

III. Z ORZECZNICTWA

Magdalena Jaś-Nowopolska*

Age Restrictions for Notaries – Gloss on the Judgment of the Federal Court of Justice (BGH) of 21 August 2023, Case NotZ(Brfg) 4/22

Abstract. This commentary examines the ruling of the Federal Court of Justice (BGH) of 21 August, 2023 (NotZ(Brfg) 4/22), and its implications for the notarial profession in Germany. Under § 47 No. 2 and § 48a of the Federal Notarial Code (BNotO), a notary's office expires at the end of the month in which they reach the age of 70. The judgment addresses the legality of this age limit, particularly in relation to European Union law, and assesses its compliance with the principles set out in Directive 2000/78/EC. The BGH reaffirms the necessity of the age restriction as a means of ensuring generational turnover within the notarial profession, which is essential for maintaining its sustainability and preventing an aging workforce. This commentary explores the BGH's interpretation of employment policy objectives, the balance between the interests of older and younger notaries, and the broader impact on Germany's notarial system. Ultimately, the ruling highlights the importance of upholding the age limit to foster a dynamic, responsive, and representative notarial profession.

Keywords: notary – Directive 2000/78 – age limit – lawyer-notary

Facts

The plaintiff (...), born in 1953, a lawyer and notary public in Germany, seeks a declaration that his mandate as a lawyer-notary (Ger. *Anwaltsnotar*) does not expire at the end of the month in which he reaches the

* Justus Liebig University Giessen, Germany | Uniwersytet Justusa Liebiga w Giessen, Niemcy, <https://orcid.org/0000-0002-0278-8335>, e-mail: Magdalena.Jas-Nowopolska@recht.uni-giessen.de.

age of 70. The plaintiff regards the age restriction as violating the prohibition of age discrimination under the European Union law. He bases his argument on Article 21 of the Charter of Fundamental Rights of the European Union¹ and on the provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,² in particular, Article 1 or Article 2 (2)(a) of that Directive, *inter alia*. The plaintiff claims that, in view of the existing substantial shortage of young professionals, the age limit is not (or is no longer) objective and appropriate within the meaning of Article 6 (1) of Directive 2000/78 and is not justified by a legitimate aim.

1. European Union age regulation

The plaintiff argues that the age restriction under the German regulation violates the prohibition of age discrimination under the EU law. Article 21 of the Charter of Fundamental Rights, which he refers to, prohibits any discrimination based on any grounds such as gender, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, being part of a national minority, property, birth, disability, age or sexual orientation. Article 1 of Directive 2000/78, which is invoked by the plaintiff, indicates the purpose of the Directive itself, which is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect the principle of equal treatment in the Member States. Article 2 (2a) of Directive 2000/78 refers to direct discrimination, which occurs where one person is treated less favourably than another and is, has been or would be treated in a comparable situation on any of the grounds referred to in Article 1.

According to Article 6 (1) of Directive 2000/78, Member States may stipulate that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and

¹ OJ C 364/5.

² Council Directive 2000/78/EC of 27 XI 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 XII 2000, pp. 16–22, hereinafter: “Directive” or “Directive 2000/78.”

necessary. The article also defines this differential treatment. The article indicates, *inter alia*, the introduction of “special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection”³ or “the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.”⁴

The Court of Justice of the European Union has consistently held in previous judgments that Member States have a wide margin of discretion, in particular, when deciding on general (retirement) age limits.⁵ However, it must be emphasised that an age limit must meet the need to achieve the objectives it pursues in a consistent and systematic manner.⁶ It is for the competent authorities of the Member States to strike an appropriate balance between the various conflicting interests, and it is for the national court to verify whether those requirements have been met.⁷

2. German law on notaries

2.1. Legal basis

In Germany, the profession of a notary is regulated by the Federal Code for Notaries of 24 February 1961 Bundesnotarordnung (BNotO).⁸ Here, it should be noted that for historical reasons, the professions of a full-time notary and a lawyer commissioned as a notary (Ger. *Anwaltsnotar*) have co-existed in Germany. According to § 3 (2) BNotO, in those judicial districts in which the office of a notary was exercised exclusively as a secondary

³ Point (a) of Article 6 (1) of Directive 2000/78.

