



DR. JUR. KLAUS KAMMERER

Column 11

Dear citizens of Georgia,

with this column, as announced in the previous Column 10, we now turn to the directives whose implementation into national law poses particular challenges for national legislators and, equally, for the European Court of Justice and national courts when it comes to questions of interpretation (Chapter III).

In a further chapter (Chapter IV), we address the diplomatic initiative of the US administration, with which it intends to force its business partners in Europe to abandon their diversity programs against discrimination, which serve the internal professional advancement of minorities and comply with European law – the Union's four key anti-discrimination directives. In March and April 2025, companies in France and Spain received reminder letters via the US embassies in those countries, requesting them to complete a corresponding form within five days.

These reminder letters sparked outrage across Europe. They are perceived as "prohibition dictates" and as an invitation to violate domestic and European law. They also raise similar concerns elsewhere, in Germany and other EU countries, about how companies can continue to uphold their own values and conduct business with the US under these conditions.

Chapter III

Directives as Acts of Secondary Law

1. Binding Force for Member States

A directive is binding on each Member State to which it is addressed, with regard to the result it seeks to achieve. It leaves the choice of form and means to the national authorities (Article 288(3) TFEU) and may be addressed to one, several, or all Member States. It is then binding only on those addressees and only with regard to the stated result.

Union law provides for a two-stage procedure. The Union institutions adopt a framework with the directive, while the Member States take the necessary implementing measures in a complementary manner. The directive must be implemented fully, precisely, and within the time limit set by the directive (see Article 4(3) TEU). No Member State may invoke its internal legal order, any provisions, practices, or circumstances of which conflict with, or diverge from, the content of the directive and the stated result. The directive must therefore be fully observed and implemented.

If the implementation deadline has already expired, the prohibition of retroactivity (rule of law principle) means that retroactive implementation is excluded, particularly in the case of provisions that burden individuals. Citizens may rely on the continued existence of the legal situation contrary to the directive, which is beneficial to them, for the past. If the directive contains provisions that favor individuals, retroactive implementation is permissible in exceptional cases.

Member States must adopt the forms and means of implementation that best ensure the practical effectiveness of the directive. To do so, they exercise the discretion granted to them by the case law of the ECJ. Accordingly, the national provision must be objectively necessary and appropriate, i.e., proportionate, to ensure that the main objective of the directive is achieved. Furthermore, implementation must comply with the principles of legal certainty and legal clarity. This means that the binding national provisions serving to implement the directive must be sufficiently clear and precise so that those affected are aware of their rights and obligations in order to be able to assert them before the national courts.

Mere domestic administrative practice or implementation through administrative provisions without external effects on citizens are not sufficient. The same applies to a static or dynamic reference to the directive being implemented within national legislation. The case law of the European Court of Justice requires "unequivocally binding" implementation, which subsequently and generally requires substantive law. This is only unnecessary if the objective

set out in the directive has already been achieved domestically through legislation, or if an existing statutory provision can be interpreted in conformity with the directive.

When implementing a directive, the national legislature may exceed its requirements beyond the minimum requirements (over-implementation). In this respect, it may exercise discretion. However, this is different if the directive contains mandatory requirements (full harmonization) from which no deviation is permitted in any way; in this respect, there is no discretion in implementation. However, the legislative extension of the directive's content to other matters outside its actual scope is permitted.

Before the expiry of the implementation period, directives have a preliminary effect that arises from the directive itself. This means that, from the date of notification of the directive, the addressees must refrain from any measures that could seriously jeopardize the achievement of the objective prescribed by the directive (prohibition of frustration – see Article 18 of the Vienna Convention *).

https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgb1285s0926.pdf%27%5D#/switch/tocPane?ts=1745594421483

*) Vienna Convention in three languages

An interpretation of domestic law in conformity with a directive before the expiry of the implementation period is legally permissible through interpretation by the national courts. It must then be examined whether the courts already have the corresponding competence to develop the law before the expiry of the implementation period and before the directive has been implemented by the legislature. The (German) Federal Court of Justice (Bundesgerichtshof) ** has affirmed this. He considers that such an interpretation in conformity with the directive does not interfere with the competence of the legislature as long as conformity can be achieved by means of interpretation in national law and as long as the legislature has no scope for implementation anyway.

<https://www.schweizer.eu//aktuelles/urteile/7814-bgh-revisionsurteil-vom-5-februar-1998-i-zr-211-95>

**** BGH 05.02.1998 – I ZR 211/95 – BGHZ 138, 55, 59 ff.**

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0114>

RL 2006/114/EG vom 12.12. 2006 – irreführende Werbung / englisch

Preliminary remark: Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising to include comparative advertising (OJ L 290 of 23 October 1997, p. 18) has now been replaced by Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising

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Standards (German law)

https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#p0016

Act against Unfair Competition *

Section 1

Purpose of the Act; scope

(1) This Act serves the protection of competitors, consumers and other market participants against unfair commercial practices. At the same time, it protects the interests of the public in undistorted competition.

(2) Provisions regulating specific aspects of unfair commercial practices prevail over the provisions of this Act when it comes to assessing whether an unfair commercial practice has been engaged in.

Section 3

Prohibition of unfair commercial practices **

(1) Unfair commercial practices are illegal.

(2) Commercial practices targeting or reaching consumers are unfair if they are not in compliance with the requirements of professional diligence and are suited to materially distorting the economic behaviour of consumers.

(3) The commercial practices in relation to consumers listed in the Annex to this Act are always illegal.

(4) When assessing commercial practices in relation to consumers, reference is to be made to the average consumer or, where the commercial practice is directed towards a particular group of consumers, to the average member of that group. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to these practices or the underlying goods or services because of their mental or physical infirmity, age or credulity in a way which the entrepreneur could reasonably be expected to foresee are to be assessed from the perspective of the average member of that group.

Annex (to section 3 (3))

The following commercial practices are always illegal vis-à-vis consumers:

Misleading commercial practices

.....
Excerpts from the Federal Court of Justice, appeal judgment of February 5, 1998, I ZR 211/95

The Court's guiding principle

...

2. Within the framework of the general clause of Section 1 of the Unfair Competition Act (UWG), the content of an EC directive can be taken into account by way of interpretation consistent with the directive even if the implementation period has not yet expired.

Excerpts from the facts:

The parties are competitors in the distribution of tennis equipment, including in Germany. The plaintiff is a distribution company of a sporting goods manufacturer (golf and tennis). The defendant made the following **offer** in a letter to two employees of the plaintiff who had approached him for testing purposes:

"... You want to know why it's worth becoming a P-Tennis customer? . . . Every P-Racket is made of materials from the latest high-tech line (such as HI-Modulus graphite, ceramic, and Kevlar) and embodies the latest innovations in racquet technology. We won't subject you to cheap composite racquets (graphite-fiberglass). Special string test packages are available for you (see enclosed data sheet). You will receive each racquet for a one-time trial at the particularly attractive price of 110 DM (German Marks).

The plaintiff considers the statement "We won't subject you to cheap composite racquets (graphite-fiberglass)" to be inadmissible under Section 1 of the Unfair Competition Act (UWG)*. This constitutes a disparaging system comparison and misleading advertising, which is objectionable under Section 3 of the German Unfair Competition Act (UWG)**, and relies on the case law of the Federal Court of Justice (BGH), according to which a comparison of one's own goods or services with those of competitors is fundamentally contrary to common decency, even if the claims made are true and the value judgments made are factually correct. This is because any advertising that seeks to emphasize one's own performance by comparatively disparaging a competitor is contrary to the principles of competition based on merit. A competitor may not presume to judge another's goods or services in an unnecessarily disparaging manner.

However, case law allows a general exception, according to which a comparison of one's own goods or services with those of a competitor is permissible if there is sufficient cause for doing so and the information, in terms of type and extent, remains within the limits of what is necessary and truthful and factual discussion.

Excerpts from the reasons for the decision

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2. Following the adoption of Directive 97-55-EC of October 6, 1997, amending Directive 84-450-EEC concerning misleading advertising to include comparative advertising (OJ L 290 of October 23, 1997, p. 18) (now replaced by Directive 2006/114/EC of December 12, 2006 concerning misleading and comparative advertising), the Senate is amending its case law with regard to a required interpretation of Section 1 of the German Act Against Unfair Competition (UWG) in line with the directive. The concept of comparative advertising does not require any change. As before, and in accordance with Article 2 No. 2(a) of the aforementioned Directive, any advertising that directly or indirectly (at least) identifies a competitor or the products or services offered by a competitor is to be considered comparative advertising (established case law).

