



**REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC**

COUNTRY REPORT 2008

GERMANY

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State of affairs up to 31 December 2008

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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.

The Constitution, or Basic Law (*Grundgesetz*), is of central importance for understanding the German legal framework on discrimination. The German Constitution is, unlike some other constitutions, directly binding on all public authorities. Legislation is passed subject to the constitutional order, and the executive and the judiciary are bound by law and justice.¹ Fundamental rights are part of this directly effective constitutional order. They are binding on the legislature, executive, and judiciary as directly valid law.² The individual in Germany has comparatively wide access to judicial review on the ground of violations of his or her fundamental rights, especially through the constitutional complaint mechanism (*Verfassungsbeschwerde*).³ Under the Basic Law, fundamental rights have become the material core of the legal order in general. They are therefore not only relevant in public law⁴, but permeate other legal spheres as well, such as criminal and private law.⁵

There are several constitutional provisions that protect human equality. Most important is the guarantee of human dignity.⁶ The core of this guarantee is the respect of any human being as an end in itself, simply by virtue of his or her humanity, irrespective of other characteristics. In accordance with this view, case law of the Federal German Constitutional Court (*Bundesverfassungsgericht*) consistently states that each person should be treated not only as an object of state action, but as an end in itself.⁷ He or she is, in addition, protected against degrading or humiliating treatment.⁸ The guarantee of human dignity is the central value decision of German law, its most important and supreme norm. In consequence, it is an important reference point for anti-discrimination law in Germany, especially as it guides interpretation of the constitutional guarantee of equality and provides normative yardsticks for other areas of law. It is important to note that through the guarantee of human dignity German law authoritatively states that no distinctions are to be made as to the worth of a human being, irrespective of any characteristic, be it presumed race, ethnic origin, religion or belief, disability, age, or sexual orientation, to name just the socially and historically pertinent grounds of discrimination under consideration in this report. The only question that arises is therefore by which concrete legal means the overarching value of human dignity can be adequately protected in various spheres of life.⁹

¹ Article 20.3 Basic Law (*Grundgesetz*).

² Article 1.3 Basic Law (*Grundgesetz*).

³ Article 93.1 Nr. 4a Basic Law (*Grundgesetz*).

⁴ Here understood in the narrow sense excluding criminal law.

⁵ On some examples of such effects see below.

⁶ Article 1.1 Basic Law (*Grundgesetz*): Human dignity is inviolable. To respect and protect it is the duty of all state authority.

⁷ Settled case law, see recently BVerfGE 115, 118.

⁸ Ibid.

⁹ On the background cf. M. Mahlmann, *Elemente einer ethischen Grundrechtstheorie*, 2008, p. 97 et seq., p. 412 et seq.

Other important constitutional guarantees are the guarantee of equality¹⁰; and special constitutional equality rights concerning children out of wedlock,¹¹ equality of status and office,¹² and equality of electoral rights.¹³

There is in Germany specialised anti-discrimination legislation. Most importantly, since 18 August, 2006 the General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, in the following abbreviated as AGG)¹⁴ is in force after many years of intense debate. This law covers labour law, general contract law, and public law. It created a completely new framework for anti-discrimination law in Germany. The act is part of a legal package that amends other existing legal regulations and contains in addition an act against discrimination in the army, the Law on the Equal treatment of Soldiers (*Gesetz über die Gleichbehandlung von Soldatinnen und Soldaten*, in the following abbreviated as SoldGG).¹⁵

In addition, there are various legal provisions which partly reiterate the fundamental guarantee of equality for areas of public law, including the law of the civil service and other public employees.¹⁶ In labour law, there is a general anti-discrimination clause in the Work Constitution Act (*Betriebsverfassungsgesetz*)¹⁷ and the fundamental principle of equal treatment of employees has been consistently established by case law.¹⁸ In addition, as regards discrimination on the ground of sex (which is not covered by this report) and, more recently, of disability, various legal instruments have been passed aiming to protect against discrimination and increase the social inclusion of women and disabled persons.¹⁹

¹⁰ Article 3 Basic Law (*Grundgesetz*).

¹¹ Article 6.5 Basic Law (*Grundgesetz*): Children born out of wedlock by law have to be provided with the same conditions for physical and mental development and accorded the same place in society as legitimate children.

¹² Article 33.1 Basic Law (*Grundgesetz*): Every German in every State (*Land*) has the same political rights and duties.

Article 33.2 Basic Law (*Grundgesetz*): Every German is equally eligible for any public office according to his aptitude, qualifications, and professional achievements.

Article 33.3 Basic Law (*Grundgesetz*): Enjoyment of civil and political rights, eligibility for public office, and rights acquired by public service are independent of religious denomination. No one may suffer disadvantage by reason of his adherence or non-adherence to a denomination or philosophical persuasion.

Article 140 Basic Law (*Grundgesetz*) in conjunction with Article 136.1 and 136.2 Weimar Constitution reiterates the equality of status and office independent of religious denomination.

¹³ Article 38.1 sentence 1 and Article 38.2 Basic Law (*Grundgesetz*).

¹⁴ For an English translation of the AGG, see the website of the German Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*): <http://www.antidiskriminierungsstelle.de/bmfsfj/generator/ADS/Service/downloads.html>

¹⁵ Act Implementing European Directives Putting into Effect the Principle of Equal Treatment, (*Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlinien*, 14.8.2006 (BGBl. I, 1897). The AGG and the SoldGG have been amended, 2.12.2006 (BGBl. I, 2742). A second amendment was made to the AGG on 12.12.2007 (BGBl. I, 2840) and to the SoldGG on 9.8.2008 (BGBl. I 2008, 1629). There was a third (though only technical) amendment to AGG after the cut-off date of this report on 5.2.2009 (BGBl. I 2009, 160).

¹⁶ See Section 8.1. Federal Law on the Civil Service (*Bundesbeamtengesetz*). This codification was amended, newly arranged and published after the cut-off date of this report on 5.2.2009. The citation in this report follows the former version.

¹⁷ Section 75.1 Work Constitution Act (*Betriebsverfassungsgesetz*).

¹⁸ Settled case law, see recently Federal Labour Court (*Bundesarbeitsgericht*), 12 October 2005, 10 AZR 640/04.

¹⁹ Most importantly, the AGG covers disability for all work relations and other areas beyond the scope of Directive 2000/78/EC, Section 81.2 of the Social Code IX (*Sozialgesetzbuch IX*) now refers to the regulation of the AGG, the Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) creates special duties for public authorities and some for private parties. See for more and details on disability below.



In the area of sexual orientation, some new legal regulations have been created that either directly aim at protection against discrimination or do so indirectly by creating options that were not previously open to people with certain sexual orientations, for example, by introducing a legally regulated form of same-sex partnership.²⁰ As to religion, special legal regulations and case law, in addition to the non-discrimination clauses of public law and labour law, deal with the reasonable accommodation of various religious beliefs, including exceptions from general laws.²¹

There is a widely held opinion in legal doctrine (which has resulted in some case law) that the general clauses of civil law provide remedies in private contract law and tort law against discrimination on any ground that infringes basic personality rights. These general clauses have to be interpreted in the light of the constitutional order (especially in the light of fundamental rights and most importantly of human dignity) that prohibits discrimination.²² Through the enactment of the AGG, these general clauses play an even more limited role in practise in this respect.

Germany is a democratic and social federal state under the rule of law.²³ As it is a social state, the State has a duty to promote the welfare of its citizens. In the field of anti-discrimination, the principle of the social state leads to a wide range of programmes aiming to promote the inclusion of groups that face discrimination.²⁴ The federal character of Germany leads to different regulations in different *Länder* in some areas where the *Länder* have legislative competencies, most notably as to education and cultural matters or certain aspects of the law regulating civil servants they employ.

Despite recent reform of the Federal order of competencies, the most important matters in public (with the exceptions mentioned) and private law are, however, still in the competence of the Federation, either as exclusive legislative power, or concurrent legislative power.²⁵

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report. Please clearly and briefly indicate whether the Member State had taken advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability?

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

²⁰ Law on Life Partnerships (*Lebenspartnerschaftsgesetz*).

²¹ See below.

²² Especially as to race and ethnic origin, see T. Bezenberger, *Ethnische Diskriminierung, Gleichheit und Sittenordnung im bürgerlichen Recht*, *Archiv für die civilistische Praxis* 196 (1996), 395 et. seq.

²³ Article 20.1 and 20.3, Article 28.1 Basic Law (*Grundgesetz*).

²⁴ For some examples see below.

²⁵ Article 70 – 74 Basic Law (*Grundgesetz*).

This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

Overview

The two attempts to transpose the Directives in Germany have met considerable resistance in the public and legal spheres, which in part was directed at details of this transposition and in part against the project as such.²⁶ A special focus of contention was the attempt not only to implement the Directives but to create a consistent regime of anti-discrimination law beyond the demands of European Law, especially to include all grounds in the prohibition of discrimination in civil law, and not only race and ethnic origin. The tone of some participants in the debate was very harsh.

This is to a certain degree surprising. There is enough empirical evidence on discriminatory opinions and behaviour in Germany to be concerned about the problem, though methodologically sound studies on many grounds of discrimination are rare.²⁷ As indicated in the overview of the context of anti-discrimination law in Germany, the guarantee of human dignity is the most fundamental provision of German Law. This is universally acknowledged and authoritatively stated by the German Constitutional Court. The core of this guarantee is to provide protection for the person and individuality of human beings as ends in themselves on no other grounds and bound to no other precondition than the humanity of the individual.

