

ERA

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**“Remedies and Sanctions in
Anti-Discrimination Law”**

Remedies & Sanctions

- **Overview:**
 - Foundations in Community law
 - Requirements from ECJ case-law
 - Implementation in Austria
 - Examples of current issues in case-law
 - Conclusions

Dir 2000/78/EC – Ch II – Remedies & Enforcement – Art 9 Defence of rights

- (1) Member States shall ensure that **judicial and/or administrative procedures**, including where they deem it appropriate **conciliation procedures**, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

Art 9 Defence of rights

- (2) Member States shall ensure that **associations, organisations** or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
- (3) Paragraphs 1 and 2 are without prejudice to national rules relating to **time limits** for bringing actions as regards the principle of equality of treatment.

Dir 2000/78/EC – Ch II – Remedies & Enforcement – Art 11 Victimisation

- Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer **as a reaction to a complaint** within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Dir 2000/78/EC – Ch II – Remedies & Enforcement – Art 16 Compliance

- Member States shall take the necessary measures to ensure that:
- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, **declared null and void** or are amended.

Dir 2000/78/EC – Ch II – Remedies & Enforcement – Art 17 Sanctions

- 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. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Anti-Racism Directive 2000/43/EC

- Essentially the **same substance** to the provisions of Art 7 (Defence of rights), Art 9 (Victimisation), Art 14 (Compliance) and Art 15 (Sanctions).
- Article 13 - (1) Member States shall designate a **body or bodies for the promotion** of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

Anti-Racism Directive 2000/43/EC Art 13

- (2) Member States shall ensure that the competences of these bodies include:
 - - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their **complaints** about discrimination,
 - - conducting independent **surveys** concerning discrimination,
 - - publishing independent **reports** and making **recommendations** on any issue relating to such discrimination.

Requirements for Remedies in the Directive

- Claims – **judicial** and/or **administrative channels**, or at least conciliation procedure
- **Associations** – participation
 - on behalf of the aggrieved person
 - or in support and with consent
- Burden of proof – Presentation by Prof. Sneath
- Few requirements all in all – MS retain autonomy on procedural law
- But basic principle that effective judicial defence of rights is necessary and procedural rules must be no less favourable (MS duty of loyalty).

Directive Requirements on **Sanctions**

- Adverse provisions in contracts, collective agreements etc. are **null and void**

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- **Sanctions** – Choice
- **Victimisation** – (Protection from “retaliatory measures” dates back to ECJ 22/9/1998, C-185/97 Coote).

Ineffective adverse provisions

- Jurisprudence on prohibitions of sex discrimination
- Case-law on Art 141 TEC (now 157 TFEU) implies some leeway (ECJ C-28/93) when it comes to how adverse provisions must be **set aside**.
- It is inadmissible to persist with the discrimination – even if only in the form of transitional measures (ECJ C-408/92).
- Until due and proper implementation, members of the disadvantaged group are entitled to the same treatment and to the application of the same arrangements as other workers (ECJ C-33/89)

Ineffective adverse provisions

- For the **period prior** to the judgment, the advantages obtained from equalising cannot be withdrawn from the favoured group, even if it were possible to deprive the favoured group of their superior status (ECJ C-28/93).
- **After** the judgment, these **advantages may be effectively set aside**. The court must separately examine whether its national law permits this lowering of standards – constitutional requirements. Under Community law, transitional measures favouring the previously favoured group are not necessary (ECJ C-408/92).

C-45/09 – Testing every stage of the implementation

- Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national provision such as Paragraph 10(5) of the AGG, under which clauses on automatic termination of employment contracts on the ground that the employee has reached the age of retirement are considered to be valid, in so far as, first, that provision is objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market and, second, the means of achieving that aim are appropriate and necessary. The implementation of that authorisation by means of a collective agreement is not, as such, exempt from any review by the courts but, in accordance with the requirements of Article 6(1) of that directive, must itself pursue a legitimate aim in an appropriate and necessary manner.

Directive Requirements on **Sanctions**

- **Sanctions – Compensation**
 - effective
 - proportionate
 - deterrent
 - ceiling only if the only damage incurred was denial of recognition (ECJ C-180/95 Draehmpaehl; similar substance already found in C-271/91 Marshall – full compensation)

Directive Requirements on **Sanctions**

- **Sanctions** also include
 - administrative penalties
 - criminal proceedings
 - exclusion from advancement

Requirements: Time bars

- **Periods of limitation or exclusion** are admissible if they do not entail less favourable procedural rules and do not make it impossible or excessively difficult to obtain a claim (ECJ C-326/96; inadmissible within a succession of short-term contracts where each termination is followed by reappointment, with the expiry date falling within a subsequent period of employment for the same employer ECJ C-78/98).
- An employer may not plead an – in itself adequate – two-year limitation period if the worker only failed to observe it because the employer deliberately **deceived** her with false information about the pay received by members of the other sex (ECJ C-326/96).