.....

However, to the extent that the Senate has assumed in its previous case law a general prohibition of comparative advertising, which it contrasted with a general principle of exception, this rule-exception relationship is no longer adhered to. Comparative advertising is now generally considered permissible, provided that the conditions set out in Article 3a I(a) to (h) of Directive 97/55/EC are met (now Articles 3 and 4 of Directive 2006/114/EC of December 12, 2006, concerning misleading and comparative advertising).

The Federal Court of Justice is not prevented from interpreting the directive in accordance with the directive because the deadline for implementing the directive on comparative advertising has not yet expired. If conformity with the directive can be achieved by means of a simple interpretation of national law, the judge is at least, according to German legal understanding, empowered to correct its previous interpretation and to take into account the changed legal and factual circumstances (.....).

The directive is a harmonization directive. Such directives on the "approximation of laws, regulations and administrative provisions" are primarily addressed to the member states and require them to implement the principles laid down in the harmonization directive into national law through appropriate legislation. Of course, there is no need to implement the directive if national law already complies with the requirements set out therein. This was the case with Directive 84-450-EEC of September 10, 1984, which merely required compliance with a minimum standard already in line with German law.

Section 1 of the Unfair Competition Act (UWG), as previously defined in case law on comparative advertising, is not consistent with the newly adopted Directive 97-55-EC. However, the broad wording of this general clause allows for a court-consistent interpretation of the directive. The transposition requirement is not solely addressed to legislative bodies. Rather, it is incumbent upon all public authorities in the Member States to take the measures necessary to fulfill the transposition obligation (Article 5 EC).

This also applies to the courts, within the scope of their jurisdiction; They must interpret national law in light of the wording and purpose of the directive (expressly ECJ, ECR 1984, 1891 = NJW 1984, 2021 [2022]; more recently ECJ, EuZW 1998, 167 = WRP 1998, 290 [293] para. 40 - Inter-Environnement Wallonie-Région wallonne with further references). However, the courts' obligation to interpret in accordance with the directive does not apply immediately upon adoption of the directive. Article 189(3) of the EC Treaty grants Member States discretion in implementing directives, which must primarily be exercised by the legislature.

The courts' (in this respect subsidiary) obligation to interpret domestic laws in accordance with the directive generally only applies if the legislature has not taken action by the expiry of the transposition period and the content of the directive is clear, either as a whole or in the area of application (cf. ECJ, NJW 1997, 3365 [3367] para. 43 - Dorsch Consult; BGH, NJW 1996, 3139 = LM H. 11-1993 § 4 WZG No. 57 = GRUR 1993, 825 [826] - DOS with further references; BGH, WRP 1998, 600 - SAM). However, given the current state of legal development, the Senate considers it necessary to consider Directive 97/55-EC even before the expiry of the thirty-month transposition period. The general clause of Section 1 of the Unfair Competition Act (UWG) allows for a change in German case law (.....). It refers to the standard of morality for the assessment of competitive behavior. It thus opens up the possibility for judicial development of the law and for an application of the law that can take into account the development of economic life and changes in public opinion, as well as long-term changes in the public's perception (.....).

The development of comparative advertising in case law illustrates this (.....). It is characterized by a gradual relaxation, which has now led to the recognition of a general principle of exception – going beyond the previous individual exceptions; in any case, the principle of prohibition has not always been strictly applied (.....). In the literature, the trend has already been toward further relaxation in the interest of better market transparency and information (.....). It was also pointed out that the practical significance of the dispute over whether comparative advertising is generally permitted or prohibited should not be overestimated (.....).

In the course of the harmonization of unfair competition law, the general clause of Section 1 of the Unfair Competition Act now allows for early adaptation to European legal developments, instead of codifying previous (divergent) case law principles, which in any case no longer apply after the expiry of the implementation period. This corresponds to the case law of the European Court of Justice, according to which Member States must refrain from measures that deviate from the objective of a directive (see most recently ECJ, EuZW 1998, 167 = WRP 1998, 290 ff.): A directive produces legal effects for the Member States to which it is addressed from the moment of its notification (Article 191(2) EC Treaty). Member States cannot be reproached for failing to implement the directive into their legal systems before the expiry of the implementation period, which is intended to give them the time necessary to adopt the implementing measures. Nevertheless, it is incumbent upon them to take the necessary measures during the transposition period to ensure that the result prescribed by the Directive is achieved upon expiry of that period (ECJ, EuZW 1998, 167 = WRP 1998, 290 [293] paras. 41-45).

Concerns that an interpretation of national laws in conformity with the Directive by the courts before the expiry of the transposition period would encroach on the legislature's powers (...) are unfounded as long as conformity can be achieved by interpretation in national law – in this case, the general clause of Section 1 of the Unfair Competition Act – and as long as the legislature has no discretion in its implementation. The latter can be assumed in any case to the extent that the concept of comparative advertising (Article 2 No. 2(a)) and the principle set out in Article 3a and the admissibility requirements regulated therein are relied upon in the case at issue. While the Directive leaves Member States free to choose the form and means of implementation (Article 189(3) EC), the content of any implementing measure must comply with the mandatory requirements of the Directive. It cannot be ruled out that – provided this is considered compatible with the objective of the Directive – a legislative elaboration of the

content would be conceivable, prohibiting comparative advertising in principle if the requirements of Article 3a(1)(a)-(h) of the Directive are not met.

A different question is whether, by implication of the provision in Article 3a(1) (of the Directive), comparative advertising should always be prohibited if the requirements set out therein are not met (...). If legislative discretion were to be recognized in this respect, this would not be preempted by this decision.

This also applies to the question, which requires interpretation, of what requirements must be met for misleading advertising comparisons (see Section 3 of the Unfair Competition Act and the appendix). The courts' consideration of Directive 97/55-EC at an early stage means that these and other questions of interpretation raised by the directive can be submitted to the ECJ, which is ultimately responsible for interpreting the directive, at an early stage. This ensures that the objective prescribed by the directive, namely to harmonize comparative advertising in the Member States of the Community, can be achieved in good time by the expiration of the implementation period (cf. ECJ, EuZW 1998, 167 = WRP 1998, 290 [293] para. 44).

There is also the following further aspect: The directive not only provides cause for a reconsideration of previous case law on comparative advertising. Rather, it also has a direct impact on the characteristic of immorality that constitutes a breach of competition law. Conduct that the European legislature has designated as fundamentally permissible cannot be considered a violation of accepted morality – regardless of whether the deadline for implementation of the directive is still running. By adopting the concept of "common morals," the national legislature has not only created the possibility of adapting to an already changed public perception, but has also opened the door to assessments that find expression in other provisions of the national or European legal system, and whose consideration in the context of interpreting this concept is already required by the unity of the legal system.

In view of all of the foregoing, the Senate considers it both permissible and objectively necessary to base the interpretation of the general clause of Section 1 of the Unfair Competition Act on the standard of Directive 97/55/EC and to permit comparative advertising in the future—while abandoning the previous principle of prohibition—within the framework also mandatory for the legislature under Article 3a of the Directive. This assessment must also be applied to past circumstances, since the present case does not involve a change in the law, but rather an application of the law, namely an interpretation of the general clause.

Whether the advertising statement is also to be considered misleading – as assumed by the Court of Appeal – so that the admissibility requirement under Article 3a(1)(a) of the Directive may also be lacking, can be left aside.

.....

See also:

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=98799&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=15073989>

EuGH Rs C-421/92 Habermann-Beltermann

JUDGMENT OF THE COURT (Sixth Chamber) 05 May 1994 in Case C-421/92

Marginal number 10

In applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty (see the judgment in Case C-106/89 *Mar-leasing v La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8).

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2. Direct Effect

The provisions of a directive, which oblige Member States to implement them into national law, are usually of an abstract and general nature. However, the difference from regulations is often only marginal, i.e., the provisions of the directive often leave Member States little or no leeway in their implementation. If implementation is lacking or is carried out incorrectly, the courts and administrations of the Member State must first seek an interpretation of national law consistent with the directive in order to give effect to the provisions of the directive before the question of the direct application of the provisions contained in the directive arises.

The **ECJ** has recognized the direct effect of directives without prior implementation as an exceptional case under certain conditions (ECJ Case 9/70 - **Leberpfennig** - paragraph 5 et seq.).

Citizens can invoke direct effect in their favor under **three conditions**:

1. Expiry of the transposition period without correct transposition,
2. The directive must be sufficiently precise with regard to the applicable provision, and
3. The directive must be unconditional in this respect, i.e., it must not leave the Member States any discretion with regard to the provision in question, which in itself requires transposition.