²⁶ On the debate see e.g. the overview in Bauer/Göpfert/Krieger, AGG, 2nd ed., para 32b; J. Braun, Forum: Übrigens – Deutschland wird wieder totalitär, *Juristische Schulung* 2002, p. 424 et seq. F.-J. Säcker, „Vernunft statt Freiheit“ – Die Tugendrepublik der neuen Jakobiner, *Zeitschrift für Rechtspolitik* 2002, p. 286. See S. Baer, „Ende der Privatautonomie“ oder grundrechtlich fundierte Rechtsetzung? – Die deutsche Debatte um das Antidiskriminierungsrecht, *Zeitschrift für Rechtspolitik* 2002, p. 290 et seq.; E. Eichenhofer, Diskriminierungsschutz und Privatautonomie, *Deutsches Verwaltungsblatt* 2004, p. 1078 et seq.; K. Hailbronner, Die Antidiskriminierungsrichtlinien der EU, *Zeitschrift für Ausländerrecht*, p. 254 et seq.; J. Neuner, Diskriminierungsschutz durch Privatrecht, *Juristen Zeitung* 2003, p. 57ff; U. Mager, Möglichkeiten und Grenzen rechtlicher Maßnahmen gegen die Diskriminierung von Ausländern, *Zeitschrift für Ausländerrecht* 1992, 170 et seq.; R. Nickel Handlungsaufträge zur Bekämpfung von ethnischen Diskriminierungen in der neuen Gleichbehandlungsrichtlinie 2000/43/EG, *Neue Juristische Wochenschrift* 2001, 2668 et seq.; E. Picker, Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie? *Juristen Zeitung* 2002, p. 880 et seq.; E. Picker, Antidiskriminierung als Zivilrechtsprogramm? *Juristen Zeitung* 2003, p. 540 et seq.; D. Schiek, Diskriminierung wegen „Rasse“ oder „ethnischer Herkunft“ – Probleme der Umsetzung der RL 2000/43/EG im Arbeitsrecht, *Arbeit und Recht* 2003, p. 44 et seq.; D. Schiek, *Differenzierte Gerechtigkeit: Diskriminierungsschutz und Vertragsrecht* (Baden-Baden: Nomos, 2000); H. Wiedemann/G. Thüsing, Zum Entwurf eines zivilrechtlichen Antidiskriminierungsgesetzes, *Der Betrieb* 2002, p. 463 et seq.; M. Mahlmann, Gleichheitsschutz und Privatautonomie, *Zeitschrift für europarechtliche Studien* 2002, p. 407 et seq.; M. Mahlmann, Gerechtigkeitsfragen im Gemeinschaftsrecht, in: *Loccumer Protokolle* 40/03, p. 47 et seq.

²⁷ Cf. Klose in Rudolf/Mahlmann, GleichbehandlungsR, § 10. There is a substantive study conducted by the author of this report in collaboration with Prof. Dr. Hubert Rottleuthner, Freie Universität Berlin, financed by the European Union and the German government to provide further information. The Anti-Discrimination Agency has commissioned such work as well, the results to be published after the cut-off date of this report.

This makes impermissible on the most fundamental level discrimination against human beings because of any characteristics such as race, ethnic origin, religion, belief, disability, age or sexual orientation, among others.

The Directives aim to provide legal tools protecting individuals against such discrimination in the public and in the private sphere.²⁸ The values the Directives aim to protect are therefore part of the core of the German legal system. The regime of legal regulations envisaged by the Directives already has, in addition, been partly a reality of Germany's legal system as regards discrimination based on sex (which is not covered by this report) and disability. These regulations and their interpretation by federal courts include the definition of discrimination, the shift of the burden of proof, legal standing and a regime of sanctions. The final implementation of the Directives through the AGG and accompanying legislation is therefore not a radical new start for German law but the further development of relevant parts of the existing law. More notice needs to be taken of these fundamental value decisions in German law to focus on an effective, sober and pragmatic development of anti-discrimination law.²⁹ Only if one does not lose sight of the human rights background of the Directives their important liberal aims can be achieved: to provide freedom to act and private autonomy for all members of society and to protect the equality of human worth.

State of implementation

Through the AGG and the accompanying legislation, a full transposition of the directives is intended. There are, however, some shortcomings.³⁰

²⁸ On the background: C. MacCruden (ed.), *Anti-Discrimination Law*, 2nd ed., Ashgate, Aldershot, 2003, with a very illuminating introduction; C. MacCruden, "The New Concept of Equality" talk delivered at the European Academy of Law, Tries 2 – 3 2003; S. Fredman, *Discrimination Law*, Oxford, Oxford University Press, 2002. S. Fredman, Equality: A New Generation?, *Industrial Law Journal*, 2001, p. 145, 154 et seq; S. Baer, *Würde oder Gleichheit*, (Baden-Baden: Nomos, 1995; D. Schiek, *Differenzierte Gerechtigkeit* (Baden-Baden, Nomos, 2000), M. Bell, *Anti-Discrimination Law and the European Union* (Oxford: Oxford University Press, 2002) p. 52; P. Skidmore, EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?, *Industrial Law Journal*, 2001, 126 et seq.; L. Waddington, *The Expanding Role of the Equality Principle in European Union Law*, (San Domenico di Fiesole: European University Institute, Robert Schuman Centre of Advanced Studies, 2003); G. More, *The Principle of Equal Treatment: From Market Unifier to Fundamental Right*, in: P. Craig/G. de Búrca (ed.), *The Evolution of EU Law* (Oxford: Oxford University Press), p. 517 et seq. For some more technical remarks on the German situation, see M. Mahlmann, Prospects of German Anti-Discrimination Law, in: *Transnational Law & Contemporary Problems*, 2005, p. 1045; for a general attack from the point of view of the economic analysis of law: R. A. Epstein, *Forbidden Grounds: The Case against Anti-Discrimination Law*, Harvard University Press, Cambridge, Ma, 1992.

²⁹ Cf. on the legal ethics of anti-discrimination law, Mahlmann in Rudolf/Mahlmann, GleichbehandlungsR, § 1.

³⁰ Assuming that European law demands a differentiated transposition, see ECJ C-49/00, ECR 2001 I-8575 Commission vs. Italy, para 21 et seq.; ECJ C- 236/95 ECR 1996 I-445 Commission vs. Greece, para 13; ECJ C-38/99, ECR 2000 I-10941 Commission vs. France para 53; ECJ C-144/99 Commission vs. Kingdom of the Netherlands, www.curia.eu.int, para 17: "It should be borne in mind, in that connection that according to settled case-law, whilst legislative action on the part of each Member State is not necessarily required in order to implement a directive, it is essential for national law to guarantee that the national authorities will effectively apply the directive in full that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before national courts". As to case-law the Court continues "even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive that cannot achieve the clarity and precision needed to meet the requirement of legal certainty", *ibid* para 21.



The main points are (other problematic issues will be identified later in this report):³¹

- an exception of dismissal from the application of the prohibition of discrimination, Sec. 2.4 AGG, though mitigated by recent case-law (cf. 0.3 and 3.2.3);
- the possible non-application of the AGG to occupational pension schemes, Sec. 2.2 Sentence 2 AGG, depending, however, on the judicial interpretation of the respective norm, (cf. 3.2.3);
- an exception from the material scope of the provision of goods and services for all transactions concerning a special relation of trust and proximity between the parties or their family, including the letting of flats on the premise of the landlord for all grounds including race and ethnic origin, Sec. 19.5 AGG which raises problems under the race directive, depending, however, on its contentious interpretation in this respect, (cf. 3.2.9; 3.2.10);
- an exception for housing including unequal treatment on the ground of race and ethnic origin to provide for socially and culturally balanced settlements, Sec. 19.3 AGG, depending on judicial interpretation (cf. 3.2.10);
- the formulation of the justification of unequal treatment for religion and belief, depending on judicial interpretation, Sec. 9.1 AGG, (cf. 4.2);
- Sec. 622.2 sentence 2 Civil Code (*BürgerlichesGesetzbuch*) provides that employment periods under the age of 25 are not taken into account when determining notice periods. This regulation is not reconcilable with Art. 6 Directive 2000/78/EC (cf. 4.7.5. a);
- there is no special prohibition of victimisation in civil law, as foreseen in Art. 9 Directive 2000/43/EC (cf. 6.4.);
- the dependence of compensation for material damage on fault (wilful or negligent wrongdoing) or gross negligence respectively, Secs. 15.1; 15.3; 21.2 AGG, contrary to ECJ jurisprudence in this respect (cf. 6.5);
- in public law, there is no comprehensive implementation regarding race and ethnic origin in the areas of social protection and social advantages, education and the provision of goods and services as to harassment and the instruction to discriminate, depending on judicial interpretation (cf. 3.2.4; 3.2.6 – 3.2.9.).

Germany had chosen to defer implementation as to age. Age is, however, now included in the AGG.

³¹ For the following list in the main text it is assumed that Article 3 of the Basic Law (*Grundgesetz*) protects adequately against discrimination on the ground of race and ethnic origin, religion, belief and disability explicitly or through the open-textured guarantee of equality in Article 3 Basic Law (*Grundgesetz*) paragraph one for the grounds of age and sexual orientation in public law through a strict test of proportionality for the justification of any unequal treatment. This interpretation is contentious in detail, but tenable in the light of the jurisdiction of the BVerfG (cf. below 1). For some other legally problematic aspects of the implementation see below. The Commission has identified the following points to be in breach of the directives in question (on these points in detail see below in the report and the report 2006): Restrictions on benefits for same sex partners, Sec. 2.4. AGG (dismissal), Sec. 622.2 Sentence 2 Civil Code (*BürgerlichesGesetzbuch*), Sec. 9.1. AGG, no full implementation of reasonable accommodation, time limit for claims based on AGG, not sufficient possibilities for engagement of association in procedures, no strict liability for discrimination. On these matters see in detail below.



0.3 Case-law

Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

Name of the court

Date of decision

Name of the parties

Reference number (or place where the case is reported).

Address of the webpage (if the decision is available electronically)

Brief summary of the key points of law and of the actual facts (no more than several sentences)

→ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

Numerous decisions by German courts in 2008 referred to the Directives as well as to the AGG. Important ones include:³²

- There is a preliminary reference to the European Court of Justice³³ concerning a provision which limits the employment of civil servants in professional fire brigades to the age of 30 years, questioning the general rationales of such limitations (especially minimum time of service before entitlement to pensions, mixed age structure). The preliminary reference also concerns Sec. 15.1 sentence 2 AGG, which provides for material damages caused by violations of the prohibition of discrimination in case of fault (wilful or negligent wrongdoing) as well as Sec. 15.3 AGG, which states that if the employer applies collective agreements he is only liable in the case of gross negligence or intent.³⁴
- Despite the exception of dismissal from the application of the prohibition of discrimination in Sec. 2.4 AGG (see above, 0.2), a discriminatory dismissal may be contrary to the principles of social choice (which are limiting the possibilities of justified dismissal) (*Sozialwidrigkeit*) and hence invalid according to the Law on Protection against Dismissal (*Kündigungsschutzgesetz*). It is argued that by this interpretation of the German Employment Protection Act in conformity with European Law, Sec. 2.4 AGG is not in breach of the Directives. Creating age groups in a social settlement between the employer and the employees in which criteria of social choice are applied (e.g. age, time of employment, family status, (severe) disability) does not violate the prohibition of age discrimination. This mechanism of social choice serves a

³² For previous case-law, see chapter 0.3 in Germany Country Reports of 2006 and 2007.