C-246/09 – Time bars

- Primary law and Art 9 of Dir 2000/78/EC must be interpreted as not precluding a national procedural rule under which a victim must make a claim within two months in order to obtain compensation, provided:
 - – firstly, that that time-limit is not less favourable than that applicable to similar domestic actions in employment law,
 - – secondly, that the fixing of the point from which that time-limit starts to run does not render practically impossible or excessively difficult the exercise of rights conferred by the Directive.
- Art 8 of Dir 2000/78 must be interpreted as not precluding a national procedural rule, adopted in order to implement the Directive, which has the effect of amending earlier legislation which provided for a time-limit for claiming compensation for discrimination on grounds of sex.

C-444/09 *et al* – Statute may not override retrospective effect

- Even though the national legislation transposing Directive 1999/70 (Fixed-Term Contracts) contains a provision which, whilst recognising the right of interim civil servants to be paid the three-yearly length-of-service increments, excludes the retrospective application of that right, the competent authorities of the Member State concerned are obliged, under European Union law and in relation to a provision of the framework agreement on fixed-term work, annexed to Directive 1999/70, having direct effect, to give that right to payment of the increments retrospective effect to the date by which the Member States should have transposed Directive 1999/70.

Effect of Directive Requirements

- **General shortcomings in implementation:**
 - Interpretation of **compatibility with Directive**
 - If not possible:
 - **direct** effect in **public** sector
 - **private** sector only with regard to **claims for damages** against the State (C-98/09), but also **pleas founded on basic legal entitlement**

Basic legal entitlement pleas – ECJ C-555/07 – Follow-up to Mangold

- It is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age **as given expression in Directive 2000/78**, to ensure effectiveness, **disapplying if need be any provision of national legislation contrary to that principle** (rule that only periods of employment after age of 25 are taken into account when calculating periods of notice); this is not dependent on obtaining a preliminary ruling.

ECJ C-341/08 – **Responsibility of courts**

- It is **for the national court** to identify the aim pursued by the measure laying down the age limit by ascertaining the reason for maintaining the measure (maximum age of 68 for panel dentists; not applied to dentists outside the panel system).

ECJ – C-388/07 – C-341/08 – **Responsibility of courts**

- Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which **does not contain a precise list** of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. It is for the national court to ascertain whether the legislation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States' discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim.

Fundamental rights – secondary Community law – C-236/09

- Art 6(2) EU provides that the European Union is to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Those fundamental rights are incorporated in the Charter, which, with effect from 1 December 2009, has the same legal status as the Treaties.
- Articles 21 and 23 of the Charter state, respectively, that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas.

Fundamental rights – secondary Community law – C-236/09

- While Article 157(1) TFEU establishes the principle of equal treatment for men and women in a specific area, Article 19(1) TFEU confers on the Council competence which it must exercise in accordance, inter alia, with the second subparagraph of Article 3(3) TEU, which provides that the European Union is to combat social exclusion and discrimination and to promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child, and with Article 8 TFEU, under which, in all its activities, the European Union is to aim to eliminate inequalities, and to promote equality, between men and women.

Fundamental rights – secondary Community law – C-236/09

- In the progressive achievement of that equality, it is the EU legislature which, in the light of the task conferred on the European Union by the second subparagraph of Article 3(3) TEU and Article 8 TFEU, determines when it will take action, having regard to the development of economic and social conditions within the European Union.
- However, when such action is decided upon, it must contribute, in a coherent manner, to the achievement of the intended objective, without prejudice to the possibility of providing for transitional periods or derogations of limited scope.

Fundamental rights – secondary Community law – C-236/09

- It was permissible for the EU legislature to implement the principle of equality for men and women – more specifically, the application of the rule of unisex premiums and benefits – gradually, with appropriate transitional periods. Thus it was that the EU legislature provided in Article 5(1) of Directive 2004/113 that the differences in premiums and benefits arising from the use of sex as a factor in the calculation thereof must be abolished by 21 December 2007 at the latest.

Fundamental rights – secondary Community law – C-236/09

- By way of derogation from the general rule requiring unisex premiums and benefits established by Article 5(1) of Directive 2004/113, Article 5(2) of that directive grants certain Member States – those in which national law did not yet apply that rule at the time when Directive 2004/113 was adopted – the option of deciding before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data.

Fundamental rights – secondary Community law – C-236/09

- Under Article 5(2) of Directive 2004/113, any decision to make use of that option is to be reviewed five years after 21 December 2007, account being taken of a Commission report. However, given that Directive 2004/113 is silent as to the length of time during which those differences may continue to be applied, Member States which have made use of the option are permitted to allow insurers to apply the unequal treatment without any temporal limitation. The Council expresses its doubts as to whether, in the context of certain branches of private insurance, the respective situations of men and women policyholders may be regarded as comparable, given that, from the point of view of the *modus operandi* of insurers, in accordance with which risks are placed in categories on the basis of statistics, the levels of insured risk may be different for men and for women.

