Resolution of the Bundesrat (German Federal Council)

Proposal for a Council Directive for the application of the principle of equal treatment regardless of religion or ideology, disability, age or sexual orientation KOM (2008) 426 endg.; Ratsdok. 11531/08

In its 847th Meeting on 19 September 2008, in accordance with sections 3 and 5 of EUZBLG (law on the cooperation of the federal government and states on European issues), the Bundesrat has decided to adopt the following position:

General remarks

- 1. The Bundesrat shares the opinion of the Commission that the effective combating of discrimination of all types and the equal involvement of people with handicaps are important duties. It once again acknowledges the principle that discrimination on grounds of religion or ideology, handicap, age or sexual orientation has no place in an enlightened society that is committed to fundamental rights. This principle is also applicable without reservation to areas beyond the labour market.
- 2. The Bundesrat abides by its previous opinion, which is that, in view the sufficient legal framework of the EU within the field of anti-discrimination policy, further initiatives within this area are not necessary and are therefore to be rejected (see statements of the Bundesrat of 8 June 2007, BR-print 153/07 (B) and of 14 March 2008, BR-print 134/08 (B) regarding the communications of the Commission: Annual strategy planning for 2008 and/or 2009).
- 3. In the opinion of the Bundesrat, in addition to legislative documentation, more proportionate measures - such as political coordination - are more conducive to attaining the desired objective, in terms of gaining experience in the spirit of mutual learning about which approaches of the member states prove to be most successful in the fight against discrimination. The different legal systems and traditions of the member states must be considered and it must be left up to them as to how they ensure protection from discrimination. Excessive and disproportionate regulations for the legislation in the member states should thus be avoided completely by the Commission.
- 4. The Commission is right to point out in its accompanying report "*Non-discrimination and equal opportunities: Renewed commitment*" of 2 July 2008 (KOM (2008) 420 endg.) that the EU already has one of the most progressive legal frameworks in the world within the area of non-discrimination. The level of protection afforded in the Federal Republic of Germany and many other member states also goes beyond the European regulations. That is a further argument for abiding by what has been achieved so far and consolidating the high-level. In view of the high level reached it is not appropriate to impose new requirements by means of further European legislation at the present time and thus create a new

need for adaptation in the event of uncertainties, as well as associated anxiety for public bodies and businesses in the Community.

- 5. In the opinion of the Bundesrat, it is not possible to use the argument that some member states grant a legal protection from discrimination going beyond the existing regulations (such as the AGG (Equal Treatment Law) in Germany) in order to justify an expansion of European anti-discrimination measures. As then there would be an inadmissible gradual harmonization at the highest level, although a 1:1 - conversion of the minimum protection requirements given by the directives is sufficient. A further factor is that there is clearly no European consensus on the method of discrimination protection - which reflects not least the large number of breach of treaty proceedings lodged against approximately half of the member states by the Commission with regard to the implementation of the anti-discrimination directives from the year 2000.
- 6. Before new legal instruments within the area of anti-discrimination are considered at all, the experiences of the member states with regard to the still recent laws for the implementation of the existing anti-discrimination directives 2000/43/EC, 2000/78/EC, 2002/73/EC and 2004/113/EC must first be awaited. The member states have issued their national laws only recently in terms of the implementation of the existing anti-discrimination directives. The large number of breach of treaty proceedings lodged by the Commission with regard to this (according to the report of the Commission " *Non-discrimination and equal opportunities: Renewed commitment*" of 2 July 2008 (KOM (2008) 420 endg.) they are against about half of the member states) makes clear the substantial difficulties of the member states in the implementation of the existing directives.
- 7. The difficulties of numerous member states in the implementation of the existing anti-discrimination regulations prove that the already existing directives have not set a sufficiently clear legal framework. The existing legal insecurity has only been strengthened by the further directive proposal of the Commission on discrimination protection issued at the present time, particularly because the different perceptions which have emerged have not yet provided any clarification of the wording of the existing directives.
- 8. The proposal - the implementation of which would involve a need for major changes in German law - would be added on to the legislation in the member states and would frequently lead to friction with the national laws, which have only recently been issued in implementation of the previous anti-discrimination directives. The Commission seems to be conscious of this problem, since it concedes in its report the extremely different initial positions for the protection of people with handicaps and therefore wants to grant the member states "*a degree of flexibility*".
- 9. The Bundesrat is of the opinion that the directive proposal, with its indistinct and inflexibly manageable regulations creates further substantial legal insecurity and unnecessary strain the economic and legal life of the member states. A multiplicity of legal proceedings could be provoked, which would significantly disturb the predictability of law necessary for economic life. This is particularly applicable to civil law.