If the three conditions mentioned are met (which the national courts can have clarified by the ECJ in preliminary ruling proceedings), the national courts and authorities must apply the provisions of the directive *ex officio* and not only when the citizen invokes them.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61970CJ0009>

Facts and main proceedings:

The plaintiff in the main proceedings transported canned fruit and exported it from Germany to Austria via the border inspection post S... on March 1, 1969. The German customs office levied a (transport) tax of 179.35 DM (Deutsche Mark) for this transport pursuant to the (federal German) law of December 28, 1968.

The plaintiff then brought an action for summary judgment before the Munich Finance Court. He argued that the aforementioned law, both in its overall conception and in certain individual provisions, violated the EEC Treaty and legal provisions adopted for the implementation of that Treaty, in particular Article 4 of Council Decision 65/271/EEC of May 13, 1965, in conjunction with Article 1 of Council Directive 67/227/EEC of April 11, 1967.

In support of his argument, the plaintiff relied, among other things, on the following: Article 4(2) of the Decision of May 13, 1965, obliges Member States, following the introduction of the VAT system, not only to abolish existing specific taxes, but also to refrain from introducing new taxes of the same type. The Federal Republic of Germany has violated this provision because the road transport tax is essentially identical in its structure, i.e., its effect is completely identical to the previous transport tax.

It is not relevant that the VAT system has not yet been introduced by all Member States. Rather, Article 4 of the Decision of May 13, 1965, has become binding for those Member States that have already amended their VAT systems in accordance with the Council Directives, from the date their new legislation enters into force. The Road Transport Tax Act violates Community law, which is also the legal opinion of the European Commission.

Although the Decision of 13 May 1965 is addressed to the Member States, individual citizens can nevertheless rely on compliance or non-compliance with it in court proceedings. The decisive factor is whether primary and secondary Community law, which takes precedence over national law, imposes an obligation on the Member State that admits of no restrictions. This is the case with Article 4(2) of the Decision of 13 May 1965.

The **Munich Finance Court** therefore stayed the proceedings and referred the following question (among others) to the ECJ for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

*... Does Article 4 of Council Decision 65/271/EEC of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway, in conjunction with Article 1 of the First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of the laws of the Member States relating to turnover taxes, **have direct effects on the legal relations between Member States and individuals, and do these provisions create rights for individuals which the courts of Member States must also respect?***

See the ECJ judgment, paragraphs 5 et seq

.....

The direct effect of a directive is evident in various case scenarios, each of which has been the subject of ECJ case law and which, in their specific legal relationship, has undergone a specific, theoretical legal expression.

These scenarios are (in summary) as follows:

- Vertical direct effect of a directive,
- Conversely vertical direct effect of a directive,
- Horizontal direct effect of a directive,
- Direct effect of a directive that burdens third parties,
- Objective direct effect of a directive.

2.1. Vertical direct effect of directives

This directive's effect affects the relationship between citizens and the state. Citizens rely on a directive provision that favors them, but which has not yet been implemented or has been incorrectly implemented, but which is directly applicable according to the three criteria described above. According to the established case law of the ECJ, the defaulting Member State must grant the benefit *ex officio*; it will be "sanctioned" for its failure by its own citizens, its own administration, and its own courts. This new sanction option is the result of judicial development by the ECJ in favor of citizens and to the detriment of the defaulting Member States.

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=90084&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=14082215>

EuGH Rs 148/78 – *Criminal proceedings against Ratti*

Facts and main proceedings:

Company S of Senago (Milan) and its legal representative, Mr. Ratti, had, following a decision by their Board of Directors, begun to apply the markings provided for in Council Directive 73/173/EEC of June 4, 1973, to the packaging of their products. They also decided to apply Council Directive 77/728/EEC of November 7, 1977, to their varnishes.

However, at the time of the decision and their application, these two directives had not yet been incorporated into Italian law, although the deadlines for their transposition into national law had already expired. Therefore, Law No. 245 of March 5, 1963 (Gazzetta Ufficiale p. 1451), which applied to both solvents and varnishes, was still formally in force in Italy.

Law No. 245 was stricter (it required the declaration of the amount of benzene, toluene, and xylene contained in the solvent or varnish in all cases) and, at the same time, less strict (it did not require the declaration of all components considered toxic, corrosive, oxidizing, highly flammable, or irritating) than the two aforementioned directives. This created difficulties for both Italian-made and imported products.

Mr. Ratti was prosecuted before the 5th Criminal Division of the Pretore di Milano for failure to comply with Law No. 245. Considering that the dispute raised questions concerning the interpretation of Community law, the Pretore di Milano referred, among other things, the following question to the Court of Justice (CJEU) for a preliminary ruling:

- a) Do Council Directive 73/173 of the European Communities of 4 June 1973, and in particular Article 8 thereof, constitute directly applicable provisions which confer on individuals subjective rights which must be protected by national courts?

See the ECJ judgment, paragraphs 18/23

2.2. *Conversely, vertical direct effect of directives*

In the reverse vertical direct effect of a directive, the defaulting Member State seeks to enforce a directive provision that is burdensome to its citizens, for example, through burdensome administrative acts based on it or through punitive measures. The ECJ consistently rejects this effect, as the defaulting Member State would be rewarded with such an effect. It would be "given" the power to intervene against its citizens, which it can and must first obtain through correct implementation. The idea of imposing sanctions on the defaulting State contradicts this effect.

2.3. *Horizontal direct effect of directives*

This direct effect of a directive, also known as horizontal direct or third-party effect, affects the relationship between private law entities. Such an effect is conceivable in two ways in private law relationships: first, a directive can establish a subjective right for a private law entity, which it can directly invoke against another private law entity.

This so-called genuine or positive horizontal effect, in which the asserted subjective right is derived directly from the directive, with the directive serving as the basis for the claim, is rejected by the ECJ in its consistent case law. Such an effect would create a burden for private law entities, even though they have no influence on the proper implementation of directives.

The Member States are the sole addressees of the transposition obligation. The direct effect of directives, here as a sanction against Member States that fail to comply with the transposition obligation, cannot be directed against private law entities to their detriment. Furthermore, a corresponding recognition of horizontal direct directive effect would encroach on the competences regulated by Union law. Such direct effect would result in the Union being granted the power to impose obligations on citizens through direct directive effect, even though this is only possible within the framework of regulations.

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=93234&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=15064294>

EuGH Rs 152/84 Marshall

Facts and main proceedings (reproduced in the grounds of the judgment):

ECJ – JUDGMENT OF 26 February 1986 — CASE 152/84 - **Marshall**

The Court of Appeal (UK) referred two questions to the ECJ for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Council Directive 76/207 of 9 February 1976 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 L 39, p. 40).

These questions arose in the context of a dispute between Ms. M. H. Marshall and the Southampton and South-West Hampshire Area Health Authority (Teaching), as defendants – hereinafter referred to as the “company” – concerning the compatibility of her dismissal with Section 6(4) of the Sex Discrimination Act 1975 and Community law.

Ms. Marshall, born on 4 February 1918, was employed by the defendant company from June 1966 to 31 March 1980.

On 31 March 1980, approximately four weeks after she turned 62, the company dismissed her, even though she had expressed her intention to retain her job until she reached the age of 65, i.e., until 4 February 1983. According to the order for reference, the sole reason for her dismissal was that, as a woman, she had exceeded the “retirement age” prescribed for women. This was because the company had pursued a general policy since 1975 according to which “normal retirement age is the age from which social security pensions are paid.”

The referring court (Court of Appeal) explains that, although this general policy was not expressly mentioned in the employment contract, it was implicitly incorporated into it. Under

the United Kingdom pension law applicable at the time—the Social Security Act 1975, in particular Sections 27(1) and 28(1)—men could receive state pensions from the age of 65 and women from the age of 60. However, these provisions did not impose an obligation on employees to retire at the age at which the state pension was paid. If an employee continued to work, both the state pension and the occupational pension were suspended.

The company reserved the right to deviate from its general policy at its reasonable discretion due to special circumstances in individual cases. In this case, it did so by continuing to employ Ms. Marshall for two years after she reached the age of 60.

Ms. Marshall was not satisfied. Having suffered a financial disadvantage equal to the difference between her salary as an employee and her pension and having lost the satisfaction associated with her job (as a senior dietitian), she brought an action before the Industrial Tribunal, claiming that her dismissal at the time and for the reason stated constituted discrimination based on sex; she had therefore been discriminated against in violation of the Sex Discrimination Act 1975 and European Community law.