³³ ECJ, C-229/08.

³⁴ Frankfurt Administrative Court (*Verwaltungsgericht Frankfurt*), 21 April 2008, 9 E 3856/07.

legitimate aim – the maintenance of a diverse age structure of the employees – and is proportionate.³⁵

- A provision in a collective labour agreement which limits the employment of flight attendants to the age of 60 is in breach of anti-discrimination-law, since there is no valid reason for such a limitation.³⁶
- Besides the pending preliminary reference to the European Court of Justice,³⁷ the provision of Sec. 622.2 sentence 2 Civil Code (*Bürgerliches Gesetzbuch*) which states that employment periods under the age of 25 are not taken into account when determining notice periods, was held both in accordance³⁸ and in breach³⁹ of European anti-discrimination law. The German Federal Constitutional Court (*Bundesverfassungsgericht*) considered it as at least not impossible that the norm is violating community law, though it had not to decide on the issue in the case before it.⁴⁰
- If in the letter of application a candidate points out his or her severe disability (*Schwerbehinderteneigenschaft*), the employer (or his vicarious agent) has to take notice of the whole application. If the vacant position is one in the public administration, the employer has to invite the severely disabled candidate to an interview (Sec. 82 sentence 2 *Sozialgesetzbuch IX*), unless the person is evidently not qualified for the job and include the representatives of the severely disabled employees (Sec. 81.1 sentence 4 and 6 *Sozialgesetzbuch IX* (version before amendment), Sec. 95.2 sentence 1 *Sozialgesetzbuch IX*). Otherwise a discrimination on the ground of disability is presumed.⁴¹
- In consequence of ECJ C-267/06, *Tadao Maruko*, it was both held that regarding pension schemes, the situation of surviving members of registered life partnerships (*eingetragene Lebenspartnerschaften*) and married couples are normatively comparable⁴² and incomparable⁴³. Both courts referred to a decision by the Federal Constitutional Court (*Bundesverfassungsgericht*). A Chamber (not the full senate) of the Federal German Constitutional Court decided that it is reconcilable with the equality guarantee of the Basic law and European law, especially the interpretation of Directive 2000/78/EC by the ECJ in *Tadao Maruko* to grant the allowance only to married couples. It referred to previous decisions where it argued that the constitutional justification of the different treatment is the constitutional demand for special protection of marriage and family by Art. 6 Basic Law (*Grundgesetz*).

³⁵ Federal Labour Court (*Bundesarbeitsgericht*), 6 November 2008, 2 AZR 523/07. On the reconcilability of Sec. 2.4. AGG and Directive 2000/78/EC cf. also Düsseldorf Land Labour Court (*Landesarbeitsgericht Düsseldorf*), 16 April 2008, 2 Sa 1/08 (appeal to the Federal Labour Court (*Bundesarbeitsgericht*) is pending).

³⁶ Federal Labour Court (*Bundesarbeitsgericht*), 16 October 2008, 7 AZR 253/07 and Düsseldorf Land Labour Court (*Landesarbeitsgericht Düsseldorf*), 5 November 2008, 12 Sa 860/08.

³⁷ ECJ, C-555/07 (*Küçükdeveci*), see for details the 2007 Country Report.

³⁸ Rhineland-Palatine Land Labour Court (*Landesarbeitsgericht Rheinland-Pfalz*), 31 July 2008, 10 Sa 295/08.

³⁹ Schleswig-Holstein Land Labour Court (*Landesarbeitsgericht Schleswig-Holstein*), 28 May 2008, 3 Sa 31/08.

⁴⁰ Federal German Constitutional Court (*Bundesverfassungsgericht*), 8. November 2008, 1 BvL 4/08.

⁴¹ Federal Labour Court (*Bundesarbeitsgericht*), 16 September 2008, 9 AZR 791/07. Lower Saxony Land Labour Court (*Landesarbeitsgericht Niedersachsen*), 24 April 2008, 4 Sa 1077/07 (not final): Defendant is exonerated if he can prove that before the advertisement he developed a profile of requirements which included excellent final marks in state examination excluding all applicants not meeting this standard.

⁴² Munich Administrative Court (*Verwaltungsgericht München*), 30 October 2008, M 12 K 08.1484 (*Tadao Maruko*, not final).

⁴³ Karlsruhe Regional Court (*Landgericht Karlsruhe*), 24 October 2008, 6 S 22/07.

It argued that in *Tadao Maruko* the ECJ stated that an unequal treatment of spouses and same-sex couples is only a direct discrimination if the spouses and the same sex couples are in a comparable situation under national law. The Court decided that this is not the case as to the family allowance. Spouses have typically children, it argued, unlike same sex couples. Therefore one spouse caring for the children has a greater need for financial support. This typical situation, in the view of the Chamber of the Court, the allowance is supposed to redress.⁴⁴ There is contradictory case law on this concrete matter, rejecting the jurisdiction of the Chamber of the Federal German Constitutional Court.⁴⁵

- Furthermore, notwithstanding ECJ C-267/06, *Tadao Maruko*, the invariable exclusion of surviving registered partners (*eingetragene Lebenspartner*) from provision for dependants in physicians' pension scheme granted also to childless surviving spouses was considered to be legal as being justified due to the reasons outlined by the Chamber of the Federal German Constitutional Court (*Bundesverfassungsgericht*) just mentioned. In addition, Directive 2000/43/EC is regarded to be not applicable to such a pension scheme as not forming part of payment⁴⁶ and considering Art.3.3 Directive 2000/78.⁴⁷ In this case, there is also no duty to reduce contributions to the pension scheme so the registered partner can provide for alternative retirement provision.⁴⁸
- No (indirect) discrimination on the ground of ethnic origin by provision which grants less remuneration for teachers of foreign origin teaching (optional) courses for "native speakers" aimed at improving the fluency in mother tongue of students with foreign background than for German teachers teaching German as justified by objective reasons, especially the lower demands on teaching skills in this optional course.⁴⁹
- No (unjustified) discrimination by prohibition for teachers to wear headscarf or another piece of clothing such as a cap in school if it is obviously out of the ordinary clothing in the school and the teacher points out his or her religious or philosophical (*weltanschaulich*) motivation for wearing the garment⁵⁰ continuing established case-law on this matter. The same holds for a Basque beret.⁵¹ A teacher who, despite warning, continues to wear a headscarf in class can be dismissed.⁵² On the other hand, it has been held, that a prohibition of wearing a headscarf as a nurse in a catholic hospital constitutes discrimination on the ground of religion as the nurse is capable of fulfilling her duties irrespective of her head garment.⁵³

⁴⁴ Federal Constitutional Court (*Bundesverfassungsgericht*), 6 May 2008, 2 BvR 1830/06, cf. for comments M. Mahlmann, Gleichbehandlung und Familienstand, Myops 2008, p. 46.

⁴⁵ E.g. Schleswig-Holstein Land Administrative Appeals Court (*Schleswig-Holsteinisches Oberverwaltungsgericht*) 22 July 2008, 3 LB 13/06: discrimination by not granting family allowance.

⁴⁶ Federal Administrative Court (*Bundesverwaltungsgericht*), 21 July 2008, 6 B 33/08.

⁴⁷ Berlin-Brandenburg Land Administrative Appeals Tribunal (*Oberverwaltungsgericht Berlin-Brandenburg*), 5 February 2008, 12 B 5.07.

⁴⁸ Lower Saxony Land Administrative Appeals Tribunal (*Niedersächsisches Oberverwaltungsgericht*), 28 April 2008, 8 LA 16/08.

⁴⁹ Federal Labour Court (*Bundesarbeitsgericht*), 7 May 2008, 4 AZR 299/07.

⁵⁰ Federal Administrative Court (*Bundesverwaltungsgericht*), 16 December 2008, 2 B 46/08.

⁵¹ Düsseldorf Land Labour Court (*Landesarbeitsgericht Düsseldorf*), 10 April 2008, 5 Sa 1836/07.

⁵² Wuppertal Labour Court (*Arbeitsgericht Wuppertal*), 29 July 2008, 4 Ca 1077/08 (appeal to Düsseldorf Land Labour Court (*Landesarbeitsgericht Düsseldorf*) is pending).

⁵³ Cologne Labour Court (*Arbeitsgericht Köln*), 6 March 2008, 19 Ca 7222/07 (the parties settled in the next instance, Cologne Land Labour Court (*Landesarbeitsgericht Köln*), 3 December 2008, 3 Sa 785/08).



- No discrimination by rejection of a Muslim applicant for a position as social educator (*Sozialpädagogin*) in a project of vocational integration for migrants, conducted by a church institution of welfare but financed by federal and EU funds (part of EQUAL) since the applicant (not holding an university degree) was not qualified according to job specification in job advertisement (“final degree from university or similar”). The fact that applicant was called by an employee of the institution and asked if she could imagine to join the church does not show that employer was willing to waive the professional requirements in that case.⁵⁴

Other case law exists on the definitions of characteristics, of direct and indirect discrimination and other matters. This case law is reported in the relevant sections below.

Cases within the scope of the AGG or the Directives brought by Roma and Travellers are not reported for 2008.

