

The Federal Anti-Discrimination Agency's research at a glance:

A legal vacuum? The transposition of the EU Anti-Racism Directive in the area of housing

On the limitations of exemptions for certain areas and on the remaining work to be done in transposing Directive 2000/43/EC into German law

Fact sheet about the legal opinion

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1. The scope of Directive 2000/43/EC with regard to the rental of housing: on the exemption for the private rental sector

The systematics of section 19 of the General Act on Equal Treatment

- Regarding discrimination on the grounds of race or ethnic origin, section 19 (2) of the General Act on Equal Treatment stipulates that such discrimination is illegal in civil law transactions irrespective of whether the transaction is classified as bulk business within the meaning of section 19 (1) no. 1 of the General Act on Equal Treatment.
- Section 19 (5) sentence 3 of the General Act on Equal Treatment is thus irrelevant for these types of discrimination. However, the exemption for the private rental sector as stipulated in section 19 (5) sentences 1 and 2 of the General Act on Equal Treatment is applicable. Whether this provision is consistent with EU law is a highly controversial issue.

Is there a basis for this exemption in Directive 2000/43/EC?

- Wording: The Directive contains no exemptions from the ban on discrimination for close relatives and relationships of trust (i.e. the area of private and family life), nor any justifications for discrimination in this area. In recital 4, it simply mentions the need to protect the area of private and family life.
- Systematics: Because Article 3 (1) of Directive 2004/113/EC explicitly includes an exemption for the area of private and family life, the reverse implication is that such an exemption is not intended to apply where race and ethnic origin are concerned.
- Objective: Given the overall goal of implementing the principle of equal treatment within the Member States, exemptions run contrary to the aim of creating a framework to combat discrimination on the grounds of race or ethnic origin.
- Requisite interpretation of primary law: The private sphere is a fundamental right protected by Article 7 of the EU Charter of Fundamental Rights and must be taken into account when interpreting the law. It does not however provide any justification in its own right, nor does it give rise to exemptions for particular areas.

Transposition in other countries

- Great Britain: The exemption for sole owners and sole tenants does not apply where race or ethnic origin are concerned.
- France: The right to housing is a fundamental right – there are no exemptions from the ban on discrimination.
- Austria: There are no exemption clauses for close relatives and relationships of trust, but there is a questionable justification for the requirement that housing adverts be non-discriminatory.
- Sweden and Denmark: Exemptions are reserved exclusively for the area of private and family life.

2. On the potential justification of section 19 (3) of the General Act on Equal Treatment as being positive action within the meaning of Article 5 of Directive 2000/43/EC

- Positive action (i.e. action to compensate for existing disadvantages) can only be taken in order to benefit those who suffer from discrimination.
- Within the scope of Directive 2000/43/EC, positive action must serve to achieve actual equality for groups that suffer these types of discrimination.
- This is not achieved by section 19 (3) of the General Act on Equal Treatment – but it is achieved by section 5 of the General Act on Equal Treatment.

3. Consequences of the shortcomings in transposition

- Judicial interpretation must be in line with EU law – but must not conflict with the wording of the law and must adhere to the principles of legal certainty and legal clarity.
- The exemption can potentially be rendered ineffective by directly applicable EU law.
- Clear legislative action is therefore necessary.

4. Proposal for redrafting section 19 (3) and section 19 (5) sentences 1 and 2 of the General Act on Equal Treatment

- Section 19 (3) of the General Act on Equal Treatment: Justification should be restricted to the scope of Directive 2000/78/EC. It must be made clear that positive action in the area of housing rental is only permitted in order to benefit those who suffer discrimination on the grounds of race or ethnic origin.
- Section 19 (5) sentences 1 and 2 of the General Act on Equal Treatment: The close relationship arising from contractual obligations should be elevated in importance to the status of a statutory characteristic.

Further information

The legal opinion can be downloaded => [here](#) (available only in German language).

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