Plötscher, *Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht*, 2003; Hailbronner, *Zeitschrift für Ausländerrecht* 2001, 254 (256-257).

³³ *Wohlfahrt* in: *Wohlfahrt/Everling/Glaesner/Sprung, Die Europäische Wirtschaftsgemeinschaft, Commentary*, 1960, Art. 7 EWGV para 1.

³⁴ ECJ C-43/75, ECR I-1976, 455 para 8 et seq. (*Defrenne/Sabena*); ECJ C-50/96, ECR 2000, I-743 para 57 (*Schröder*).

³⁵ Especially the *Starting Line Group (SLG)*, formed in 1991, must be mentioned by name. Today it is an informal network of about 400 organisations from the EU Member States. The *SLG* has been campaigning long time for the creation of a Directive to combat racism and xenophobia, the so-called „Starting Line“. On the origins of Art. 13 EC see *Chopin*, *EJML* 1 (1999), 111 ff.; *Bell*, *MJ* 6 (1999), 5 (6 ff.); *Bell/Waddington*, *ILJ* 25 (1996), 320 ff.; *European Network against Racism* (Ed.), *Campaigning against racism and xenophobia from a legislative perspective at European level*, 1999, 3, at: <http://www.migpolgroup.com/uploadstore/ENARcampe.pdf> (31 Jan. 2005); *Khan*, *The Muslim Lawyer* 3 (Sept. 1999), 1 ff., at: <http://www.aml.org.uk/journal> (31 Jan. 2005)

³⁶ Art. 2 para 2 lit. a Directive 2000/43/EC; Art. 2 para 2 lit. a Directive 2000/78/EC; Art. 2 lit. a Directive 2004/113/EC; Art. 2 para 2 Directive 2002/73/EC; Directive 76/207/EEC does not contain a definition of direct discrimination, yet it is prohibited by Art. 2 para 1.

Indirect discrimination is defined by section 3 para 2 ADG. It shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of the discriminated group at a particular disadvantage compared with other persons. This is the case, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.³⁷

c. Instruction to discriminate and (sexual) harassment

The instruction³⁸ to discrimination, harassment³⁹ and – regarding the equal treatment between men and women – sexual harassment⁴⁰ are deemed to be discrimination in way of legal fiction by the underlying Directives. Both legal terms are a rather new concept for German law.

The German draft legislation contains these definitions in section 3 para 1-5 ADG. Nevertheless, it makes a distinction between labor and civil law discrimination: Only in the field of employment does sexual harassment constitute a disadvantageous treatment, according to section 3 para 4 ADG. This should soon be changed, as the Directive 2004/113/EC prohibits such acts also with regard to goods and services and private insurance (Art. 2 lit. d). (General) harassment and the instruction to discriminate constitute unlawful discrimination in both fields.

It is remarkable that harassment and the instruction to discriminate are now part of the draft. Even though these legal instruments may be regarded as necessary for employment law, the authors of the May 2004 draft still believed these legal terms were superfluous with regard to civil law. That assessment was both right and wrong. In terms of harassment the existing provisions of German tort and contract

³⁷ Art. 2 para 2 lit. b Directive 2000/43/EC; Art. 2 para 2 lit. b Directive 2000/78/EC; Art. 2 lit. b Directive 2004/113/EC; Art. 2 para 2 Directive 2002/73/EC; Directive 76/207/EEC does not contain a definition of indirect discrimination, yet it is prohibited in Art. 2 para 1.

³⁸ Art. 2 para 4 Directive 2000/43/EC; Art. 2 para 4 Directive 2000/78/EC; Art. 4 para 4 Directive 2004/113/EC (initially, the Commission proposed the use of the term „incitement“, rather than “instruction” in the English text, in order to align the meanings of the language versions, COM 2003 657, 14); Art. 2 para 4 Directive 2002/73/EC; Directive 76/207/EEC neither contains a definition nor an explicit prohibition of the instruction, respectively incitement to discriminate.

³⁹ Art. 2 para 3 Directive 2000/43/EC; Art. 2 para 3 Directive 2000/78/EC; Art. 2 lit. c Directive 2004/113/EC; Art. 2 para 2 and 2 para 3 Directive 2002/73/EC; Directive 76/207/EEC neither contained a definition nor an explicit prohibition of harassment.