Further decisions in 2008 include:

1.) General

Federal Labour Court (*Bundearbeitsgericht*), 14 October 2008, 9 AZR 511/07: No retroactive force of AGG for discriminations before 18 August 2006; Lower Saxony *Land* Labour Court (*Landesarbeitsgericht Niedersachsen*), 15 September 2008: Application of AGG on continuous issues (*Dauersachverhalte*) only if they are at least partly persisting after entry into force of AGG; Hamburg *Land* Labour Court (*Landesarbeitsgericht Hamburg*), 19 November 2008, 3 Ta 19/08: refusal of job interview after invitation by the employer indicates that the application to a discriminating job advertisement was not serious, in which case compensation for discrimination is excluded; Federal Labour Court (*Bundearbeitsgericht*), 27 August 2008: No jurisdiction of labour courts if the employer commissions a third party (in this case a lawyer) to publish a job advertisement; Hesse *Land* Labour Court (*Landesarbeitsgericht Hessen*), 6 March 2008, 9 TaBV 251/07: the workers’ council has a right to a prohibitory injunction in cases of gross breaches of anti-discrimination law by employer, such as an advertisement directed to applicants “in their first professional year” as this constitutes an indirect discrimination on the grounds of age.

2.) Age

Lower Saxony *Land* Labour Court (*Landesarbeitsgericht Niedersachsen*), 16 May 2008, 16 Sa 1157/07: global exclusion of employees in social choice (*Sozialauswahl*) of dismissal only because of proximity to retirement age constitutes a discrimination on the ground of age but may be justified; Schleswig-Holstein *Land* Labour Court (*Landesarbeitsgericht Schleswig-Holstein*), 9 December 2008, 5 Sa 286/08: job advertisement, in which a “younger accountant” (“jüngere/r Buchhalter/in”) is searched for, contains discrimination on the ground of age (in concrete case abuse of law); North Rhine-Westphalia *Land* Administrative Appeals Tribunal (*Oberverwaltungsgericht Nordrhein-Westfalen*), 16 April 2008, 6 A 153/06: age limit of 35 years for appointment as civil servant on probation (*Beamtenverhältnis auf Probe*)

⁵⁴ Hamburg *Land* Labour Court (*Landesarbeitsgericht Hamburg*), 29 October 2008, 3 Sa 15/08 (appeal to the Federal Labour Court (*Bundearbeitsgericht*) is currently pending. For further discussion of these cases cf. 4.2 a).

is considered reconcilable with AGG because of sufficient time of employment before retirement and need for differentiated age structure; Oldenburg Administrative Court (*Verwaltungsgericht Oldenburg*), 31. October 2008, 7 B 2870/08: age limit of 65 for maritime pilots (*Schiffslotsen*) is in accordance with AGG because of justified demand of sufficient physical ability; Berlin-Brandenburg Land Labour Court (*Landesarbeitsgericht Berlin-Brandenburg*), 11 September 2008, 20 Sa 2244/07: differentiation of salary only based on the age of the employee in labor agreement for federal public employees (*Bundesangestelltentarifvertrag*) constitutes a direct and unjustified discrimination on the ground of age (appeal to the Federal Labour Court (*Bundesarbeitsgericht*) is currently pending); Cologne Land Labour Court (*Landesarbeitsgericht Köln*), 27 August 2008, 9 Sa 649/08: The statement of an employer that the candidate's knowledge of computing is "out-of-date" is not a circumstance justifying the presumption of discrimination on the ground of age; Hamm Land Labour Court (*Landesarbeitsgericht Hamm*), 7 August 2008, 11 Sa 284/08: public employer (*öffentlicher Arbeitgeber*) owes compensation if he advertises a position for "20-25 years old"-applicants only and rejects the application of a 28-year old candidate if the relevant position is one in the public administration only with an option of transfer to civil service later on but not the position of a civil servant from the beginning; Hamm Land Labour Court (*Landesarbeitsgericht Hamm*), 26 June 2008, 15 Sa 63/08: the fact that a candidate only applies for positions which are advertised in an age-discriminating way may indicate that the applications are not serious but constitute a misuse of law, Federal Labour Court (*Bundesarbeitsgericht*), 19 March 2008, 7 AZR 1100/06: no breach of Directive 78/2000 by provision which permits limitation of contracts for scientific personnel in public research institutions to a maximum of 6 years; Berlin-Brandenburg Administrative Appeals Tribunal (*Oberverwaltungsgericht Berlin-Brandenburg*), 18 September 2008, 6 S 28.08: discrimination by maximum age limit of 44 years for promotion in higher executive service of criminal investigation department is justified by aim to maintain reasonable relation between length of service in this position and entitlement to higher pension; Federal Social Security Court (*Bundessozialgericht*), 9 April 2008, B 6 KA 44/07 R: no revocation of termination of authorization for physician (in this case a pathologist) because of European Law, which was not binding in the time of termination on the ground of age (68 years); Rhineland-Palatine Land Labour Court (*Landesarbeitsgericht Rheinland-Pfalz*), 29 August 2008, 9 Sa 266/08: no discrimination by pension scheme which provides for reduction of benefits in case of early retirement if payments are reduced in all cases of early retirement (e.g. in connection with claim of disability pension); Cologne Land Labour Court (*Landesarbeitsgericht Köln*), 26 June 2008, 9 Sa 220/08: no discrimination on the ground of age by provision in social plan (redundancy programme, *Sozialplan*) which limits the individual pay-off – rising with seniority – to a certain amount (in this case 85.000 Euro); Düsseldorf Land Labour Court (*Landesarbeitsgericht Düsseldorf*), 22 August 2008, 10 Sa 573/08: no (unjustified) discrimination on the ground of age if social plan (redundancy programme, *Sozialplan*) allows for less compensation for employees above the age of 59 if the remaining amount still accomplishes the purpose of such a plan, which is to grant aid for the transitional period until new employment or drawing of retirement allowance; North Rhine-Westphalia Social Security Court (*Landessozialgericht Nordrhein-Westfalen*): no discrimination by provision which limits payment by health insurance for in vitro fertilisation to the (woman's) age of 40 since probability of success is otherwise small.



3) Disability

Berlin-Brandenburg *Land* Labour Court (*Landesarbeitsgericht Berlin-Brandenburg*), 4. December 2008, 26 Sa 343/08: introducing a rolling system of shift work constitutes an unjustified indirect discrimination on the ground of disability if an employee who is due to her disability unable to work in night shifts, is not excepted from it, despite this being possible; Munich *Land* Labour Court (*Landesarbeitsgericht München*), 8 July 2008, 8 Sa 112/08: no discrimination on the ground of disability if in job interview employer asks candidate if he has any mental disorder (appeal to the Federal Labour Court (*Bundesarbeitsgericht*) is pending).

4) Sexual Orientation

Würzburg Administrative Court (*Verwaltungsgericht Würzburg*), 4 November 2008, W 1 K 08.1909: no discrimination on the ground of sexual orientation if exemption from fees for second television/radio which is granted to married couples but not to registered partners (*eingetragene Lebenspartner*) because the court held that there was no discrimination and such a discrimination would be justified to foster procreation by financial benefits for married couples; Stuttgart Administrative Court (*Verwaltungsgericht Stuttgart*), 28 April 2008, 12 K 2264/07: no discrimination by provision in statute of post office clerks' health insurance (*Postbeamtenkrankenkasse*) which excludes registered partners (*eingetragene Lebenspartner*) from the possibility of co-insurance granted to spouses.

5) Race and ethnic origin

Bavarian Higher Administrative Court, Munich (*Bayerischer Verwaltungsgerichtshof München*), 14 August 2008, 7 CE 08.10592: German citizens who qualified for university entrance abroad do not have a right to participate in the process of distribution of university places which are part of the contingent for foreigners, since they may participate in the regular process for Germans and not ethnic origin, only nationality is relevant; Hamm *Land* Labour Court (*Landesarbeitsgericht Hamm*), 17 July 2008, 16 Sa 544/08: indirect discrimination on the ground of ethnic origin of a long-serving employee if employer changes profile of requirements (*Anforderungsprofil*) for his position so that mastery of written German is required although the work could be organized in a way which would render this specification unnecessary (appeal to the Federal Labour Court (*Bundesarbeitsgericht*) is pending); Düsseldorf *Land* Labour Court (*Landesarbeitsgericht Düsseldorf*), 18 June 2008, 7 Sa 383/08: no harassment of Turkish employee by xenophobic scribbling on the toilets in warehouse if no other indication for "hostile environment"; Oldenburg Local Court (*Amtsgericht Oldenburg*), 23 July 2008, E2 C 2126/07: rejection of male foreigner by doorman of a discotheque constitutes discrimination, compensation is reduced to 500 Euro because of testing situation (not final).



6) Religion and belief

Federal Labour Court (*Bundearbeitsgericht*), 18 November 2008, 3 AZR 277/07: not including siblings in provision for dependants of occupational pension scheme does not discriminate against employee who opposes marriage or registered partnership (*eingetragene Lebensgemeinschaft*) because of religious or philosophical (*weltanschaulich*) reasons and therefore does not have offsprings; Rhineland-Palantine *Land* Labour Court (*Landesarbeitsgericht Rheinland-Pfalz*), 2 July 2008, 7 Sa 250/08: no discrimination if employee in a nursing home which is attached to a Church is dismissed because the employee leaves the Church as this is justified by breach of duty of loyalty.



1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

The guarantee of equality⁵⁵ provides, first, for equality before the law,⁵⁶ which has been interpreted by the Federal German Constitutional Court as going beyond the equal application of law and as giving the right to the creation of law that respects the principle of equality in treating essentially equal things equally and essentially unequal things unequally.⁵⁷ The guarantee of equality contains, second, special protection against discrimination on the ground of sex,⁵⁸ parentage, race, language, homeland and origin, faith, or religious or political opinions.⁵⁹ There is a prohibition against disadvantaging somebody because of his or her disability, which implies the admissibility of positive action.⁶⁰ The same applies to sex. It is explicitly stated that the state should support the effective realization of the principle of equality for women and men and works towards abolishing current inequalities.⁶¹

The equality provision of the German Constitution thus combines a broad open-textured guarantee of equality with special prohibitions of discrimination on certain enumerated grounds and certain explicit regulations on positive action.⁶² The broad open-textured guarantee of equality makes it possible to extend the protection against unjustified unequal treatment to grounds not explicitly covered in the special prohibitions. Most notably, sexual orientation was therefore included among the forbidden grounds of discrimination though not explicitly listed in the guarantee of equality. Age is without doubt another characteristic covered, though there is so far no differentiated jurisdiction of the German Constitutional Court on age discrimination.

⁵⁵ Article 3 Basic Law (*Grundgesetz*).