- 10. In view of the existing AGG, the directive proposal is questionable both regarding its area of application and regarding its specific requirements and the subsequent strains for the economy arising from it.
- 11. For an entrepreneur, all contacts with clients and prospective clients are to be covered, from the initial meeting through information and product offers, conditions, consulting discussions and negotiations, all the way to conclusion of a contract. The Bundesrat fears that the intended discrimination protection will have the reverse effect, if e.g. a lessor, in view of the documentation and justification efforts incumbent on him, avoids concluding a contract with possible discrimination victims right from the start.
- 12. The provisions of article 8 (burden of proof) and 7 (legal protection), in particular regarding the intended provisions in article 4 (equal treatment of handicapped persons) together with article 2 paragraph 5 (refusal of appropriate measures), would lead to unquantifiable bureaucracy and a large number of claim proceedings. The obligation to take measures which prevent a disadvantage in advance can also mean that, for example, a school building must be transformed or the entire traffic infrastructure must be changed. With regard to the question of reasonableness, proceedings might regularly be brought involving issues of major public interest. An enterprise could be required, if necessary, to disclose all its internal data to demonstrate absence of disadvantage with the disproportionality present. Additional European legal instruments without specific benefits for citizens undermine the serious attempts to implement better legislation.
- 13. Even if in some passages, as in article 4 (equal treatment of people with disabilities), the directive proposal considers the proportionality of the load and thereby seeks to allow for the reduced capabilities of SME, the regulations entail a high additional cost of administration, in particular for SMEs. They must, without having specialist personnel and legal departments to the required extent, acquaint themselves with the regulations and apply them. The area of the European regulations needing to be considered will thus increase.
- 14. The Bundesrat sees here no consistent implementation of the basic principle of the Commission "*first think of the SME dimension*". In its report "*implementation of the Lisbon programme of the community - A modern SME policy for growth and employment*" (KOM (2005) 551 endg.), the Commission wanted to emphasise this principle for all policies and apply it for the simplification of legal and administrative proceedings. The new guideline proposal on anti-discrimination is not in line with this way of thinking.
- 15. The Bundesrat similarly points out that the efforts of the Commission to reduce the duties of enterprises to supply information by 25% by 2012, through the action programme for the decrease of the administrative loads in the EU (KOM (2007) 23 endg.), will be undermined if, as stated in the accompanying report, regular statistical recording of the number and effects of discrimination are recommended.
- 16. The expansion planned in the directive proposal would, in this form, entail a substantial interference in the principle of freedom of contract (which is also recognised in Community law), which is not necessary for effective protection from discrimination. Without the principle of private autonomy, modern societies

are no longer conceivable. Civil societies are dependent on the private right provided in particular by contracts for free self-determination. The directive proposal is in this respect, in the opinion the Bundesrat, likely to bring the legitimate interest of the individual to be protected against discrimination into an unbalanced and disproportionate relationship with the legitimate interest of the economy and society.

About the regulations in detail

- 17. In particular for the area of education, the Bundesrat rejects any expansion of EU anti-discrimination law: Under articles 149, 150 of the EC Treaty, the responsibility for general and professional education remains with the member states; the EU is limited to coordination, support and supplementary measures. In particular the overall expansion of the area of application of the directive to education suggested by the Commission is not compatible with this clear regulation.
- 18. The directive proposal only excludes non-commercial lessors from the ban on discrimination (see article 3 paragraph 1 set of 2). In addition though, the documentation required by the directive has a disproportionately large organisational expenditure and thus disproportionately high costs are imposed on the commercial "*small*" lessor.
- 19. Unequal treatment - for example because of a disability or age - is not discriminating in itself. Fairly often it reflects objective necessities (e.g. restrictions on access to dangerous services for reasons of the duty to safeguard traffic). In this respect, a general clause in the directive proposal, which generally makes it possible for the member states in the implementation of the suggested guideline to permit unequal treatment in individual cases in the event of a material reason in particular within the area of the civil law, is missing.
- 20. The Bundesrat finds that the legal security regarding the rights and obligations of economic players and citizens intended by the proposal is not achieved. Instead, legal insecurity and cause for proceedings will result from the indistinct and unmanageable regulations for the national legislation.
- 21. Under article 3 paragraph 1 letter d of the directive proposal, the ban on discrimination must be applicable with regard to accessing and the supply of goods and services which are available to the public, including housing for all persons within the public and private sector. This effectively represents an expansion of the disadvantage prohibition to all legal transactions under private law, with the exception of family and inheritance obligations. The fact that this would mean a completely disproportionate and excessive regimentation of daily life is obviously also known to the Commission. The restriction envisaged as a result, i.e. that for individuals the discrimination prohibition should only apply to the extent that they exercise their professional or business activity, is however unclear in its scope and unsuitable for a reliable application of the law. Exactly what the Commission understands by "*professional or business activity*" is not clarified. The explanation that "*transactions between private persons, who act as*

such" should be not covered cannot contribute anything substantial to clarifying the area of application.