The Industrial Tribunal dismissed the claim insofar as it was based on the Sex Discrimination Act 1975, but found a breach of the principle of equal treatment under Directive 76/207.

On appeal, the Employment Appeal Tribunal upheld the judgment on the first point but overturned it on the second point, holding that although the dismissal had breached the principle of equal treatment enshrined in that directive, an individual could not validly rely on that breach in proceedings pending before a United Kingdom court.

Ms. Marshall appealed this decision to the Court of Appeal. Considering that the company was established under Section 8(1A)(b) of the National Health Service Act 1977 and was therefore a "public authority" in its capacity as an employer, the Court of Appeal referred the following questions to the ECJ for a preliminary ruling:

1. Does the defendant company's general policy of dismissing Ms. Marshall after she reached the age of 60 solely on the ground that she was a woman past the normal retirement age for women constitute discrimination prohibited by the Equal Treatment Directive?
2. If so, can Ms. Marshall rely on the Equal Treatment Directive before the national courts in the circumstances, notwithstanding any possible conflict between the Directive and Section 6(4) of the Sex Discrimination Act 1975?

See the ECJ judgment, paragraph 48.

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The second variant of direct directive effect in private law relationships, ***spurious*** or ***negative horizontal effect***, is characterized by the fact that a private-law entity in a civil dispute claims that a national legal provision that burdens it and favors the opposing party must remain inapplied because it conflicts with a directive. While the judiciary may not apply a domestic provision that contradicts a directive, the fact that a court would have to disregard this provision

in such a conflict would always result in a burden for the party, who could rely on the domestic law that conflicts with the directive. The ECJ therefore rejects this form of horizontal effect as inadmissible in its case law (Case C-397/01 – Pfeiffer, paragraphs 108 et seq.).

2.4. Direct impact of directives *on third parties*

This type of direct effect of a directive benefits a citizen who asserts a right arising from a directive against the Member State (vertical effect) that can only be realized through a sovereign intervention against another private individual, e.g., in the protection of neighbors. The ECJ allows an exception here in its case law and considers a direct effect of a directive to the detriment of a third party to be permissible because the sovereign decision of the state authority has merely negative effects—in the sense of a legal reflex—on that individual's rights, thus not constituting a "genuine interference" with that individual's subjective rights.

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EuGH Rs C-201/02 - **Wells**

The main proceedings and the questions referred

In 1984, Ms. Wells – the plaintiff – purchased a house on a country road that runs through the Conygar Quarry and divides it into two halves. At that time, the operation had been closed for a long time; the first operating permit had been granted in 1947.

At the beginning of 1991, the quarry's owners applied for registration, i.e., a new operating permit. The competent authorities approved the resumption of operations subject to conditions. However, at no time did they consider a formal environmental impact assessment in accordance with Directive 85/33, let alone conduct such an assessment.

Ms. Wells then pressed for an environmental impact assessment to be included in the permitting process in the administrative procedure and, after her application was unsuccessful, filed an application for judicial review with the High Court of Justice.

The High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), referred the following questions (among others) to the ECJ for a preliminary ruling:

1. – 3

4. "Is (i) a citizen entitled to challenge the state's failure to require an environmental impact assessment, or (ii) is this prohibited by the doctrine of (horizontal) direct effect, which the Court advocates and which excludes the direct and onerous effect of a directive on private individuals through measures taken by a state body?"

5. If the answer to question ii) is in the affirmative: How far do such prohibitions on direct effect extend in the present circumstances, and what measures may the United Kingdom of Great Britain and Northern Ireland take in accordance with Directive 85/337?"

See the ECJ judgment, paragraphs 54 et seq.

.....

2.5. Objective direct effect of directives

An objectively direct effect of a directive fulfills the three described requirements for direct applicability without benefiting or burdening any individual legal entity. This form of direct effect is particularly important for directives in the field of environmental and nature conservation. The administration must become aware of the problem on its own initiative, for example, in a planning approval procedure that must be based on an environmental impact assessment, taking into account an objectively directly applicable provision of the directive.

See Federal Administrative Court (BVerwG) of January 25, 1996 – Ref. No. 4 C 5.95

Reasons:

I.

The plaintiffs oppose the planning of the A 60 motorway in the section between B. and L. ... They are farmers, parts of whose agricultural land are to be used for the construction of the motorway or for compensatory measures under nature conservation law. ...

The plaintiffs have challenged the planning approval decision and argued in the lawsuit: The planning is flawed because no environmental impact assessment (hereinafter: EIA) was carried out. The planning authority has unduly restricted the scope of the investigation. Therefore, planning alternatives have been inadequately examined. The planning is based on an incorrect traffic forecast. ...

II. ...

1. Contrary to the opinion of the Court of First Instance, the plaintiffs' rights have not been violated by the fact that a formal environmental impact assessment was not conducted. In particular, this procedural defect did not result in an error in the balancing of interests.

a) However, the Court of First Instance correctly assumed that the plaintiffs, as owners of properties affected by the plan approval, can in principle derive a violation of their rights from the fact that a formal environmental impact assessment was not conducted; after all, the environmental impact assessment serves to identify and assess the environmental concerns affected by the plan and is therefore part of the balancing process. ...

b) The Court of First Instance also agrees that the plan-approved project had to be subjected to a formal environmental impact assessment. The provision of Section 22, Paragraph 1, Sentence 1 of the Environmental Impact Assessment Act (UVPG), which exempts projects

already publicly announced upon the law's entry into force on August 1, 1990, from the requirement of an EIA, is not in accordance with European Community law (judgment of the European Court of Justice of August 9, 1994 - C 396/92 - ECR 1994, 13717, 3751).

However, the Senate does not share the view that projects for which, as in this case, an approval procedure was initiated after July 3, 1988, are subject to an EIA in accordance with the other provisions of the Environmental Impact Assessment Act. The German legislature has clearly stated in Section 22, Paragraph 1, Sentence 1 of the UVPG that an EIA should not be conducted in the procedures specified therein. This decision cannot be circumvented by an interpretation consistent with the directive, which would nevertheless open up the scope of application of the Environmental Impact Assessment Act to situations to which it was specifically not intended.

The gap created by the fact that the statutory application requirement does not extend to all authorisation procedures initiated after July 3, 1988, must instead be closed by direct recourse to the EIA Directive. This is not contradicted by the fact that directives do not have direct effect, but are binding on Member States only with regard to the result to be achieved, leaving them free to choose the form and methods (Article 189(3) EC).

The fact that they are addressed to Member States and, by their very nature, are designed for implementation does not preclude their direct effect. This can occur if a directive is not implemented, not fully implemented, or inadequately implemented by a Member State by the expiry of the implementation period. The prerequisite is that the directive contains an unconditional provision. This is the case if its application is neither subject to conditions nor dependent on a constitutive decision of an EC institution or the Member State.

In addition, the obligations arising from the directive must be sufficiently precisely defined (see ECJ, judgments of 19 January 1982 - RS 8/81 - ECR 1982, 53, 71; of 26 February 1986 - RS 152/84 - ECR 1986, 737, 748; and of 23 February 1994 - C 236/92 - ECR 1994, I 497, 502). This is the case with the EIA Directive regarding the construction of motorways. The EIA Directive contains a sufficiently precise and unconditional core of provisions. This is sufficient. It is irrelevant whether the directive as a whole meets the requirements for direct effect (cf. ECJ, judgment of January 19, 1982 - RS 8/81 - loc. cit.). Article 2(1) of the EIA Directive unequivocally requires Member States to subject certain projects, which in any case include the construction of motorways, to an EIA before granting a development consent.

It is irrelevant that, according to Article 2(2) of the EIA Directive, it is left to the Member States to decide whether this assessment takes place in the development consent procedure or in a separate procedure. The use of vague legal terms or the recognition

* <https://www.gesetze-im-internet.de/uvpg/UVPG.pdf>

3. The requirement to interpret and develop national law in accordance with directives

The obligation arising from Article 288(3) TFEU to implement the objectives of a directive in national law extends to the Member State as a whole, i.e., to all Member State bodies, including the judiciary. Accordingly, in carrying out the task of legal practice assigned to it according to

the domestic distribution of competences, the Member State judiciary must interpret national law in accordance with the directive and, where appropriate, develop it further. This obligation to interpret national law in accordance with directives, a variant of the requirement to interpret national law in accordance with EU law, offers an alternative to the direct effect of directives, particularly where this is not applicable – such as in horizontal relationships (between two private law entities).