⁴⁰ Art. 2 lit. d Directive 2004/113/EC; Art. 2 para 2 and 2 para 3 2002/73/EC; Directive 76/207/EEC neither contained a definition nor an explicit prohibition of sexual harassment.

law already provide sufficient protection. In contrast, the instruction to discriminate could not always be covered by existing law.⁴¹ Now, these considerations simply seem to have been thrown overboard. Instead of drafting a legislation that fits into and makes use of an already existing and developed legal system, issues are dealt with doubly and more just to ensure correct implementation.

3. *Permissible different treatment*

The constitutionally protected private autonomy creates the need for the possibility of balancing the interests of the private persons involved in each case.⁴² Therefore, sections 3 para 2, 5, 20 para 4 and 5, 21 ADG permit different treatment under certain circumstances.

a. Bereichsausnahmen (Exceptions from the scope/textual exceptions)

Family law obligations and obligations governed by the law of inheritance are excluded from the scope of the draft legislation by section 20 para 4 ADG. So are contractual obligations that lead to a *besonderes Nähe- oder Vertrauensverhältnis* (relationship involving special closeness or trust) between the parties or their relatives according to section 20 para 5 ADG.⁴³ This provision is clearly inspired by recital 4 of the Directive 2000/43/EC. The new sex Directive 2004/113/EC will contain a similar reminder in its recital 13.

In my view, the formulation “goods and services which are available to the public” should also be understood as creating an exemption from the scope of anti-discrimination law for *consumers*. The provisions on equal treatment on the grounds of racial and ethnic origin bind, therefore, only *seller/suppliers*. At least, a *besonderes Nähe- oder Vertrauensverhältnis*, according to section 20 para 5 ADG should always be denied, if the violator of the principle of equal treatment is a *seller/supplier*.

b. Justification

Sections 3 para 2, 5 and 21 ADG provide legal justifications for different treatment. In cases of multiple discrimination, different treatment must be permissible in the

⁴¹ For a detailed analysis see *Schöbener/Stork* 8 ZEuS (2005), soon to be published.

⁴² *Vennemann*, 3 German Law Journal (2002), para 18 (*supra* note 13)

⁴³ Section 7 para 3 of the dutch *Algemene wet gelijke behandeling* (Equal Treatment Act, AWGB), 1 Sept. 1994, contains a similar provision in order to protect the private and family life: “Subsection 1 (a and d) shall not apply to requirements which may reasonably be imposed having regard to the private nature of the circumstances to which the legal relationship applies.” At: <http://www.cgb.nl/english/asp/awgb.asp> (31 Jan. 2005).

light of any of the grounds involved, according to section 4 ADG. However, seen together with the differences in scope, the detailed and differing possibilities for justification do create a “discrimination hierarchy” among the prohibited grounds.

i) Legitimate aim (indirect discrimination)

According to section 3 para 2 ADG, indirect discrimination only occurs in the absence of a legitimate aim (*rechtmäßiges Ziel*) or if the means of achieving that aim are either inappropriate or unnecessary. The emphasis on an objective justification in cases of indirect discrimination is put on two elements. Firstly, the aim of the provision, criterion or practice which establishes a difference of treatment must deserve protection and must be sufficiently substantial to justify it taking precedence over the principle of equal treatment. Secondly, the means employed to achieve that aim must be appropriate and necessary. The legitimate aim in cases of indirect discrimination may be applied to justify different treatment on any of the permitted grounds listed in section 1 ADG.

ii) Positive Action

A further provision that may be used to justify different treatment is the positive action-clause, contained in section 5 ADG. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent private persons from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to one of the characteristics contained in section 1 ADG. However, measures must be necessary and proportionate.⁴⁴

iii) Reasonable grounds

In all other cases, section 21 ADG permits different treatment on the basis of sex, religion or belief, disability, age or sexual identity when based on a *sachlicher Grund* (reasonable grounds). However, different treatment is never permissible when it comes to racial and ethnic origin.

Reasonable grounds include, according to section 21 No. 1-3 ADG, the avoidance of danger, the prevention of damages and the need for protection of private life or for personal security. Measures are further justified if they grant special advantages

⁴⁴ The principle of proportionality is not contained in the text of the underlying Art. 5 of the Directive 2000/43/EC. However, the Commission explicitly recognizes this principle with regard to positive action: „Such measures must be shown to be necessary, focused on overcoming a specific disadvantage and must be limited in time, being in force no longer than is necessary to deal with the problem identified.” (COM 2003 657, 14).

and if public interest does not demand compliance with the principle of equal treatment. Such measures come close to positive action-situations, actually laid down in section 5 ADG. However, section 21 No. 3 ADG will also permit discriminatory acts that do not aim at preventing or compensating for specific disadvantages linked to one of the pertinent characteristics.