- 22. If the Commission regarding article 3, No. 1 letter d of the directive proposal wants to exclude actions within the private sphere, the area of application of the regulation would already have to be limited to persons acting within the public sphere. In the report of 2 July 2008, the Commission - in contrast to the explanations on the directive proposal - speaks of the fact that private persons must only be affected if their activities are for a "*profit-making purpose*". Subsequently - going in this respect much too far - all remunerated legal transactions by private persons were included in the area of application.
- 23. The restriction of the area of application contained in article 3 paragraph 2 is too narrow and open to misunderstanding. That laws of the individual nations on marital or family status remain unaffected by this guideline is in principle self-evident and of a declaratory nature, since no provisions in the law of persons are to be introduced with the directive. In article 3, however, there is a mention of services possibly dependant on marital and family status. This appears to mean that only laws of the individual nations that relate these services to marital or family status should remain unaffected by the directive. This was also already evidently laid down in recital 22 of the directive 2000/78/EC, on which this new directive proposal was to be based and linked in article 3 paragraph 2. In order to avoid misunderstandings, a clarification is therefore necessary in article 3 paragraph 2.
- 24. The provision of article 4 paragraph 1 letter a of the directive proposal, according to which effective discrimination-free access to and the supply of goods and services must be ensured in advance and planned in advance for disabled people if they are available to the public, including housing and transport, and including appropriate changes or adjustments, is just as unclear. This would have the consequence that suppliers of goods and services would in principle be required to provide all goods and services on the market (as well) in a form suitable for disabled people. Thus, through the regulation, a requirement for e.g. handicapped housing has been introduced. For the legal basis of such a requirement however the EU has no regulatory authority. The area of housing clearly falls under the legislative competence of the member states. Such an extensive obligation would make excessive requirements on every supplier in the long term. It must be considered that, under the wording of the directive proposal, every kind of goods and services (not only dwellings or means of transport) and every kind of disability (not only handicaps in terms of walking) would be included. The attempt of the Commission to limit the much too broad scope of application of the regulation retrospectively by the fact that "*disproportionate loads*" must be excluded (whereby, in particular, reference is made to the "*size, resources and nature*" of the supplier), is impracticable. A proportionality test can take place only in the respective individual case - retrospectively. The predictability of law which is necessary for the suppliers would no longer be ensured. In view of the variety of possible case configurations it appears also not justifiable to trust in the fact that the vague regulations will be made manageable in a foreseeable time by the judgements of the courts. This is all the more the case

in that the test criteria planned for proportionality (e.g. size and resources of the supplier) would have to be examined in each individual case at great cost.

From the perspective of the Bundesrat it is already made clear by the two examples specified above that the directive proposal would provoke legal insecurity and lead to a large number of proceedings. The predictability of law necessary for reasonable economic life would be substantially disturbed.

- 25. It also remains unclear whether article 14 of the directive proposal entails the banning of fault-related compensation liability for damages for all areas, in particular civil law. In the written requests of the Commission of 23 October 2007 (breach of treaty proceedings No. 2007/2253 concerning the implementation of directive 2000/43/EC) and/or of 31 January 2008 (breach of treaty proceedings No. 2007/2362 concerning the implementation of directive 2000/78/EC) it is stated in the equivalent articles 15 and/or 17 that an infringement against the anti-discrimination regulations does not in itself presuppose fault and no sanctions can therefore be associated with such a requirement. It remains unclear however whether this aspect should relate, in view of the case law issued by the European Court of Justice, exclusively to the area of industrial law or - regarding the implementation of directive 2000/43/EC - also to the area of civil law.

  The unconditional banning of a fault-related claim to compensation would have - in particular for civil law - far-reaching and, in the opinion the Bundesrat, unsustainable consequences. For claims for compensation submitted with good reason - apart from a few exceptions within the area of absolute liability, German civil law, like the civil law in most European states, ties in with the requirement for representation or, in the area of EU legislation, with the requirement for the responsibility of the debtor. Fault-independent liability as a consequence of a standardized liability for discrimination in article 14 of the directive proposal would however be a kind of "*absolute liability*" with incalculable risks for the contracting parties concerned. Such a major sanction is not in any case necessary for effective protection from discrimination in civil law matters. The interests of the parties can be taken into account within this area by other measures as well, such as fault-independent omission and/or removal requirements, which, accompanied by fault-dependant claims to compensation, are an effective and sufficient measure.

  The directive proposal leaves open who must meet the cost of the necessary structural alteration measures for the realisation of the requirement for the production of access to a specific dwelling. A burden on the landlord would in any case not be appropriate.

Participation of a Bundesrat-official

- 26. The Bundesrat finds that the participation of a Bundesrat-official is necessary for the government expert group on non-discrimination imposed by the Commission.