The requirement to interpret national law in accordance with directives therefore does not presuppose the direct effect of the directive and its requirements of sufficient precision and unconditionality; rather, it exists alongside and complements that effect of the directive. In relation to each other, the requirement to make a decision in conformity with directives takes precedence over the (permissible) direct effect of directives, since making a decision in conformity with directives preserves the applicability of national law and thus proves to be more sovereign-friendly than direct effect of directives. This is because it leads to the suspension of conflicting national law.

Like the national legislature's obligation to implement directives, the Member State judiciary's obligation to make a decision in conformity with directives stems from the primary law implementation requirements (Article 288(3) TFEU). The ECJ overwhelmingly also cites Article 4(3) TEU as a ground for validity, although recourse to this general duty of loyalty is, in principle, unnecessary. The requirement to find legal solutions in conformity with directives cannot be based on the primacy of supranational Union law – unlike the obligation to interpret and develop national law in conformity with primary law – unless the relevant directive provision results in direct application. This is because the primacy of Union law presupposes the direct applicability of the Union law norm.

The obligation to find legal solutions in conformity with directives extends not only to the implementing law, but to all Member State law, including autonomous law. The requirement to find legal solutions in conformity with directives therefore also covers Member State law that predates the directive to be implemented and was therefore not enacted for its implementation (non-intentional implementing law).

However, the obligation to find legal solutions in conformity with directives only extends to the scope of the respective directive. If the national legislature implements a directive in an over-reaching manner, i.e., if it goes beyond the directive's requirements without being compelled to do so under EU law, the Member State's judiciary is not obliged under EU law to interpret it in accordance with the directive. This can lead to a situation where a national provision that

implements a directive and simultaneously goes beyond its requirements must be interpreted differently ("split"): once in accordance with the directive, insofar as the provision falls within the scope of the directive, and once in an autonomous national interpretation, insofar as the provision implements the directive's requirements in an over-reaching manner.

According to the case law of the ECJ, a finding of law that conforms to the directive is only required to the extent that national law allows for this. The Court only requires that the national court, "within the scope of its jurisdiction," and while fully exploiting the margin of appreciation "conferred on it by its law," align its interpretation "as far as possible" with the directive.

See

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=98799&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=15073989>

EuGH Rs C-421/92 - Habermann-Beltermann

JUDGMENT OF THE COURT (Sixth Chamber) 05 May 1994 in Case C-421/92

Marginal number 10

In applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty (see the judgment in Case C-106/89 *Mar-leasing v La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8).

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The **ECJ** thus accepts the domestic limits of legal decision-making, which arise primarily from the distribution of powers between the judiciary and the legislature. At the same time, the ECJ places all efforts on national courts to enforce the directive's objectives through legal decision-making that are possible for them under domestic law. National courts are obliged to "use the same methods to achieve the result pursued by the directive" as they apply to autonomous national law. In order to comply with this requirement of equal methodological treatment of directive law and national law, German courts must also consider developing the law in line with the directive, to the extent that this would also be possible for them when applying autonomous German law. Accordingly, in individual cases, an analogy, teleological extension, or reduction in line with the directive may also be necessary. However, the Court does not require developing the law in line with the directive *contra legem*.

However, national law is superseded if the ECJ establishes a primary law principle that is equivalent in content to the directive requirement, in particular in the form of a fundamental

right of the Union, the applicability of which is made possible by the existence of the directive (Article 51(1) first sentence of the Charter). While the overriding norm invoked upholds the principle of the inadmissibility of horizontal directive effect from a dogmatic point of view, it renders it ineffective with regard to the application of exceptions.

In interpreting in accordance with a directive, national methodological rules must be applied with priority; there is no common European methodology in this regard. Nevertheless, the ECJ has developed methodological rules that are to be applied with priority in certain specific cases. In addition to domestic limits, the general legal principles of Union law, in particular the principle of legal certainty and the prohibition of retroactivity, as well as the fundamental rights of the Union, also place limits on the requirement to find law in accordance with a directive. Therefore, the following are prohibited: For example, an interpretation of national criminal law consistent with a directive, which increases the criminal liability of those who have violated the provisions of the directive, is not subject to such a limitation. There is no corresponding limitation in private law. Unlike direct horizontal effect, an interpretation consistent with a directive can therefore also impose a burden on a private-law entity.

Chapter IV

The US administration's initiative as an attack on existing European law, using the anti-discrimination directives as an example – an invitation to violate the law or a still permissible intervention?

The US administration's diplomatic initiative, with which it intends to force its business partners in Europe to abandon their diversity programs against discrimination, which serve the internal professional advancement of minorities, gives us the opportunity to subject to legal scrutiny the action initiated by President Trump against the diversity programs classified as "illegal" at American universities and in companies operating in the US market.

Question: To what extent are the measures decreed by the US administration compatible with European law – the four key anti-discrimination directives of the Union – and the national provisions that serve to implement these directives?

Press reports and company statements

The following press reports and the statements contained therein illustrate the problem and demonstrate – in a legal sociological sense – the corresponding practical consequences of this politically motivated intervention:

DIVERSITY PROGRAMS / US Embassy sends warning letters to French companies

The US Embassy in Paris is writing to French companies demanding that they stop anti-discrimination programs and complete a form within five days. The move is causing quite a stir.

The US Embassy in Paris has written to major French companies demanding that they discontinue their anti-discrimination programs. The letter, which has since circulated online, points out that Executive Order 14173, signed by President Donald Trump in January, applies to all suppliers and service providers of the US government, regardless of their nationality and the country in which they operate.

The decree is titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunities" and is directed against diversity, equity, and inclusion (DEI). US corporations such as Walmart and Coca-Cola have recently "adapted" their anti-discrimination policies as a result. The first European companies, such as the Swiss pharmaceutical giants Roche and Novartis and the Zurich-based major bank UBS, have also responded, for example, by removing targets for women's quotas. However, these responses were voluntary.

Those who do not complete the form must provide reasons

The US Embassy's approach of specifically calling on European corporations to discontinue DEI measures therefore has a new quality. It is causing a stir in France. After initial media reports on Friday evening, those close to Finance and Economy Minister Eric Lombard felt compelled to react. "This practice reflects the values of the new US administration. They are not ours," ministry sources said. The minister will remind his counterparts in the US government of this.

On Saturday, the French Ministry of Commerce rejected this influence, calling it "unacceptable." "France and Europe will defend their companies, their consumers, but also their values," the ministry stated. The US "interference" in the affairs of French companies is "unacceptable."

The astonishment over the letter is all the greater given that it comes with a form that the affected companies are required to complete and return within five days. "All State Department contractors must certify that they do not implement DEI programs that violate applicable anti-discrimination laws," it states. Those who do not wish to complete the document are asked to provide "detailed reasons." These reasons will then be forwarded to the internal legal department.

The US Embassy's actions are putting pressure on companies with business in the US to act, at a time of already growing trade tensions; starting next Wednesday, Trump plans to impose 25 percent import tariffs on cars. According to the French newspaper "Les Echos," which first reported on the letter, representatives from a wide range of industries have received mail, including telecommunications, energy, pharmaceuticals, and luxury goods.

"It's unbelievable, we're dealing with a kind of return of McCarthyism, but on a global scale," Les Echos quoted a French CEO as saying. According to a report in the British newspaper Financial Times, the letter was also sent by US diplomats in eastern EU countries and Belgium.

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Frankfurter Allgemeine Zeitung - News - March 31, 2025, by Katharina Moser

The US government is requiring all business partners around the world to comply with new American regulations restricting diversity programs. Messages have been sent to the companies they work with, requesting this. "The US Embassy in Spain, like all our embassies worldwide, is communicating the new rules, which US President Donald Trump has put into effect by decree, to our local suppliers of products and services," a spokesperson for the US Embassy in Madrid said on Monday. "We want to ensure that our contracts comply with all federal anti-discrimination laws and that our suppliers do not maintain programs that promote diversity, equality, and inclusion in violation of federal law." The US State Department did not immediately respond to a request for comment.

The Spanish Ministry of Labor declared the US requirement an "egregious violation" of Spain's strict anti-discrimination laws. Companies that complied with the new US regulations risked investigations by Spanish authorities.

The questionnaire asked companies to confirm compliance with the regulations. According to an insider, these questionnaires were sent to a range of companies, from electricity and water utilities to newspapers subscribed to the embassy and catering companies. It was initially unclear how many companies received the letter and how much their contracts with the US embassies were worth.