⁴ Point (c) of Article 6 (1) of Directive 2000/78.

⁵ In its judgment of 16 X 2007, Case C-411/05 (BeckRS 2007, 70804 with a commentary by Krieger FD-ArbR 2007, 245083), the ECJ granted Member States a wide margin of discretion in setting general age limits and held that a general collectively agreed age limit, which is linked to the receipt of a standard pension, is proportionate despite direct discrimination.

⁶ Among others, the necessity to achieve the objectives pursued is raised in the judgment of ECJ of 18 XI 2010, *Georgiev*, Case C-250/09, ECR 2010, I-11869, para. 56.

⁷ *Ibidem*.

⁸ Act of 24 II 1961 (BGBl. I p. 97) last amended by the Act of 20 XII 2023 (BGBl. I p. 389).

occupation on 1 April 1961, only lawyers (Ger. *Rechtsanwälte*) will continue to be appointed as notaries to exercise the office concurrently with the profession of a lawyer (a lawyer commissioned as a notary; Ger. *Anwaltsnotar*) for the duration of their membership in the bar association competent for that judicial district. In contrast, the § 3 (1) BNotO notaries are appointed for life to exercise their office as their main occupation (full-time notaries).

Since 1991, the provisions of Federal Code for Notaries have provided for an age limit as a restriction on the appointment of a notary for life. According to § 47 No. 2 BNotO, the office of a notary expires upon reaching retirement age (section 48a) or death. Section 48a regulates that notaries reach retirement age at the end of that month in which they reach the age of 70. Reaching the age of 70 is a mandatory and automatically effective reason for the termination of notarisation.

As indicated in the literature,⁹ the purpose of the age limit introduced in 1991 was to achieve an orderly age structure in the notary profession and to protect those that seek legal advice from problems associated with the over-ageing of notaries. The age limit also ensures that a greater number of younger candidates can be considered for the office of notary. According to § 1 BNotO, notaries are independent holders of a public office, who are appointed in the Länder to record legal acts ('notarial recording') and to perform other tasks in the field of the preventive administration of justice. However, in accordance with § 4 BNotO, "As many notaries are to be appointed as are required to meet the needs of the proper administration of justice. In particular, consideration is to be given to ensuring that the consumers of legal services are adequately supplied with notarial services and that an orderly age structure of the members of the profession is maintained." The demand of those that seek legal services for notarial services should primarily be inferred from the notarial transactions carried out by notaries to date, with the need to provide services in a particular official area being the decisive factor.¹⁰ The decision of the state judiciary to announce recruitment for notarial positions is not related to the resignation of an appointed notary from a lawyer-notary's office, as it is in the case of a full-time notarial office.¹¹

⁹ R. Regler, § 48a, in: *BeckOK BNotO*, ed. C. Eschwey, 10th ed. (1 VIII 2024), marg. no. 1, 2, Beck online. Compare also: J. Vogel, § 48a, in: *Bundesnotarordnung Kommentar*, eds. N. Frenz, U. Miermeister, 6th ed., 2024, Beck online.

¹⁰ Decision of BGH 22 X 1979 – NotZ 3/79OLG Cologne 21 XII 1978.