⁵⁶ Article 3.1 All humans are equal before the law.

⁵⁷ Settled case law, BVerfGE (Decisions of the Federal Constitutional Court) 49, 148 (165); 98, 365 (385).

⁵⁸ Article 3.3 and Article 3.2 Basic Law (*Grundgesetz*): Men and women are equal.

⁵⁹ Article 3.3 sentence 1 Basic Law (*Grundgesetz*).

⁶⁰ Article 3.3 sentence 2 Basic Law (*Grundgesetz*).

⁶¹ Article 3.2 sentence 2 Basic Law (*Grundgesetz*).

⁶² There are other provisions, e.g. Article 9.3 sentence 2 Basic Law (*Grundgesetz*) makes null measures directed at impeding the activities of unions and its members.

As Germany is a federal state, the *Länder* (states) have constitutions with their own guarantee of equality whose details differ from the guarantee of equality of the Basic Law.⁶³ In practice, this has not had any significant legal effect due to the supremacy of the federal constitution and the congruent interpretation of fundamental rights by *Land* constitutional courts and the Federal German Constitutional Court.⁶⁴

b) *Are constitutional anti-discrimination provisions directly applicable?*

All fundamental rights, and therefore the guarantee of equality, are binding on the legislature, executive, and judiciary as directly valid law, Art. 1.3 Basic Law.

c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

Fundamental rights have according to settled case law no direct horizontal effect.⁶⁵

⁶³ State/Provision /Ground/Content concerning differences from the federal guarantee of equality: Bavaria: Constitution of the Free State of Bavaria (*Verfassung des Freistaates Bayern*), Article 118a; Disability; promotion of equalisation; Berlin: Constitution of Berlin (*Verfassung von Berlin*), Article 10 Section 2; Sexual identity; prohibition of discrimination; Ibid., Article 11; Disability; promotion of equality; Brandenburg: Constitution of the *Land* of Brandenburg (*Verfassung des Landes Brandenburg*), Article 12 Section 2; Sexual identity, nationality, social background; prohibition of discrimination; Ibid., Article 12 sec 4; Disability; promotion of equality; Ibid., Article 25; Ethnic minority of the Sorbs; Right to own national identity, language, culture, schools, participation in legislation regarding Sorbian affairs; Bremen: Constitution of the Free Hanseatic City of Bremen (*Landesverfassung der Freien Hansestadt Bremen*), Article 2 Section 2; Social background; prohibition of discrimination; Ibid., Article 2 Section 3; ; Disability; promotion of equality; Mecklenburg - West Pomerania: Constitution of the *Land* of Mecklenburg - West Pomerania (*Verfassung des Landes Mecklenburg-Vorpommern*), Article 17a, Article 18; Old age, disability, ethnic and national minorities and groups; special protection, when minority or group consists of German citizens; North Rhine - Westphalia: Constitution for the *Land* of North Rhine-Westphalia (*Verfassung für das Land Nordrhein-Westfalen*), Article 13; Religion; prohibition on denying schooling for religious reasons in public schools in absence of confession schools; Rhineland - Palatinate: Constitution for Rhineland-Palatinate (*Verfassung für Rheinland-Pfalz*), Article 17 Section 2; Diverse grounds (groups of persons (*Personengruppen*)); Prohibition of discrimination; Ibid., Article 17 Section 4; Ethnic and linguistic minorities; Respect (*Achtung*); Ibid., Article 64; Disability; protection, promotion of equality and integration; Saxony: Constitution of the Free State of Saxony (*Verfassung des Freistaates Sachsen*), Article 6; Ethnic minority of the Sorbs; Right to own national identity, language, culture, tradition, schools; Saxony - Anhalt: Constitution of the *Land* of Saxony-Anhalt (*Verfassung des Landes Sachsen-Anhalt*), Article 37; Ethnic minorities; Protection of cultural independence and political participation; Ibid., Article 38; Old age, disability; protection of disabled and elderly people, promotion of equality; Schleswig - Holstein: Constitution of the *Land* of Schleswig-Holstein (*Verfassung des Landes Schleswig-Holstein*), Article 5 Section 1, 2; Ethnic minorities, especially Danes and Frisians; Protection of cultural independence and political participation, protection of Danes and Frisians and promotion of their affairs; Ibid., Article 5a; protection of rights and interests of people in need of care; promotion of accommodation; Thuringia: Constitution of the Free State of Thuringia (*Verfassung des Freistaats Thüringen*), Article 2 Section 3; Ethnos, social background, sexual orientation; Prohibition of discrimination; Ibid., Article 2 Section 4; special protection of people with disabilities, promotion of equal participation in social life.

⁶⁴ See Article 31 Basic Law (*Grundgesetz*): Federal Law takes precedence over *Land* law. However, Article 142 Basic Law (*Grundgesetz*) states that notwithstanding the provision of Article 31, provisions of *Land* constitutions guaranteeing basic rights in conformity with Articles 1 to 18 of the Federal Constitution remain in force. This provision gives *Länder* some space for independent guarantees of fundamental rights.

⁶⁵ BVerfGE 7, 198.



However, they have an indirect horizontal effect (*mittelbare Drittwirkung*) through the interpretation of open-textured provisions in private law, most importantly the general provisions on bona fide and equity.⁶⁶

⁶⁶ BVerfGE 7, 198, settled case law, see supra O.1. A possible exception to this rule is Art. 1 Basic Law (*Grundgesetz*).



2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

The constitutional guarantee of equality covers explicitly sex, parentage, race, language, homeland and origin, faith, religion, political opinion and disability. As the guarantee includes an open-textured general principle, other grounds are potentially included as well. The Federal Constitutional Court regards sexual orientation and identity as part of the human personality as protected by the guarantee of human dignity and the general right to personality.⁶⁷ The guarantees in the constitutions of the *Länder* differ in their details from this list, without this being – as mentioned – of practical significance.⁶⁸

The AGG covers all grounds of the directives. Sexual orientation is substituted by the term sexual identity, without this having any discernable practical legal relevance.

The SoldGG covers all grounds with the exception of age and disability, taking advantage of the exception for the military service in Art. 3.4 Directive 2000/78. There are, however, regulations on severely disabled soldiers.⁶⁹

Other specialised legislation contains slightly modified lists. The main examples are the following: Section 8.1 Federal Law on the Civil Service (*Bundesbeamtengesetz*) repeats the principle of access to the civil service according to aptitude, qualifications, and professional achievements and prohibits discrimination in access to the civil service on the grounds of sex, parentage, race or ethnic origin, disability, religion and belief, political opinions, origin, relations or sexual identity.⁷⁰ Age (*Alter*) is not explicitly included, though implicitly covered, among others through Sec. 24 AGG. Section 67 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*) obliges employers and employees in the public sector to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities, or attitude or sex or sexual identity.⁷¹

⁶⁷ Settled case law, see BVerfGE 49, 286; 96, 56; 115, 1. The right includes finding and cognition of the identity, *ibid.* The right to a name according to sexual orientation is encompassed by this right, including for homosexual transsexuals, *ibid.*

⁶⁸ See Footnote 64.

⁶⁹ Cf. the decision by the Federal Administrative Court (*Bundesverwaltungsgericht*), 11 March 2008, 1 WB 8/08 which clarifies that there is no analogous application of the AGG in those cases.

⁷⁰ *Geschlecht, Abstammung, Rasse oder ethnische Herkunft, Behinderung, Religion oder Weltanschauung, politische Anschauungen, Herkunft, Beziehungen oder sexuelle Identität.*

⁷¹ *Rasse, ethnische Herkunft, Abstammung oder sonstige Herkunft, Nationalität, Religion oder Weltanschauung, Behinderung, Alter, politische oder gewerkschaftliche Betätigung oder Einstellung, Geschlecht, sexuelle Identität.*



At *Land* level, the legal regulations for civil servants and other public employees contain similar provisions, though slightly differing in detail, notably as to the explicit inclusion of sexual orientation.⁷²

According to Section 75.1 Work Constitution Act (*Betriebsverfassungsgesetz*), employers and work councils are under an obligation to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitudes, sex or sexual identity.⁷³ Section 27.1 Law on Bodies of Executives (*Sprecherausschussgesetz*) contains an equivalent provision for executives.

As the latter regulations list characteristics only as examples, other comparable types of discrimination are prohibited as well.

The general principle of equal treatment of employees protects employees generally against unequal treatment without objective reason. It is generally held that discrimination on the ground of characteristics listed in Section 67.1 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*) or Section 75.1 Work Constitution Act lack objective reason and can be regarded as unlawful arbitrary treatment. The AGG enforces this view.

⁷² See Annex 1.

⁷³ *Rasse, ethnische Herkunft, Abstammung oder sonstigen Herkunft, Religion, Nationalität, Religion, Weltanschauung, Behinderung, Alter, politische oder gewerkschaftliche Betätigung oder Einstellung, Geschlecht, sexuelle Identität.*

Legislation regulating public and private employment includes several measures at federal and *Länder* level prohibiting discrimination on the ground of disability.⁷⁴ There is some law on the prohibition of discrimination on the grounds of sexual orientation⁷⁵ and other *Land* laws against discrimination.⁷⁶