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Frankfurter Allgemeine Zeitung, April 3, 2025 - Page 3, by Roland Lindner, New York

Turn around because Trump wants it

America's president wants to win the battle against diversity on all fronts. Companies have to make tough decisions. Will they stay true to themselves? Or can what was "strategically necessary" yesterday be discarded today?

It's called "Fearless Girl"... For around six years, the bronze sculpture has stood in front of the stock exchange on New York's Wall Street and is a popular photo subject for tourists. With a determined gaze, chin raised, and hands on hips, it gazes at the famous neoclassical building, something of a symbol of American capitalism. ... The artwork was originally commissioned by the financial services provider State Street, a major shareholder in many US companies. As State Street itself stated, it wanted to set an example for "the importance of gender diversity" and combined this with a call to the companies in which the financial services provider has investments to recruit more women for leadership positions, ... and set specific guidelines in doing so. State Street, for example, demanded that larger companies fill at least 30 percent of their board seats with women, threatening to vote against the re-election of board members at the shareholders' meeting if they did not. In an interim report, the company proudly reported

that since "Fearless Girl's arrival on Wall Street," hundreds of companies had increased their representation of women.

A few weeks ago, however, State Street made an abrupt about-face and dropped its diversity mandate. The financial group announced that it had "refined" its approach to the composition of supervisory boards and no longer saw itself in a "prescriptive role." While it still believes diversity is necessary, companies are best positioned to decide on the selection of their leadership.

State Street is just one example of many: In recent months, a number of US companies have abandoned diversity efforts. Such "DEI" initiatives—for "Diversity, Equity, and Inclusion"—have become one of the most politically sensitive issues in America and the subject of a bitter culture war.

On the day of his inauguration, Trump signed an executive order declaring war on DEI programs, and the next day, the president followed up with another. In it, he declared DEI "illegal" across the board and ordered a halt to related activities in government agencies. Trump not only targeted the government apparatus, but also threatened companies and other organizations such as universities with lawsuits. This has now increased pressure across the board to rethink DEI programs. What may once have seemed like a fairly simple and harmless way for companies to position themselves as good corporate citizens has become a political and legal minefield.

The executive orders are part of a broader attack on anything even remotely perceived as DEI in Trump's administration. This goes so far as to instruct government agencies to avoid using words like "women," "race," "injustice," or "pollution" on their websites or in official documents.

In the business world, DEI is now being scaled back in many ways. Retail giant Walmart is ending its commitment to an organization it founded five years ago and funded with \$100 million to support Black Americans. Internet giant Meta and beverage company Pepsico have eliminated "Chief Diversity Officer" positions in their management teams. Words like "diversity" and "inclusion" are being censored from annual reports, and ride-hailing service Uber removed an entire paragraph in which it had previously emphasized the "strategic importance" of diversity. ... The consulting firm Deloitte will no longer publish DEI reports. It has also asked employees who work with government agencies to stop using pronouns in their email signatures.

Foreign companies with a presence in the US are also feeling pressure to act. The Swiss pharmaceutical company Roche announced an adjustment of its DEI activities, not only in America, but around the world. A survey by the F.A.Z. among German companies revealed that changes of course are also being considered here.

American embassies in countries such as France and Spain have just sent letters to US government business partners there, informing them that they, too, must comply with Trump's DEI decrees. DEI programs aim to promote groups based on criteria such as gender, ethnic origin, or sexual orientation.

The anti-DEI movement already received a significant boost in 2023 from a Supreme Court ruling. It prohibited universities from using membership in certain ethnic groups as a criterion

for admitting students; in the US, this is called "affirmative action." While the decision only applied to universities, conservative activists felt encouraged by it to also pressure companies over their DEI programs, whether through lawsuits or high-profile campaigns. Robby Starbuck, in particular, made a name for himself by denouncing companies on online platforms like X and threatening them with boycotts. Many of them actually changed course, including Walmart and the automaker Ford. Starbuck recently said in an interview with the Frankfurter Allgemeine Zeitung: "On paper, these terms like diversity, equality, and inclusion may sound good. But let's take equality, for example: In principle, it means we take something away from excellent people and give it to people who put in less effort." Furthermore, DEI initiatives are a double-edged sword for the people they are intended to benefit because they raise doubts about their qualifications.

University Professor Thomas sees things differently. "DEI is not in conflict with meritocracy," he says. The programs are not designed to give people an artificial advantage in their careers that their performance does not justify. Rather, it's about increasing the supply of qualified workers from traditionally underrepresented groups and also improving a work environment that is often "unfriendly" to them. Thomas also believes that DEI efforts have in many cases gone too far or have been implemented incompetently.

Trump's executive orders are aimed particularly—but not exclusively—at companies that receive contracts from the US government. They are now required to "certify" that they do not operate any unlawful DEI programs. Even outside of government business, companies are to be "encouraged" to end "illegal DEI discrimination" through the use of pressure. Government agencies are instructed to submit lists of up to nine companies and other institutions, such as universities, whose DEI initiatives will be investigated for possible violations of the law. It is also made clear that simply renaming DEI activities is not enough. The executive orders were temporarily blocked by a judge with a preliminary injunction, but an appeals court has overturned this decision for the time being.

The situation can be even more complicated for foreign companies, especially if the laws in their home country are incompatible with the current US government policy. In Germany, for example, the German Stock Corporation Act stipulates that the supervisory boards of listed companies must be at least 30 percent women and at least 30 percent men. There are also gender-specific rules for board membership.

Some companies are daring to protest openly. The British cosmetics chain Lush, which has more than 200 stores in the US, recently renamed three of its bath products "Diversity," "Equity," and "Inclusion," describing this as a direct response to Trump's executive orders. Like the ice cream brand Ben & Jerry's, Lush is known for frequently taking a stance on political and social issues and even has its own "activism manager," Carleen Pickard. She says DEI is at the "core" of Lush's identity, and the company will never deviate from it. The idea to rename the products came about after a dinner with an acquaintance in Los Angeles who worked as an IT specialist for the government. He recounted how he spent the day removing references to DEI initiatives from a government agency's website. "We wanted to do the exact opposite of what's happening right now," Pickard said.

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** Authors: Contributing authors were Nadine Bös, Mark Fehr, Bernd Freytag, Markus Frühauf, Tillmann Neuscheler, Christian Müßgens, Henning Peitsmeier, Susanne Preuß, and Benjamin Wagener.*

EQUAL OPPORTUNITY PROGRAMS / Diversity becomes a business risk because of Trump

The US government's bans are exacerbating the concerns of German managers, according to a F.A.Z. survey. Standing by one's own values and doing business with the US? That threatens to become complicated.

... How are German companies reacting to the new guidelines from Washington? The F.A.Z. surveyed large German companies with strong US ties. The general tenor: Many remain committed to equality, diversity, and inclusion in the workplace, but are currently closely monitoring the extent to which they need to adapt to the political and legal changes in the US. The importance of government contracts for a company plays a role in this. The DEI decrees primarily bind US authorities and their procurement.

... Trump's move could have far-reaching consequences for software giant SAP. For Germany's most valuable publicly traded company, America is not only by far the largest single market – it accounts for a third of its revenues. SAP is also listed on the American stock exchange, and public administration is an important customer. Executive board member Thomas Saueressig recently told the Frankfurter Allgemeine Zeitung (FAZ) that even a large part of the American military's supply logistics runs on SAP software.

At the same time, the company has set itself the goal of becoming "the most inclusive software company in the world" – with numerous support programs for greater diversity at all levels. How to deal with Trump could therefore become a crucial question for the company. The decision is accordingly delicate. Officially, the company states that, as a global company, SAP has always benefited from an inclusive workforce. "We are currently reviewing the President's executive orders with regard to their impact on SAP." Promoting diversity or doing business with the American government – both at the same time are unlikely to be possible in the future.

America is also an important market for Germany's automakers. Volkswagen has already drawn criticism from conservative politicians, particularly in the southern United States, who have labeled the company "woke," partly because of the strong co-determination of its unions in Europe.

VW now says it remains committed to equal opportunity as an employer. The American subsidiary, Volkswagen Group of America, continues to act in accordance with its own non-discrimination policy. It recruits, trains, and promotes individuals regardless of their age, race, color, religion, gender, and other characteristics or orientations.

It is also being quietly pointed out that the new decrees from Washington are primarily aimed at companies that accept contracts from public bodies. The Wolfsburg-based automaker, led by CEO Oliver Blume, sees this as having only a limited impact so far.