Fundamental rights – secondary Community law – C-236/09

- It is not disputed that the purpose of Directive 2004/113 in the insurance services sector is, as is reflected in Article 5(1) of that directive, the application of unisex rules on premiums and benefits. Recital 18 to Directive 2004/113 expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals. Recital 19 to that directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit ‘exemptions’. Accordingly, Directive 2004/113 is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.

Fundamental rights – secondary Community law – C-236/09

- Accordingly, there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely.
- Such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.
- That provision must therefore be considered to be invalid upon the expiry of an appropriate transitional period (21 December 2012).

Austria – Sanctions – Private law

- **Claims for Performance – Relationships protected by law**
 - Pay discrimination – plus non-material damages
 - Discrimination in training and employment conditions – plus non-material damages
 - Prevention of discriminatory dismissals plus non-material damages; alternatively compensation for material loss plus non-material damages

Austria – Sanctions – Private law

- **Claims for damages**
 - Discrimination over appointment, promotion and termination of contract
 - Compensation for material loss (minimum amounts) and non-material damages
 - Harassment (victimisation)
 - Compensation for material loss and non-material damages (minimum: 720 EUR)

Austria – Sanctions – Public sector

- **Administrative penalties** – Invitation to apply or tender – Complaint lodged by applicant for position or by Ombud for Equal Treatment
- Administrative penalties imposed for less favourable treatment on racist, ethnic or religious grounds or grounds of disability. May also result in withdrawal of licence to trade.
- Exclusion from **advancement**

Austria – Procedures

- **Complaints** before employment and social tribunals
- **Equality Commission:** conciliation procedures; Commission can also bring court case if this fails; publication of rulings; general expertise
- **Ombud for Equal Treatment:** support, studies, reports, recommendations
- Legal defence through **trade unions** and Chambers of Labour
- **Actions for declaratory judgments** brought by trade unions and works councils

Discrimination – Appointment – Non-pecuniary damage – 8 ObA 11/09i

- The constitution of an employment contract is usually a lengthy process that begins with contacting a potential employer in response to an advertised vacancy. This “constitution” does not just consist of the final decision to conclude a contract, but also of the preceding application and selection procedures.
- The law prohibits any discriminatory conduct during this “process”.
- There should be specific statutory damages in response to any conduct that violates this prohibition of discrimination.

Discrimination – Appointment – Non-pecuniary damage – 8 ObA 11/09i

- In fixing an entitlement to non-pecuniary damages, the law incorporates the “procedural” aspect of anti-discrimination protection by acknowledging the legal good that a candidate in the employment market must “not suffer discrimination” and attaching a value to it in the form of a lump sum. The aim that requires enforcing is that the group of individuals concerned should not gain the impression when applying for work that they have “no prospects” in the employment market on the grounds of a specific characteristic they possess (sex, age, ethnic origin, etc.) and hence refrain from submitting applications.

Pay grades from 18 – Claim for Performance – ECJ C-88/08; 9 ObA 83/09k

- Section 26 Law on Contractual Public servants does not allow any consideration of job experience prior to the age of 18 when assessing pay grades. This has an impact on pay. The Austrian legislator sought, by excluding consideration of professional experience gained prior to attaining full legal capacity at the age of 18, to avoid placing pupils in general education at a disadvantage as compared to apprentices in vocational education.

Pay grades from 18 – Claim for Performance – ECJ C-88/08; 9 ObA 83/09k

- However, this excludes accreditation both of experience acquired before the age of 18 by a person who has pursued a general education and of that acquired by a person with a vocational education. That criterion may therefore lead to a difference in treatment between two persons with a vocational education or between two persons with a general education based solely on the criterion of the age at which they acquired their professional experience. In those circumstances, the criterion of the age at which the vocational experience was acquired does not appear appropriate for achieving the aim of not treating general education less favourably than vocational education.

Direct effect – Basic structure of labour law

- Anglo-Saxon roots. Constituted around **individual rights.**
- Austria attaches great importance to **collective negotiation.**
- Danger: collective bargaining procedures may be eroded because the outcome can increasingly be challenged by any individual worker

Direct effect – Basic structure of labour law

- Question whether generally applicable provisions founded on the substantive results of collective negotiation are not more effective for weaker groups in society than the option to pursue undefined rights through the courts.
- Danger of weakening trust in the efficacy of the arrangements for which labour law in the Member State provides. Random outcomes of individual proceedings determine the resilience of these arrangements.

Direct effect – Basic structure of labour law

- Limited leeway for collective assessments of what might be regarded as advantageous and “traded off”?
- Given that the demarcations are uncertain, at best less willingness to concede social benefits to individual groups?
- General lowering as a consequence of C-88/08. Similar issue following C-356/09.

The End

Thank You

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