⁷⁴ Cf. Section 81.2 Social Code IX (*Sozialgesetzbuch IX*), referring to the AGG. The prohibition of discrimination on the basis of disability binds the partners to a collective wage agreement (unions and management), BAGE (Decisions of the Federal Labour Court) 108, 333. *Land* anti-discrimination laws exist in all German *Länder*: Baden-Wuerttemberg: *Land* Law on Promoting the Equality of People with Disabilities (*Landesgesetz zur Gleichstellung von Menschen mit Behinderungen*), Date: 03.05.2005, Gesetzblatt 2005, 327; Bavaria: Bavarian Law on Promoting the Equality, Integration and Participation of People with Disabilities (*Bayerisches Gesetz zur Gleichstellung, Integration und Teilhabe von Menschen mit Behinderung*), Date: 09.07.2003, Gesetz- und Verordnungsblatt 2003, 419, last amendment: 22.07.2008, Gesetz- und Verordnungsblatt 2008, 479; Berlin: Law on Equal Opportunities for People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung*), Date: 17.05.1999, last amendment: new publication as per 25.06.2006, Gesetz- und Verordnungsblatt 2006, 957; Brandenburg: Law on Promoting the Equality of Disabled People in the *Land* of Brandenburg (*Gesetz zur Gleichstellung behinderter Menschen im Lande Brandenburg*), Date: 20.03.2003, Gesetz- und Verordnungsblatt I 2003, 42; Bremen: Bremen Law on Promoting the Equality of Disabled People (*Bremisches Gesetz zur Gleichstellung von Menschen mit Behinderung*), Date: 18.12.2003, Gesetzblatt 2003, 413, last amendment: 08.07.2008, Gesetzblatt 2008, 231; Hamburg: Hamburg Law Promoting the Equality of Disabled People (*Hamburgisches Gesetz zur Gleichstellung behinderter Menschen*), Date: 10.03.2005, Hamburgisches Gesetz- und Verordnungsblatt 2005, 75; Hessen: Hesse Law on Promoting the Equality of People with Disabilities (*Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen*), Date: 20.12.2004, Gesetz- und Verordnungsblatt I 2004, 482, last amendment: 05.06.2007, Gesetz- und Verordnungsblatt I 2007, 294; Mecklenburg – West Pomerania: Law on Promoting the Equality, Equal Participation, and Integration of Disabled People (*Gesetz zur Gleichstellung, gleichberechtigten Teilhabe und Integration von Menschen mit Behinderungen*), Date: 10.07.2006, Gesetz- und Verordnungsblatt Mecklenburg-Vorpommern 2006, 539; Lower Saxony Law on the Equality of People with Disabilities (*Niedersächsisches Behindertengleichstellungsgesetz*), Date: 25.11.2007, Niedersächsisches Gesetz- und Verordnungsblatt 2007, 661; North Rhine – Westfalia: Law of the *Land* of North Rhine – Westfalia on Promoting the Equality of People with Disabilities (*Gesetz des Landes Nordrhein-Westfalen zur Gleichstellung von Menschen mit Behinderung*), Date: 16.12.2003, Gesetz- und Verordnungsblatt Nordrhein-Westfalen 2003, 766, last amendment: 18.11.2008, Gesetz- und Verordnungsblatt Nordrhein-Westfalen 2008, 766; Rhineland – Palatinate: *Land* Law on Promoting the Equality of Disabled People (*Landesgesetz zur Gleichstellung behinderter Menschen*), Date: 16.12.2002, Gesetz- und Verordnungsblatt 2002, 481; Saarland: Law No.1541 on Promoting the Equality of People with Disabilities in Saarland (*Gesetz Nr. 1541 zur Gleichstellung von Menschen mit Behinderungen im Saarland*), Date: 26.11.2003, Amtsblatt 2003, 2987; last amendment: 15.02.2006, Amtsblatt 2006, 474; Saxony: Law on Improving Integration for People with Disabilities in the Free State of Saxony (*Gesetz zur Verbesserung der Integration von Menschen mit Behinderung im Freistaat Sachsen*), Date: 28.05.2004, Sächsisches Gesetz- und Verordnungsblatt 2004, 196, 197, last amendment: 14.07.2005, Sächsisches Gesetz- und Verordnungsblatt 2005, 167, 176; Saxony-Anhalt: Law on the Equality of Opportunity and Against Discrimination of Disabled People in the *Land* of Saxony-Anhalt (*Gesetz zur Chancengleichheit und gegen Diskriminierung behinderter Menschen im Land Sachsen-Anhalt*), Date: 20.11.2001, Gesetz- und Verordnungsblatt LSA 2001, 457, last amendment: 22.12.2004, Gesetz- und Verordnungsblatt LSA 2004, 856; Schleswig – Holstein: Law on Promoting the Equality of Disabled People of the *Land* of Schleswig-Holstein (*Gesetz zur Gleichstellung behinderter Menschen des Landes Schleswig-Holstein*), Date: 16.12.2002, Gesetz- und Verordnungsblatt 2002, S. 264, last amendment: 18.11.2008, Gesetz- und Verordnungsblatt 2008, 582; Thuringia: Thuringian Law on Promoting the Equality and Improving the Integration of People with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderungen*), Date: 16.12.2005, Gesetz- und Verordnungsblatt 2005, 353.

⁷⁵ See Berlin: Law on Article 10.2 of the Constitution of Berlin (*Gesetz zu Artikel 10 Abs. 2 der Verfassung von Berlin*), 24 June 2004; Saxony-Anhalt: Law on Eliminating the Disadvantages faced by Lesbians and Homosexuals (*Gesetz zum Abbau von Benachteiligungen von Lesben und Schwulen*), 22 December 1997.

⁷⁶ Section 15.2 sentence 3 of the Saarland Media Law (*Saarländisches Mediengesetz*) provides for non-discriminatory radio programmes that increase – among others the – respect for the sexual identity of persons; Section 6.3 Law on Public Security and Order of the Saxony-Anhalt *Land* (*Gesetz über die öffentliche Sicherheit und Ordnung des Landes Sachsen-Anhalt*) provides that discretion of the police has to be non-discriminatory,



2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*
Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

The AGG contains no legal definitions of the characteristics.⁷⁷

Disability

Section 2 Social Code IX (*Sozialgesetzbuch IX*) and Section 3 of the Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) provide the most important legal definition of disability. According to these provisions human beings are disabled if their physical functions, mental faculties or their psychological health have a high probability of differing from the state typical for the given age for longer than 6 months and if, in consequence, their participation in society is impaired. This definition is close to the findings of the ECJ in C-13/05 (*Chacón Navas*).

Human beings are *schwerbehindert* (severely disabled) if their disability reduces their ability to participate in working life by at least 50%. Persons with a degree of disability of less than 50% but more than 30% are treated as severely disabled persons if they cannot find or maintain employment due to their disability.⁷⁸ The degree of disability is established by the administration⁷⁹ applying standards established by experts and the administration, the details of which are contentious. A minimum impairment of 20% is necessary for this procedure.⁸⁰

listing sex, parentage, race, disability, sexual identity, language, home and origin, belief, religious or political opinions (*Geschlecht, Abstammung, Rasse, Behinderung, sexuelle Identität, Sprache, Heimat, Herkunft, Glaube, religiöse oder politische Anschauungen*).

⁷⁷ The explanatory report gives some, however, not binding indication, cf. Bundestagsdrucksache 16/1780, 31. It is explained that the term race does not imply the acceptance of racist theories. It is stated that ethnic origin is to be understood according to the definitions of CERD, including race, colour, parentage, national origin or ethnicity, without clarifying the exact delineation of these terms. Disability is to be understood as in Section 2 Social Code IX (*Sozialgesetzbuch IX*) and Section 3 of the Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) (see below in the text). There is recent case law about this reference – both affirming (Brandenburg *Land* Labour Court (*Landesarbeitsgericht Berlin-Brandenburg*), 4 December 2008, 26 Sa 343/08) and contesting it (Düsseldorf *Land* Labour Court (*Landesarbeitsgericht Düsseldorf*), 14 May 2008, 12 Sa 256/08, appeal to the Federal Labour Court (*Bundesarbeitsgericht*) is pending). Sexual identity is to include homosexual, bisexual, transsexual and intersexual persons. In legal commentary, transsexuality is regarded as a matter of gender, not sexual identity, cf. Mahlmann, in: Rudolf/Mahlmann, *GleichbehandlungsR*, § 3 para 63 with further references to the correspondent jurisdiction of the ECJ.

⁷⁸ Section 2.3 Social Code IX (*Sozialgesetzbuch IX*).

⁷⁹ Section 69.1 Social Code IX (*Sozialgesetzbuch IX*).

⁸⁰ Section 69. 1 sentence 6 Social Code IX (*Sozialgesetzbuch IX*).



The *Land* disability laws mostly follow the definition of disability.⁸¹

- b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion'; or a "disability", sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

Race and ethnic origin

The guarantee of equality of the Basic Law lists “race” (*Rasse*) among the characteristics on the ground of which discrimination is prohibited. It is commonly held that this term does not refer to any real difference between human beings as, from an anthropological point of view, different human races do not exist. The persistent use of “race” in English terminology and its counterpart in the Basic Law leads therefore to discussion and criticism which has an impact on the legal terminology used in (draft) legislation dealing with the matter.⁸²

Race is defined as actual or alleged characteristics that are biologically inherited.⁸³ It is noteworthy that anti-Semitism is regarded as discrimination on the ground of race, not of religion, because of the historic background of Nazi ideology.⁸⁴ Ethnic origin is covered by the term “race”. The belonging to autochthonous minorities (i.e. the Danish minority, the Sorbian people, the Frisians in Germany and the German Sinti and Roma)⁸⁵ is determined in *Land* law with reference to subjective standards such as self-definition and other indicators.⁸⁶

Apart from constitutional law, there are various special laws that refer to race, for example the law on residence,⁸⁷ or the law on the restitution of victims of persecution during the period of Nazi government.⁸⁸ In criminal law, there are provisions penalising incitement to racial hatred.⁸⁹ In these contexts race is defined along the lines of constitutional law.

⁸¹ See for the standard formulation Section 3.1 Law on the Equality of the Disabled (*Behindertengleichstellungsgesetz*) Nordrhein-Westfalen; Section 4 Berlin *Land* Equality Law (*Landesgleichberechtigungsgesetz*); for a slightly different definition cf. Section 2.1 Law on the Equality of the Disabled (*Behindertengleichstellungsgesetz*) Saxony-Anhalt: People are disabled if they have physical, psychological or mental impairments or limitation which is not only temporary (i.e. longer than six months) and who are the object of measures, circumstances or treatment by the State and society that limit or worsen their living conditions.

⁸² The Federal German Constitutional Court used the term “racial” (*rassisch*) only in quotation marks, cf. BVerfGE 23, 98, 105 et seq.

⁸³ See Sachs, HStR V, § 126 para 44; Osterloh, in: Sachs, Grundgesetz, 5. ed., 2009, Article 3 para 293, 294.

⁸⁴ See BVerfGE 23, 98; Federal Constitutional Court, 1 BvR 1056/95, 6 September 2000.