Competitor BMW is also closely monitoring the situation in the United States and is constantly reviewing its corporate policies and programs for compliance with US law. However, the automaker intends to continue its sustainability (ESG) activities as planned. In these areas, too, BMW is not guided by short-term trends, but rather pursues a clear plan of moderation and balance, implementing concrete measures such as the Joint Leadership Program, equal pay, and highly flexible and tailored working time models. Rival Mercedes-Benz sounds less decisive. On the one hand, Mercedes-Benz North America "has always stood for equal opportunities and condemns any form of discrimination." On the other hand, the response states that it adheres to the relevant laws and will continue to do so in the future.

Nervousness is noticeable among some management consultants. Many in the industry have vocally advocated for DEI programs in the past, and some now fear losing government contracts in America. Companies in Germany are also visibly struggling with the right wording. Terms like "DEI" and, above all, the word "equity" are disappearing from the official language.

According to a spokesperson, sportswear manufacturer Adidas has retained the abbreviation DEI both in its March annual report and on its website. Adidas also emphasizes its goal of achieving balanced representation of women in leadership positions. However, the company must comply with applicable laws in the US, as in all other markets, and therefore cannot rule out the possibility of adapting certain wording in the future if other laws change. Nevertheless, Adidas remains committed to building a fair, respectful, and inclusive corporate culture for all employees.

A similar sentiment can be heard from steel manufacturer Thyssenkrupp: "Recent political developments in the US highlight the challenges of a changing regulatory environment." Fundamentally, the company's economic relations with the US date back more than 185 years. And this formulation sounds like a hopeful sign for the future: "We are convinced that transatlantic cooperation, open dialogue, and long-term economic relations between Germany and the US will endure beyond individual terms in office."

Will Trump be appeased by rewording? If push comes to shove, companies could be forced to abandon their values in order to stay competitive in the US – which could lead to further discord, as Germany has legal requirements for the proportion of women in leadership positions that could conflict with the new course in Washington. Not only is a minimum representation of women on corporate executive boards mandatory in Germany, but large stock corporations in Germany must also set targets for the proportion of women in the two management levels below the executive board. While the zero target is legally permissible here, it requires justification.

A spokesperson for Siemens Energy sums up the tricky tension: "When laws change in a country, we carefully analyze them and consider how we can implement the changes in practice without calling our fundamental values into question." This analysis is still ongoing for the USA.

The consumer goods manufacturer Beiersdorf (NI-VEA), for which diversity is part of its corporate culture, is likely also in such a conflict zone. On the other hand, the company pursues ambitious goals in the US market. According to a spokeswoman, Beiersdorf achieved a 50:50

gender balance in all global leadership positions in the Consumer business sector in 2023. This balance was maintained in 2024. Beiersdorf aims to achieve a more balanced gender ratio in positions below the executive board level by 2026 and will report on its progress by then.

Compared to publicly listed companies, family-owned businesses like Trumpf (Stuttgart / Ditzingen) have more leeway when it comes to diversity and regulation. Nicola Leibinger-Kammüller, the woman at the helm of this Swabian technology specialist, is considered a critic of strict quota regulations. When contacted, the company stated that diversity remains important in order to attract more women to production in the USA. However, corresponding programs are open to all employees. "So we don't favor anyone based on their membership in a particular group, and it doesn't play a role in the recruiting process either." The term "DEI" is not even used in its communications.

...

According to current information, three publicly traded companies – **Volkswagen**, **SAP** and the German Telekom subsidiary **T-Mobile** – have bowed to the pressure.

- *RedaktionsNetzwerk Deutschland - News from April 6, 2025*

T-Mobile USA is discontinuing its diversity, equity, and inclusion initiatives and dissolving two advisory boards. The company is responding to pressure from the US regulatory authority, the FCC, which only approved T-Mobile's proposed acquisition of cable network operator Lumos on the condition that T-Mobile scales back its DEI programs.

Bredan Carr, a confidant of US President Donald Trump, had previously announced that the regulator would not approve mergers and acquisitions of companies that "continue to promote unfair forms of DEI discrimination."

- *Frankfurter Allgemeine Zeitung - News from May 10, 2025*

According to a report, the German DAX-listed company **SAP** intends to abandon its target of a 40 percent female workforce. The reason is likely due to legal changes in the USA.

SAP is apparently canceling programs for greater gender diversity in consideration of US President Donald Trump's policies. Citing an internal email from the company, the Düsseldorf-based *Handelsblatt* reported on Saturday (May 10, 2025) that SAP no longer intends to pursue its goal of achieving a 40 percent female workforce. Gender diversity will also no longer be considered as a benchmark for executive board compensation.

According to the report, SAP is also planning adjustments in the area of diversity and other changes. As a "globally operating company with a strong presence in the USA,"

it must respond to "external changes, such as current legal developments." This necessitates adjustments in the area of "Diversity & Inclusion."

For example, the US will no longer be included in the company's quota for women in leadership positions. Furthermore, the "Diversity & Inclusion Office," which is responsible for diversity initiatives, will lose its independence. According to the "Handelsblatt," it will be merged with the "Corporate Social Responsibility" department. According to the newspaper, SAP confirmed the change in the criteria for executive board compensation upon request.

- *Frankfurter Allgemeine Zeitung, May 17, 2025*

Volkswagen is adapting its global diversity targets to US regulations. The group is responding to pressure from the Trump administration. VW also wants to prevent the group from being excluded from contracts in the important US market. The management of the Volkswagen Group announced that it has adjusted its DEI strategy.

As Chief Legal Officer Manfred Döss explained on Friday at the automaker's virtual annual general meeting, VW has decided to "exclude Group companies headquartered in the US and their subsidiaries from the Group-wide target collection for DEI key performance indicators starting in 2025." This is being done "for regulatory reasons," he said, without explaining the procedure.

The decision means that, for example, the proportion of women in American management or the inclusion of certain social groups will no longer affect the global compensation of the company's executives. Trump and his administration are extremely critical of such financial incentives for executives, along with other issues surrounding diversity.

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Legal Framework

1. Directives of the European Union

Between 2000 and 2004, the Council of the European Union adopted four equal treatment directives, which transposed the General Equal Treatment Act (AGG) into German law.

The so-called **Caregiver Directive** – as a **fifth directive** – followed in 2022.

The directives provide definitions for the different types of discrimination within their respective scopes and, among other things, require effective, proportionate, and dissuasive sanctions for

violations of the principle of equal treatment, as well as making it easier for those affected to provide evidence.

The directives are intended to change the social reality in the EU member states, meaning they are intended not only to prohibit discrimination but to effectively eliminate it.

The directives in detail:

- **Anti-Racism Directive** (2000/43/EC)

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043>

Article 5

Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

- **Framework Directive on Employment** (2000/78/EC)

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0078>

Article 7

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

- **Gender Directive** (2002/73/EC)

This directive, along with other directives on equal treatment between men and women, has since been revised by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ EC No. L 204, p. 23)

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0073>

- **Directive 2006/54/EC** on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (**recast**)

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0054>

Article 3

Positive action

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

- **Directive on Gender Equality Outside the World of Work (2004/113/EC)**

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0113>

Article 6

Positive action

With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

- **Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU**

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1158>

Article 16

Level of protection

1. Member States may introduce or maintain provisions that are more favourable to workers than those laid down in this Directive.

.....

The purpose of the so-called **Anti-Racism Directive** is to create a framework for combating discrimination based on race or ethnic origin.

With the **Employment Framework Directive**, the EU aims to create a general framework to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation in employment and occupation.

The so-called **Gender Equality Directive** refers to the implementation of the principle of equal treatment for men and women regarding access to employment, vocational training, and career advancement, as well as working conditions.

The **Gender Equality Directive outside the World of Work** serves to create a framework for combating gender-based discrimination in access to and supply of goods and services.

....

2. The General Equal Treatment Act (AGG) and the Stock Corporation Act (AktG) – Positive Action

General Act on Equal Treatment

https://www.gesetze-im-internet.de/englisch_agg/index.html

Section 5 - Positive action

Notwithstanding the grounds referred to in sections 8 to 10 and 20, unequal treatment is also permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on any of the grounds referred to in section 1.

.....

https://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.pdf

.....

Stock Corporation Act - Section 96 Composition of the supervisory board

....

