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## Legal Recourse and Sanctions - EU Gender Equality Law -



## Structure

- EU legal framework (Art. 21, 23 CFR, Art. 157 TFEU, Equal Treatment Directives 2006/54/EC and 2000/78/EC)
- Legal recourse in case of discrimination (claim for performance, damages, claim for compensation)
- Sanctions (ineffectiveness laws/contracts)



## EU Legal Framework Primary Law



- Art. 21 CFR: general discrimination based inter alia on sex
- Art. 23 CFR: Equality between men and women (subjective fundamental right "general principle of EU law" (CJEU since 15 June 1978 C-149/77 Defrenne III))
- Art. 157 TFEU: Principle of equal pay, concretisation of Art. 21 and 23 CFR, direct effect in Member States!

## EU Legal Framework Secondary Law



- Equal Treatment Directive 2006/54/EC (central basis in secondary law, cf. Directive 2000/78/EC for other discrimination characteristics)
- Implementation of the principle of equal opportunities and equal treatment of men and women in access to employment, working conditions including remuneration, occupational schemes for social security

## EU Legal Framework Secondary Law



- Art. 4 Directive 2006/54/EC Non-discrimination in pay (supplementation/alignment to Art. 157 TFEU, direct effect!)
- Art. 14 Non-discrimination in recruitment/employment conditions
- Important, e.g.: Burden of proof regulation Art. 19 (no effective protection against discrimination without shifting the burden of proof!)

## Legal recourse: Entitlement to compensation in case of pay discrimination



- BAG (Federal Labour Court) 26 September 2017 – 3 AZR 733/15 – (pay discrimination in sense of Art. 157 TFEU, suspension of own pension entitlement if receiving higher surviving dependant's pension)
- Indirect discrimination (more entitlements of women are suspended)
- Broader concept of pay (all components of pay, also occupational pensions by state law)
- Direct right to equal treatment under Article 157 TFEU

## Legal recourse: Entitlement to compensation in case of pay discrimination



- Legal consequence of pay discrimination: “Equal treatment/Upward adjustment” (since CJEU 8 April 1976 -43/75 Defrenne II)
- Scope of application: Law, collective agreement, employment contract
- Unrestricted for the past (elimination of unequal treatment)
- Alterable for the future
- National time limits for bringing action (limitation periods/statute of limitation) remain unaffected (cf. Art. 17 (3) of Directive 2006/54/EC)

## Legal recourse: Compensation for damages



- Basic principle: Art. 18 Directive 2006/54/EC Sentence 1

Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered.

## Legal recourse: Compensation for damages



- Limitation?: Art. 18 Directive 2006/54/EC Sentence 2

Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

## Legal recourse: Compensation for damages German law: § 15 (1) AGG (General Equal Treatment Act):



- BAG 19 August 2010 – 8 AZR 530/09 – (Age discrimination, job advertisements, damages and compensation)
- Typical cases: Non-appointment, non-promotion
- Material damage, lost of earnings
- Full burden of proof for cause-in-fact and proximate cause underlying the liability (would applicants have been hired without discrimination?)
- Shifting of burden of proof Art. 19 Directive 2006/54/EC does not apply

## Legal recourse: Compensation for damages German law § 15 (1) AGG



- Special problem: Limitation of compensation to lost earnings in the period of notice?
- (CJEU 17 December 2015 C-407/14- Arjona Camacho: Full compensation for the damage, LAG Berlin 26 November 2008 - 15 Sat 517/08 -: no time limitation, disputed in detail: employer could have dismissed in the probationary period)
- No punitive damages (see above) (CJEU see above)

## Legal recourse: Compensation for damages German law § 15 (2) AGG



- Non-material damages (infringement of the right to privacy): max. 3 months' salary, if the applicant would not have been recruited even in the case of a non-discriminatory selection
- Independent of fault
- Ignorance of discrimination irrelevant
- Discriminatory motive not required

## **Legal recourse: Compensation for damages German law: § 15 (2) AGG:**



- BAG 26 January 2017 – 8 AZR 848/13 –

"The fact referred to by the employee fact that the employer from approximately equal numbers of applications from women and men had selected only women who were to some extent less qualified than him does not without further evidence necessarily conclude that the employee was discriminated against on account of his sex."

## **Sanctions Art. 23 Directive 2006/54/EC**



- Member States shall take all necessary measures to ensure that
- any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished,
- provisions contrary to the principle of equal treatment in individual or collective contracts or agreements ... shall be, or may be, declared null and void or are amended.

## Sanctions

### Art. 25 Directive 2006/54/EC



- Member States shall lay down the rules on penalties 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 penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

## Judicial practice in dealing with Directives



- BAG 21 February 2017 – 1 AZR 62/12 –

"According to settled case-law of the European Court of Justice, domestic courts, when applying national law, are required to interpret it, as far as possible, in the light of the wording and purpose of the directive, in order to fulfil the objective laid down in the directive, and thus Art. 288 (3) TFEU. The obligation to attain the goal of a directive by way of interpretation finds its limits in the methodology permitted by domestic legal tradition. It must not serve as a basis for an interpretation of national law contra legem. Whether and to what extent national law permits a corresponding interpretation in conformance with the directive is for the domestic courts to judge."



## Judicial practice in dealing with Directives



- BAG 25 October 2018 - 8 AZR 501/14

(ECJ December 7, 2016 C-414/16- Egenberger)

"A national court hearing a dispute between two private individuals, if it is unable to interpret the relevant national law in accordance with Article 4(2) of Directive 2000/78, is required, within the limits of its powers, to guarantee the legal protection conferred on individuals by Articles 21 and 47 of the Charter of Fundamental Rights of the European Union and to ensure that those provisions are fully effective by disapplying, if necessary, any conflicting national provision."