⁸⁵ These groups come under the Council of Europe Framework Convention for the Protection of Minorities, see the declaration of Germany stating: “National Minorities in the Federal Republic of Germany are the Danes of German citizenship and the members of the Sorbian people with German citizenship. The Framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma of German citizenship”.

⁸⁶ See below 3.2.8 and references.

⁸⁷ E.g. Section 60.1 Residence Law (*Aufenthaltsgesetz*): residence rights in the case of persecution on the grounds of race in a person’s home country.

⁸⁸ E.g. Section 1.6 Property Law (*Vermögensgesetz*).

⁸⁹ Section 130 Penal Code (*Strafgesetzbuch*).



Religion and belief

The most important definition of religion and belief stems from the interpretation of the guarantee of freedom of religion⁹⁰ by the Federal German Constitutional Court. Here the freedom of faith, conscience and of religious and philosophical (*weltanschaulichen*) belief is protected. The terms religion and belief are not defined at constitutional level. However, through the rulings of the Federal Constitutional Court and legal science these terms have gained a more or less uncontested meaning. Faith in this context is interpreted as a subjective conviction relating to religion or a philosophical belief (*Weltanschauung*) independently of the content of the religion or belief. Religion and belief encompass a wide range of systems of convictions not limited to those which are well-established.⁹¹ Often, religion and belief are taken to be any specific views as regards the whole of the world and the origin and purpose of mankind which gives sense to human life and the world.⁹² To distinguish between religion and philosophical belief, reference is made to the concepts of transcendence and immanence. Religion transcends the world whereas philosophical belief is not a metaphysical, but immanent system of convictions.⁹³ This distinction is contested in detail in legal science. But these questions have little practical relevance. For example, the Federal Constitutional Court accepted as self-evident that Bahá'í is a religion.⁹⁴ It relied in this context on current trends in society, cultural tradition and the understanding of religion in general and in religious science.⁹⁵ Beyond that, a teleological interpretation of the fundamental freedom of religion is regarded as being decisive.⁹⁶

Sexual orientation

As the AGG, other laws refer to sexual identity (*sexuelle Identität*) rather than sexual orientation.⁹⁷ The Federal German Constitutional Court refers to both as aspects of the human autonomous personality.⁹⁸ This encompasses homosexuality and transsexuality, without excluding any other imaginable orientation.⁹⁹

Age

Age is generally understood as biological age.

There is no explicit reference to Recital 17 of Directive 2000/78/EC.

- c) *Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

There are no such general restrictions (but cf. 4.7.5).

⁹⁰ Article 4.1 Basic Law (*Grundgesetz*).

⁹¹ The Federal German Constitutional Court held in an early decision (BVerfGE 12, 1 (4)) that religion refers only to the traditional religions established among the cultured people. This jurisdiction has been given up.

⁹² BVerfGE 90, 112 (115).

⁹³ Ibid.

⁹⁴ BVerfGE 83, 341 (353).

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ See Article 10.2 Constitution of Berlin (*Verfassung von Berlin*).

⁹⁸ See Federal Constitutional Court (*Bundesverfassungsgericht*), 6.12.2005, 1 BvL 3/03, para 48.

⁹⁹ Ibid. para 48 et seq. On transsexuals, cf Fn 77.

- d) *Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*
- *Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

Sec. 4 AGG provides that any unequal treatment on the basis of several prohibited grounds has to be justified as to every of these grounds. Sec. 27.5 AGG states that in cases of multiple discrimination the Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*) and the competent agents of the Federal government and the German *Bundestag* are supposed to cooperate. The rules in place (within their general limits) would allow for tackling these cases. In the absence of substantive data on these cases and respective case-law, however, it is hard to say if legislation on this matter would be necessary.

- e) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

So far, no German jurisdiction establishing multiple discrimination of Art. 13 grounds and gender is reported.

2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

There is no explicit regulation of this matter in the AGG. The definition of discrimination (see below 2.2) is, however, generally understood as covering assumed characteristics. This is necessarily the case for race, as different human races in the scientific sense do not exist.

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

There is no explicit regulation of discrimination based on association. The new regulations of the AGG are interpreted as potentially covering such cases, though there is no case law in this respect.¹⁰⁰

¹⁰⁰ Däubler, AGG, § 1 para 97; on the background in European law, Mahlmann, in: Mahlmann/Rudolf, GleichbehandlungsR, § 3 para 83, 104.



2.2 Direct discrimination (Article 2(2)(a))

a) *How is direct discrimination defined in national law?*

The AGG contains the following definition of direct discrimination, following the German version of the directives:

Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the prohibited grounds.¹⁰¹

The guarantee of equality establishes the principle of equal treatment as a fundamental right at the constitutional level.¹⁰² This provision, however, contains no explicit legal definition of direct discrimination. The definitions in use have been developed by the German Constitutional Court. At the constitutional level, most doctrinal developments have been initiated by cases implying discrimination on the ground of sex.¹⁰³ This case law forms the blueprint for the concept of discrimination as used in other areas of the law as well.

According to settled case law, unequal treatment presupposes the unequal treatment of essentially equal matters. In the case of a direct discrimination (though this term is not necessarily used), the unequal treatment must be based on the particular characteristic. The German Federal Constitutional Court has emphasised in some early decisions the need of an intention of the discriminator.¹⁰⁴ This precondition has been weakened in a more recent decision. A discrimination is given even if the act concerned was not deliberately discriminatory but had other aims or if discrimination is only one factor in a “bundle of motives” (*Motivbündel*).¹⁰⁵ Consequently, no decisive causal link between the characteristic and the discrimination is needed. It suffices that the characteristic is part of the (negative) criteria that lead to the discriminatory behaviour.

Section 81.2 Social Code IX (*Sozialgesetzbuch IX*) prohibits discrimination on the ground of disability in work relations for severely disabled persons and persons of equivalent status,¹⁰⁶ referring to the AGG, including its regime of justifications.¹⁰⁷

¹⁰¹ Sec. 3.1 sentence 1 AGG: *Eine unmittelbare Benachteiligung liegt vor, wenn eine Person wegen eines in § 1 genannten Grundes einer weniger günstige Behandlung erfährt, als eine andere Person in einer vergleichbaren Situation erfährt, erfahren hat oder erfahren würde.*

¹⁰² Article 3 Basic Law (*Grundgesetz*).

¹⁰³ Article 3.2 and 3.3 Basic Law (*Grundgesetz*).

¹⁰⁴ BVerfGE 75, 40 (70).

¹⁰⁵ BVerfGE 89, 276 (289).

¹⁰⁶ The Federal Labour Court ruled that already before the coming into force of the AGG and amendment of Art. 81.2 Social Code IX, the personal scope of the non-discrimination rule in the old version of 81.2 Social Code IX was to be interpreted as covering all kinds of disability as understood in Community Law (direct/indirect discrimination), cf. Federal Labour Court (*Bundesarbeitsgericht*), 4 April 2007, 9 AZR 823/06.

¹⁰⁷ The Federal Labour Court has interpreted this provision before the enactment of the AGG with explicit reference to the definitions of Directive 2000/78/EC. According to the Federal Labour Court, a direct discrimination shall be deemed to occur where one person is treated less favourably than another has been or would be treated in a comparable situation, cf. Federal Labour Court *Neue Zeitschrift für Arbeitsrecht* 2005, p. 870, 872.

Section 7.2 sentence 2 Disabled Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) defines discrimination as follows: Discrimination shall be deemed to occur if disabled and able-bodied persons are treated differently without a compulsory reason and the equal participation of disabled persons in society is in consequence directly or indirectly impaired.

Further prohibitions of direct discrimination are found in various special laws, with minor variations on the definitions listed above.

b) Are discriminatory statements or discriminatory job vacancies announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)

Sec. 11 AGG states that discriminatory job vacancy announcements are prohibited. Such an advertisement, e.g. expressing a preference for applicants of a certain age,¹⁰⁸ may constitute a direct discrimination.¹⁰⁹ As to other discriminatory statements, there is no explicit regulation beyond the norms of harassment. The prohibition of discrimination in the AGG is, however, open to an interpretation covering these cases.

c) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).

The AGG provides in Sec. 8.1, that an unequal treatment which is based on a characteristic shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate, following closely the wording of the Directives.

Sec. 9 AGG contains a regulation of the justification on the ground of religion and belief. A difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity, Sec. 9. 1. Sec. 9.2. AGG provides that the prohibition of different treatment on the grounds of religion or belief shall be without prejudice to the right of the religious community referred to under Section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation.

Sec. 10 AGG provides that differences of treatment on grounds of age shall not constitute discrimination, if, they are objectively and reasonably justified by a legitimate aim.

¹⁰⁸ Recently: Schleswig-Holstein Land Labour Court (*Landesarbeitsgericht Schleswig-Holstein*), 9 December 2008, 5 Sa 286/08.

¹⁰⁹ Däubler, AGG, § 3 para 16a.



The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include, among others:

- the setting of special conditions on access to employment and vocational training, including special employment and work conditions, including remuneration and dismissal conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection, Sec. 10 No 1;
- the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment, Sec. 10 No 2;
- 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, Sec. 10. No 3;
- the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, Sec. 10 No. 4;
- an agreement, that provides for the termination of an employment relation without dismissal at the time, when the employee is entitled to apply for pension on the ground of age, notwithstanding the regulations in Sec. 41 Social Code VI (*Sozialgesetzbuch VI*), Sec. 10 No 5;
- differentiations of benefits in social plans in the sense of the Work Constitution Act (*Betriebsverfassungsgesetz*), if the parties have created a settlement graduated according to age and staff membership in a firm, in which the chances on the labour market, which are essentially dependent on age, are visibly considered, or that excluded employees who are economically secure from benefits of the social plan, as they are entitled to pensions, be it after reception of unemployment benefits, Sec. 10 No 6.

There are further justifications for general civil law. According to Sec. 20.1 AGG differences in treatment on the ground of religion, disability, age, sexual identity or sex (the latter not covered in this report) are not prohibited if there is an objective reason for the treatment. As exemplary cases the following are listed:

- the avoiding of dangers, the prevention of damage or other comparable aims, Sec. 20.1 Nr. 1;
- the protection of the intimate sphere or personal security, Sec. 20.1 Nr. 2;
- the granting of special advantages without a given interest in equal treatment, Sec. 20.1 No. 3;¹¹⁰
- in case of differences in treatment on the ground of religion, if the treatment by religious communities, their institutions independently of their legal form or associations, the aim of which is to cultivate in common a religion is justified in the light of freedom of religion and the respective self-understanding, 20.1 No 4.