¹¹ The decision is taken after obtaining the activity data for the previous year or previous years on the basis of the number of existing notaries. For this reason – as

2.2. Age limitation

It should be noted that if younger candidates can only be considered for vacant notary positions, without an age limit, this would lead to the ageing among the notary population. Increasingly, only older notaries, whose professional experience would be more limited due to them obtaining their qualifications later, would be available to those seeking legal advice. As pointed out in the literature and case law, this would jeopardise the functioning of the justice system.¹² This provision therefore serves an employment policy objective within the meaning of Article 6 (1) of Directive 2000/78. On the one hand, the intention of the legislator is to facilitate the access of younger candidates to the office of a notary public. On the other hand, the age limit is intended to ensure sufficient turnover in the interests of the career prospects of younger trainees.¹³ As indicated in the literature, most notaries use the statutory age limit to the last day. The fear is therefore that removing the age limit would quickly lead to the ageing of the profession.¹⁴

2.3. Number of notaries and their age in Germany

The argumentation above requires presenting data on notaries in Germany. Such was the finding of the Senate when it stated that an age restriction applicable to all notaries throughout the country is (still) necessary to achieve this goal. The expert report of the Federal Notary Chamber obtained by the Senate pursuant to Section 78 (1) No. 4 of the BNotO has shown that there is indeed a shortage of trainee notaries in the notary's office, in some cases a significant shortfall. However, this does not apply to full-time notary offices. There is a significant surplus of trainees in all areas. As cited in the judgment: "Only a negligible number of vacancies (well below 1%) were filled in the full-time notary's office between 2020 and 2022 (...). In all federal states and in all local court districts, significantly more candidates applied for vacancies than

the defendant rightly points out – the newly appointed lawyer-notary is not the legal successor of the notary who has left. The notarial activity of the latter is, in principle, liquidated in accordance with § 56 (2) sentence 1 BNotO.

¹² Inter alia: BGH, decision of 17 III 2014 – NotZ(Brfg) 21/13.

¹³ Judgment of BGH of 27 V 2019 – NotZ(Brfg) 7/18, DNotZ 2020, 71.

¹⁴ T. Grote, *Höchstaltersgrenze für Notare war auch zum 31.10.2021 mit deutschem Verfassungs- und Unionsrecht vereinbar*, "DNotZ" 2024, p. 229.

there were vacancies. (...) According to the evidence, there is also no difficulty in filling the vacancies advertised for notary assessors with highly qualified candidates.”¹⁵ There is a shortage of trainees only in certain districts, including the district of the higher regional courts, where lawyers practise as notary publics as an additional profession (Braunschweig, Bremen, Celle, Frankfurt am Main, Hamm, Oldenburg, Schleswig and the district of the court of appeal, as well as the district of the higher regional court in Düsseldorf, part of the district of the regional court in Duisburg on the right bank of the Rhine and the district court in Emmerich). The Judgment also pointed that “the number of lawyer-notaries in the lawyer-notary profession also fell insignificantly during this period, namely from 5,275 to 5,102 (-3.28%) (expert opinion Annex 1, pp. 2–48).”¹⁶ The notary statistics for this period show a change of -2.8% and -0.9% for 4,997 lawyer-notaries.¹⁷ However, unlike in the full-time notary’s office, there were not always significantly more applications for vacancies, or at least not a sufficient number of applications.¹⁸

The literature indicates that the number of filled positions for both types of notaries is decreasing (for example, from 9,164 in 2005 to 6,658 in 2023¹⁹), admittedly more so in case of notaries who are lawyers than just notaries.²⁰ The number of positions depends on the number of required positions, which is regulated differently in the Länder and is only comparable to a limited extent due to different calculation methods. As indicated in the literature, the profession is certainly not one characterised by youth.²¹ Analysing publicly available data from, for example, the Senate of the Administration of Justice in Berlin, the average age is 56.8 years.²² For a profession that can be practised almost exclusively between the ages of about 30 and 70, an even age distribution should not be expected due to the late age of entry. Rather, a concentration in

¹⁵ Marg. no. 33 of the Judgment.

¹⁶ Marg. no. 27 of the Judgment.

¹⁷ Source: www.notar.de/der-notar/statistik (accessed: 15 IX 2024).

¹⁸ Marg. no. 27 of the Judgment.

¹⁹ See <https://www.notar.de/der-notar/statistik> (accessed: 15 IX 2024).