The list is not to be understood as exhaustive, but merely provides examples of what is “especially” (*insbesondere*) a reasonable ground. Further justifications will be established by the courts. According to the *Begründung* (explanatory note) of the original 2001 draft, which also made reference to the “reasonable grounds”, a ground or purpose is reasonable if it not only reflects a personal apprehension, but also relates to the content of the planned legal transaction and is found justifiable by an average observer.⁴⁵ The explanatory note to the ADG simply states that a “reasonable ground” must be ascertained on a case by case basis according to the requirements of good faith.⁴⁶

Finally, section 21 No. 4 and 5 ADG address two special forms of different treatment: One’s own religion or belief is a reasonable ground to treat people of different convictions differently. Different treatment in private insurance is permitted, if one of the pertinent grounds is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. However, costs related to pregnancy and maternity shall not result in differences in individuals’ premiums and benefits.⁴⁷

iv) Genuine and determining occupational requirement

With regard to civil law contracts relating to an occupation (section 20 para 3 ADG) and organizations whose members carry out a particular profession (section 19 para 1 No. 2 ADG), different treatment is deemed permissible if the existence or the absence of one of the characteristics contained in section 1 ADG constitutes a genuine and determining requirement (*wesentliche und entscheidende berufliche Anforderung*) for the occupation or for membership in the organization. In the case of occupational activities within churches and other organizations, the ethos of which is based on religion or belief, these characteristics bear special importance in determining whether different treatment is justified. Further modifications apply when sex or age is involved: Different treatment based on sex may only be justified if its consideration is a de-

⁴⁵ Explanatory note to the DiskE 2001, 47.

⁴⁶ Explanatory note to the ADG, 88.

⁴⁷ The provisions on private insurance, sections 20 para 1 No. 2 and 21 No. 5 serve to implement Art. 5 para 2 and 3 of Directive 2004/113/EC, cf. *Begründung* (explanatory note) to the ADG, 92.

termining occupational requirement (*unverzichtbare Voraussetzung*). Different treatment because of age only requires a legitimate aim (*legitimes Ziel*).

4. Burden of proof

Section 23 ADG⁴⁸ lays down a rule dealing with the burden of proof. It stays close to the wording of Art. 8 para 1 of Directive 2000/43/EC and Art. 9 para 1 of Directive 2004/113/EC: When someone, who considers himself wronged because the principle of equal treatment has not been applied to him, establishes facts from which it may be presumed that there has been a case of direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. The draft allows the respondent either to rebut that presumption and prove that there was no case of discrimination or to argue that the difference in treatment was based on reasonable or justified criteria.

5. Right of legal action taken by an association

According to section 24 ADG, *Anti-Diskriminierungsverbände* (Anti-Discrimination Associations, ADV), which give advice to disadvantaged persons, may engage in judicial proceedings to enforce the victim's rights. To qualify as an ADV, the pertinent organization must neither act in a commercial capacity nor on an only temporary basis and has to comprise at least 75 members or form a union of at least seven associations. The fact that legal action can also be taken by someone other than the victim constitutes a rare exception in German law, which does not know the *actio popularis*.⁴⁹

6. Sanctions

Section 22 para 1 ADG grants the victim the right to forbearance and the right to have the negative consequences of the discriminatory act nullified. Like its predecessors, the draft provides in section 22 para 2 ADG for an obligation to contract, if a contractual relationship had been concluded without breach of the prohibition to discriminate and if the performance is *hinreichend bestimmt* (sufficiently specified). The inclusion of an obligation to contract into the Anti-Discrimination Act has to be assessed according to the guarantees of the German Constitution, as there is no obligation from the Directives 2000/43/EC and 2004/113/EC to provide for such a sanction. Art. 15 and 14 of the Directives merely state that sanctions must be "effec-

⁴⁸ Section 23 ADG provides: „Wenn im Streitfall die eine Partei Tatsachen glaubhaft macht, die eine Benachteiligung wegen eines in § 1 genannten Grundes vermuten lassen, trägt die andere Partei die Beweislast dafür, dass andere als in § 1 genannte, sachliche Gründe die unterschiedliche Behandlung rechtfertigen oder die unterschiedliche Behandlung wegen eines in § 1 genannten Grundes nach Maßgabe dieses Gesetzes zulässig ist.“

⁴⁹ Vennemann, (*supra* note 13), para 22.