(2) In the case of listed companies to which the Employee Co-Determination Act, the Act on Co-determination in the Coal, Iron and Steel Industry or the Supplementary Co-determination Act applies, the supervisory board is to be **composed of women at a minimum ratio of 30 per cent and of men at a minimum ratio of 30 per cent**. The minimum ratio is to be fulfilled by the supervisory board as a whole. Where, prior to the election, the side of the shareholder representatives or the side of the employee representatives raises an objection with the chairperson of the supervisory board, based on a resolution adopted by a majority, against the fulfilment of the ratio by the supervisory board as a whole, the minimum ratio for that election is to be fulfilled separately by the side of the shareholder representatives and by the side of the employee representatives. In all cases, the ratio is to be mathematically rounded up or down in order to achieve full numbers of persons. If, in the case of the ratio being fulfilled by the supervisory board as a whole, the **higher ratio of women** of one side is reduced subsequently and that side then objects to the fulfilment of the ratio by the supervisory board as a whole, then this will not render the composition of the respective other side ineffective. Where an election of members of the supervisory board by the general meeting and their delegation to the supervisory board violates the requirement as to the minimum ratio, **this**

election will be null and void. Where an election is declared to be null and void for other reasons, the elections performed in the meantime do not violate the requirement as to the minimum ratio in this regard. The acts governing co-determination set out in sentence 1 are to be applied to the election of supervisory board members representing the employees.

(3) In the case of listed companies that have resulted from a cross-border merger, a cross-border change of the legal form or a cross-border division whose supervisory or administrative organ consists, in accordance with the Act on Employee Co-Determination in the Case of a Cross-Border Merger or the Act on Employee Co-Determination in the Case of a Cross-Border Change of the Legal Form or of a Cross-Border Division, of the same number of shareholder representatives and of employee representatives, the **ratio of women and men** sitting on the supervisory or administrative organ must constitute, in each case, **at least 30 per cent**. Subsection (2) sentences 2, 4, 6 and 7 applies accordingly.

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3. Criticism

Positive measures such as quotas are not discriminatory under German law. The anti-discrimination directives (and Section 5 of the AGG) expressly declare these instruments, which are intended to eliminate existing inequalities and achieve actual equality, to be permissible. The so-called women's quotas, which are controversial in Germany and allow a decision in favor of a female candidate in cases of equal qualifications, are, contrary to claims to the contrary, neither contrary to European law nor unconstitutional. However, they are largely ineffective – for years now, there has simply been no "equal qualification" in recruitment procedures.

After a decade and a half of ineffective voluntary commitments, a minimum gender quota of 30 percent for supervisory boards in Germany has been in effect since January 1, 2016, pursuant to Section 96 of the AktG. However, the sanctions are moderate, only 100 companies are affected, and voluntary commitments are again supposed to suffice for executive boards and management levels. Germany has prevented more far-reaching European regulations. Given the experience with the gender quota, there is reluctance to take positive measures with regard to other characteristics, such as migration background.

4. Legal assessment

We have seen that the national legislature can transpose a directive into national law by going beyond the directive's requirements without being subject to EU law. In this respect, the options contained in the five directives cited above establish independent regulatory competence for

the addressees by empowering them to take "positive measures" in shaping the law beyond the level of discrimination protection guaranteed by law as a minimum standard. In terms of form and content, the directives fulfill the function of an opening clause; the addressees are both the national legislature and companies as legal entities under private law.

To the extent that the opening clause of the respective directive is adopted by the national legislature as the addressee and the resulting scope for action is over-exaggerated, as demonstrated by the example of the AGG and the AktG, the clause has only a declaratory significance. This is because the Member State could in any case take legislative action and establish its own, materially "over-exaggerated" anti-discrimination program.

A different assessment must be made of cases in which companies, as legal entities under private law, consider themselves addressed as addressees and utilize these options for themselves by establishing their own "positive action" programs in the spirit of "diversity, equality, and inclusion." In this respect, the opening clauses serve as a legal basis for companies to establish independent internal regulations and practices of various kinds, providing the specific "positive action" with unassailable legitimacy under both European and national law.

The Union's decision to "make the options of opening clauses available" to national legislators and, at the same time, to companies as legal entities under private law is political in nature and opens up a wide range of practical possibilities. The options available to companies range from "inaction" to non-binding, programmatic, revocable voluntary commitments, to legally binding "positive measures" that are secured in the statutes and in provisions co-determined by works constitution law.

The opening clause is a basis of legitimacy under private law and not only allows for "legal policy-making" competence, but also represents complementary competition between the national legislator and companies as legal entities under private law. As a general rule under domestic law, binding laws that conclusively and bindingly regulate a matter do not permit deviating provisions in the statutes of companies as legal entities.

The DER programs highlighted in the press articles can – beyond mere "moral" commitments – be formally incorporated into statutory regulations and thus establish substantive, legally enforceable rights for individuals.

The same applies to "positive measures" as substantive legal provisions that are the subject of collective agreements, such as works agreements under the Works Constitution Act

(BetrVG), which, although not enforceable by the works council as employee representatives in the company, can be the subject of works council initiatives and substantive regulations in voluntary works agreements.

This will be explained in more detail in order to provide a concrete answer to how the US administration's intervention should be legally classified.

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https://www.gesetze-im-internet.de/englisch_betrvg/englisch_betrvg.pdf

Works Constitution Act

Section 80 Works Constitution Act - General duties

(1) The works council has the following general duties:

1.

2. to apply to the employer for measures that serve the establishment and the staff.

2a. to promote the **implementation of actual equality between women and men**, in particular, as regards recruitment, employment, training, further training and additional training and vocational advancement;

2b. to promote **reconciliation of family and work**;

3.

4. to promote the **integration of persons with severe disabilities** including the adoption of integration agreements according to section 166 of Book Nine of the Social Code and of other persons in particular need of assistance;

5.

6. to promote the employment of **elderly employees** in the establishment;

7. to promote the **integration of foreign employees** in the establishment and to further understanding between them and their German colleagues, and to request **activities to combat racism and xenophobia** in the establishment;

8. 9.

.....

Section 88 Works Constitution Act - Works agreements on a voluntary basis

The following, in particular, may be determined by works agreements:

1.1a.2.3.

4. measures to promote the **integration of foreign employees** and to **combat racism and xenophobia** in the establishment.

5. measures to include **persons with severe disabilities**.

.....

Section 92 Works Constitution Act - Manpower planning

(1) The employer has to inform the works council in full and in good time of matters relating to manpower planning including in particular present and future manpower needs and the resulting staff measures including the planned employment of persons who are not in an employment relationship with the employer, and vocational training measures on the basis of documents. He or she has to consult the works council on the nature and extent of the action required and means of avoiding hardship.

(2) The works council may make recommendations to the employer relating to the introduction and implementation of manpower planning.

(3) Paragraphs (1) and (2) apply accordingly to measures under **section 80 (1) no. 2a and 2b**, in particular, to the adoption and implementation of measures to promote **equality between women and men**. This also applies to the **integration of persons with severe disabilities** in accordance with section 80 (1) no. 4.

.....

The domestic labor and works constitution law cited here illustrate the scope the opening clauses of the five directives grant companies to implement "positive measures" in the sense of diversity programs on their own responsibility and, at the same time, to legally safeguard them, linked to the legal rights of employees. In doing so, they act "in conjunction" with the national legal system, regardless of whether the Member State uses the opening clauses for its own "positive measures" by directly obligating companies under domestic law – in this case, under the Works Constitution Act (BetrVG). In addition to claims arising from collective bargaining agreements as a regulatory instrument, the Works Constitution Act also establishes individual statutory claims for employees under the Works Constitution Act itself in order to eliminate discrimination and promote the professional advancement of minorities.

The "threatening letters" sent by the US administration to companies in France and Spain demanding that they abandon such DER programs may, depending on the national legal situation, constitute an incitement to violate the law in order to eliminate individual rights protected by law and collective law. This intervention also indirectly targets the policies of the European Union, in order to force it to abandon its anti-discrimination policy. However, this has little chance of success, since the member states and their companies can independently

regulate the "positive measures" of their DER programs by law or collective law at the company and operational level thanks to the principle of over-implementation of directives and the assigned national competence.

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In the next, twelfth and final column, I will provide you with a concluding overview of legal protection before the European Court of Justice and the courts of the Member States. This will include, among other things, the allocation of jurisdiction between the European Court of Justice (ECJ) and the European General Court (CJEU), the procedural processes and types of proceedings, the appeal procedure, and in particular the preliminary ruling procedure in the context of legal proceedings pending before a court of a Member State. Finally, with regard to legal protection before the courts of the Member States, its limits in national procedural autonomy in the application of EU law will have to be highlighted.

(signed) Dr. Kammerer