²⁰ U.J. Fischer, *Altersgrenze für Notare vor dem BGH und in der Presse – ein Blick auf die Altersgrenze für Notare vor dem BGH und in der Presse – ein Blick auf die Realität Realität Altersgrenze für Notare flexibilisieren? Vorteile für Nachwuchs, Amtsinhaber Altersgrenze für Notare flexibilisieren? Vorteile für Nachwuchs, Amtsinhaber und Bevölkerung und Bevölkerung*, 2023, p. 472, AnWB online.

²¹ Ibidem. This fact is also pointed out by Kilian: M. Kilian, *Europarechtskonformität der Altersgrenze für Notare*, “EWiR” 2024, no. 1, p. 19.

²² Ibidem.

the later decades of life should be expected, completely independent of any demographic shortcomings.

The Senate on notarial matters of the Federal Court of Justice has also identified other structural reasons for the shortage of candidates for the notary profession. These are, in particular, the specialised notarial examination that has to be passed, and the ever-increasing (also technical) requirements for practising as a lawyer-notary.²³ The doctrine also points out that new specialised procedures related to digitisation are emerging in the practice of the notary profession. The situation requires the lawyer-notary to become more involved in the notarial profession. In particular, the duplicate file management required in connection with the digitisation of the document archive leads to a considerable investment of time and personnel. New data protection and anti-money laundering guidelines, which have become increasingly centralised in recent years, mean further monitoring and control obligations for individual notary offices.²⁴

The Senate also pointed out that in 2021 the legislature adopted certain changes to the rules governing the notary profession. Some facilities were introduced for the practice of the notarial profession (§ 48b and § 5b (3) BNotO), but the age limit was still maintained. The Act of 25 June 2021 on the modernisation of notarial professional law and the amendment of further provisions, introduced changes to improve the exercise of the notary profession with family responsibilities. Among other things, § 48b BNotO also concerns the period of resignation from office with the guarantee of reappointment, which has been extended from one to three years.

Conclusion

Having analysed the statistical data, the changes introduced to improve the practice of the notarial profession with family responsibilities and the purpose for which the age limit was introduced, it must be concluded that the age limit is also still necessary in the notarial profession in order to achieve a legitimate objective within the meaning of Article 6(1) of Directive 2000/78. If older notaries with an established notarial position remain in office without the age limit, younger lawyers will not

²³ Marg. no. 31 of the Judgment.

²⁴ T. Grote, *op. cit.*

have sufficient and foreseeable prospects of becoming economically efficient notaries. It should also be emphasised that an appropriate balance of interests is ensured by the fact that the age limit for notaries is significantly higher than the retirement age limit applicable at federal and state level, and that legal notaries who retire are not prevented from continuing to practise law nor work as notary public agents or notary administrators.

BIBLIOGRAPHY

- Fischer U.J., *Altersgrenze für Notare vor dem BGH und in der Presse – ein Blick auf die Altersgrenze für Notare vor dem BGH und in der Presse – ein Blick auf die Realität* *Realität Altersgrenze für Notare flexibilisieren? Vorteile für Nachwuchs, Amtsinhaber Altersgrenze für Notare flexibilisieren? Vorteile für Nachwuchs, Amtsinhaber und Bevölkerung und Bevölkerung*, 2023, pp. 472–474, AnwBl online.
- Grote T., *Höchstaltersgrenze für Notare war auch zum 31.10.2021 mit deutschem Verfassungs- und Unionsrecht vereinbar*, "DNotZ" 2024, pp. 229–238.
- Kilian M., *Europarechtskonformität der Altersgrenze für Notare*, "EWiR" 2024, pp. 18–20.
- Regler R., § 48a, in: *BeckOK BNotO*, ed. C. Eschwey, 10th ed. (1.08.2024), Beck online.
- Vogel J., § 48a, in: *Bundesnotarordnung Kommentar*, eds. N. Frenz, U. Miermeister, 6th ed., 2024, Beck online.