tive, proportionate and dissuasive” and may comprise payment of compensation to the victim. The opinion in the legal academia as to whether the obligation to contract is an appropriate sanction in cases of discrimination appears to be divided. While some authors⁵⁰ argue that the refusal of contract because of one’s racial or ethnic origin should generally result in an obligation to contract, it is questionable in terms of proportionality if this doctrine can also be applied to other grounds of discrimination.⁵¹

Section 22 para 3 ADG allows a claim for pecuniary damages,⁵² but only if the violator is responsible for the breach of obligation as a result of negligence or intent. If a non-pecuniary damage occurs, the victim may claim a just compensation. It is highly questionable if the wording complies with European Law, as far as it ties a claim for compensation to personal fault. Even though the requirement of fault forms the basis of German law on compensation, it cannot be applied in cases of discrimination. With regard to a similar provision in the Directive 76/207/EEC, dealing with discrimination on grounds of sex in the field of employment, the ECJ⁵³ held that when a Member State chooses to penalize the breach of the prohibition of discrimination under rules governing civil liability, “the Directive ... preclude[s] provisions of domestic law which make reparation of damage suffered as a result of discrimination ... subject to the requirement of fault.”

D. Prospects

The new draft is an attempt to reconcile the opposing rights of civil law subjects by establishing a system that covers all grounds of discrimination mentioned in Art. 13 EC while at the same time allowing for different treatment in a vast range of cases. As this provokes a far-reaching interference of state authorities, i.e. courts, and anti-discrimination bodies in the social sphere, it is worth questioning if this is the appropriate political decision. In addition, key provisions of the draft (*besonderes Nähe- oder Vertrauensverhältnis; sachlicher Grund*) are left to the courts’ interpretation, thus

⁵⁰ Vgl. *Bezenberger*, *Archiv für die civilistische Praxis* 196 (1996), 395 (427 ff.); *Neuner*, *Juristenzeitung* 2003, 57 (64); *Otto*, *Personale Freiheit und soziale Bindung*, 1978, 165 f.; *Bork* in: *Staudinger*, 2003, Vorbem zu §§ 145-156 para 24 (all without reference to the Directive 2000/43/EC); *Heinrichs* in: *Palandt* (ed.), *BGB*, 64th ed. 2005, Einf § 145 para 10 and Anh nach § 319 para 20, who comes to this conclusion with regard to the effect of the non-implemented Directive 2000/43/EC.

⁵¹ *Neuner*, *Neue Juristische Wochenschrift* 2000, 1822 (1829) argues, that the obligation to contract is also a proportionate sanction in cases of discrimination on grounds of disability.

⁵² See on this issue *Steinbrück*, *Jura* 2004, 439.

⁵³ ECJ C-180/95, ECR 1997, I-2195 para 22 (*Draempaehl*); So states ECJ C-177/88, ECR 1990, I-3941 para 22 (*Dekker*): “...the Directive [76/207/EEC] does not make liability on the part of the person guilty of discrimination conditional in any way on proof of fault or on the absence of any ground discharging such liability.”

promoting legal uncertainty. That is why the new draft legislation seems to prevent and confuse rather than support and clarify the settlement of discrimination matters.

Furthermore, it should be kept in mind that a free and open market allocates resources in accordance with rational criteria. It prevents rather than favors discrimination, as discriminatory preferences are costly foibles.⁵⁴ Therefore, legal intervention to create equal opportunities in the marketplace can enhance economic efficiency almost only in cases of *statistical discrimination*.⁵⁵

Finally, from a legal point of view, the general prohibition on most grounds of discrimination apart from racial and ethnic origin does not appear to be necessary, as there is no sufficient statistical data proving widespread discriminatory practices in civil law contracts. Specific and custom tailored anti-discrimination provisions for certain areas of civil law (banks and private insurance) seem much more promising and proportionate.⁵⁶ Such a necessity test is of crucial importance in determining the limits of anti-discrimination legislation and must guide political and economic considerations.

⁵⁴ Engert, 4 German Law Journal (2003), 685 (689): At least under a *taste theory* of discrimination, systematic discrimination on a large scale is unlikely to persist.

⁵⁵ Engert, 4 German Law Journal (2003), 685 (698). *Statistical discrimination* occurs when a person has a certain trait, propensity, or disposition that matters (economically) for the other party to the contract because it can cause some extra cost. Discrimination in insurance premiums is paradigmatic of *statistical discrimination*, see Engert, 4 German Law Journal (2003), 685 (689 et seq.).

⁵⁶ See on this issue with regard to sex discrimination Schöbener/Stork 8 ZEuS (2005), soon to be published and Riesenhuber/Franck, Juristenzeitung 2004, 529 (536 et seq.).