Sec. 20.2 sentence 3 AGG provides that a difference in treatment on the ground of religion, disability, age or sexual identity is for private insurances only admissible, if it is based on acknowledged principles of calculations adequate to the risks, especially on actuarial evaluation based on statistical data.

¹¹⁰ This case is supposed to cover cases of special advantages to one group, e.g. bonuses for students, that would not be extended to everybody.



Sec. 19.3 AGG contains a special justification for unequal treatment in the case of housing. Differences in treatment in the context of letting housing is permissible to create and maintain socially stable structures of inhabitants and balanced structures of settlement and balanced economic, social and cultural relations.¹¹¹

Sec. 24 AGG provides for an analogous extension of the regulations of the AGG to civil servants, including exceptions.

Other areas of the law contain no explicit regulations of justifications.

As to the constitutional guarantee and the justification of unequal treatment, the Federal German Constitutional Court holds that any unequal treatment on the grounds of sex (which is, as mentioned above, the standard setting characteristic in the framework of Art. 3 Basic Law) is unconstitutional unless it is a necessary consequence of attempts to resolve problems which by their very nature affect men or women only.¹¹² Whether any direct discrimination on the grounds listed in Article 3.3 Basic Law can be justified or not is the subject of debate. Some argue for this interpretation, others regard Article 3.3 Basic Law as a strict interdiction of any discrimination.¹¹³

The general doctrine of justification of unequal treatment is of relevance in this context as well, given the open-textured nature of Art. 3 Basic Law, that extends its scope of application to such characteristics as age or sexual identity. Art 3.1 Basic Law has been interpreted in the older case law of the Court as an interdiction of arbitrary treatment within the limits of material justice.¹¹⁴ More recent decisions have increased the demands for unequal treatment to be justified beyond this position. The Federal German Constitutional Court has ruled that as the principle of equality before the law intends to prevent the unjustified unequal treatment of persons, the legislature is regularly subject to strict constraints in cases of unequal treatment. These legal constraints become stricter depending on the extent to which the personal characteristics that constitute the ground for unequal treatment resemble the characteristics listed in Article 3.3 of the Basic Law and there is therefore greater danger that unequal treatment based on them will lead to discrimination against a minority. The strict constraint is, however, not limited to discrimination against persons. It also exists where unequal treatment of subject matters leads to the unequal treatment of groups of people. The strictness of the constraint depends on the degree to which the persons affected are able to change the characteristics that are the ground for unequal treatment through their behaviour. In addition, the limits on the legislature are more narrowly circumscribed depending on the extent to which the unequal treatment of persons or subject matters can affect disadvantageously the enjoyment of basic liberties.¹¹⁵ As a result, direct discrimination under the guarantee of equality is possible, but only within the limit of differentiated standards of justification. These standards range from a test of arbitrariness to strict scrutiny of proportionality.

¹¹¹ Cf. 3.2.10 on the question whether or not this exception is in line with Community Law.

¹¹² BVerfGE 57, 335 (342); 85, 191 (207).

¹¹³ Osterloh, in Sachs, GG, Article 3 para 241, 254 (justification possible); Sachs, HStR V, § 126 para 52 (no justification possible).

¹¹⁴ BVerfGE 1, 14 (52); 25, 101 (105).

¹¹⁵ BVerfGE 88, 87 (96).



- d) *In relation to age discrimination, if the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?*

There is no special indication how the comparison is to be made.

2.2.1 Situation Testing

- a) *Does national law permit the use of ‘situational testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court?. For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation?*

There is no explicit regulation of situational testing in German law. Its use depends therefore on the law of evidence of the respective field. One can only speculate what role situational testing could play given the absence of any significant practical use of it in a legal context by NGOs or clarifying case law.¹¹⁶

As far as a shift of the burden of proof is regulated, Sec. 22 AGG, situational testing could be used as evidence which makes the assumption of discrimination plausible.¹¹⁷

- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

Given the lack of case-law, cf. 2.2.1 a), this question cannot be answered.

- c) *Outline important case-law within the national legal system on this issue.*

There is no important case-law on the matter, cf. 2.2.1.a).

- d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs, equality body, etc)*

There is no such practice of any relevant scope, cf. 2.2.1.a).

2.3 Indirect discrimination (Article 2(2)(b))

- a) *How is indirect discrimination defined in national law?*

¹¹⁶ E.g. in civil proceedings an expert opinion, Section 405 Code of Civil Procedure (*Zivilprozessordnung*), could refer to the results of situational testing. There is, however no case law on the matter. According to Section 284 sentence 2 Code of Civil Procedure (*Zivilprozessordnung*) evidence beyond the legally prescribed type and form can be used if the parties agree. For a recent case cf. Oldenburg Local Court (*Amtsgericht Oldenburg*), 23 July 2008, E2 C 2126/07, above 0.3.

¹¹⁷ Cf. the explanatory report, Bundestagsdrucksache 16/1780 p. 47.

Sec. 3.2 AGG provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having one of the characteristics within the scope of the AGG at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹¹⁸

The case law on predecessors of this norm give some indications of its possible interpretation.¹¹⁹ The Federal Labour Court has ruled that discrimination on the ground of sex is not only supposed to have taken place if one sex is always disadvantaged in respect to working conditions but if there are significant differences (*wesentliche Unterschiede*) between the number of men and women among privileged and disadvantaged employees.¹²⁰ According to this ruling, the discrimination can be based on a regulation, a contract or the actual behaviour of the employer. The latter clarifies that indirect discrimination can result from factors other than just regulations, as now explicitly stated in Art. 3.2 AGG.

The question of what difference in number establishes a “significant difference” (potentially relevant for the interpretation of “particular disadvantage”) has not been clarified by the courts and is the object of debate. A ratio of 1 woman to 10 men enjoying better working conditions has been regarded as a significant difference.¹²¹ In another decision, a ratio of about 80% women to 20% men was deemed sufficient.¹²²

Indirect discrimination does not presuppose the intention to discriminate. It is regarded as sufficient to establish a significantly greater (*wesentlich stärker*) negative impact of the regulation, contract or actual behaviour of the employer on one sex.¹²³ This case law is based on ECJ case law.¹²⁴

The objective reason for the discrimination has to be weighed against the consequences of the unequal treatment to establish whether or not the unequal treatment is justified. Any rule established by the employer has to be suitable for its purpose and necessary to achieve it.

¹¹⁸ Sec. 3.2 AGG: *Eine mittelbare Benachteiligung liegt vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen wegen eines in § 1 genannten Grundes gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn, die betreffenden Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich.*

¹¹⁹ Below the constitutional level, the concept of indirect discrimination has been elaborated in particular by the labour courts and legal science in the context of the application of sex discrimination, cf. Sec. 611a, 612.3 Civil Code, now repealed by the Law transposing European Anti-discrimination Directives. This formed the basis for solving problems connected with discrimination in other areas, e.g. on the grounds of disability. Though indirect discrimination was not defined in Section 611a Civil Code on sex discrimination it has been assumed that it was nevertheless covered by this regulation as only this interpretation brings it in line with Directive 76/207/EC, where this concept is explicitly stated in Article 2.1. As other examples from the case law, referred to in the text show, indirect discrimination is no new concept in German law.

¹²⁰ See Federal Labour Court (*Bundesarbeitsgericht*) *Neue Juristische Wochenschrift* 1992, 1125; Federal Labour Court (*Bundesarbeitsgericht*), *Neue Juristische Wochenschrift* 1993, 3091, 3093.

¹²¹ Federal Labour Court (*Bundesarbeitsgericht*) *Neue Juristische Wochenschrift* 1993, 3091, 3094.

¹²² Federal Labour Court (*Bundesarbeitsgericht*), *Neue Juristische Wochenschrift* 1992, 1125, 1126f.

¹²³ Federal Labour Court (*Bundesarbeitsgericht*) *Neue Juristische Wochenschrift* 1993, 3091, 3094.

¹²⁴ ECJ, ECR Cs. 170/84, 1986 I-1607 (*Bilka*).

The reason must not be disproportionate as to the principle of equal treatment, for example non-discriminatory requirements set out in employment policies.¹²⁵

The former prohibition of discrimination based on disability, Section 81.2 Social Code IX (*Sozialgesetzbuch IX*), which now refers to the AGG, has been interpreted already before by the Federal Labour Court, explicitly referring to Article 2.2 b) of Directive 2000/78/EC.¹²⁶

Other federal courts also apply this interpretation of indirect discrimination along the lines of ECJ case law and the Directives, though important details such as references to hypothetical comparators are not explicitly mentioned.¹²⁷

Section 7.2 sentence 2 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) defines discrimination as follows: Discrimination shall be deemed to occur if disabled and able-bodied people are treated differently without a compulsory reason and the equal participation of disabled persons in society is in consequence directly or indirectly impaired. The meaning of an indirect impairment is not further specified. Most *Land* disability laws follow this definition closely.¹²⁸

When interpreting the guarantee of equality, the Federal German Constitutional Court regarded a law's discriminatory effects sufficient to establish unequal treatment.

¹²⁵ Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 9th ed. 2009, § 3 AGG, para 9 et seq. for an overview.

¹²⁶ Federal Labour Court (*Bundesarbeitsgericht*), *Neue Zeitschrift für Arbeitsrecht* 2005, 870, 873. Previously, indirect discrimination was regarded as being justified if it was objectively justified by a legal aim and if the means to achieve this aim were necessary and proportionate, see Federal Labour Court (*Bundesarbeitsgericht*), *Der Betrieb* 2004, 1106, thus extending the standard conception to discrimination on the ground of disability.

¹²⁷ See Federal Administrative Court (*Bundesverwaltungsgericht*), 23 June 2005, 2 C 21/04.

¹²⁸ See Section 4 of the Baden-Württemberg Law on the Equality of the Disabled (*Landes-Behindertengleichstellungsgesetz Baden-Württemberg*); Article 5 of the Bavarian Law on the Equality of the Disabled (*Bayerisches Behindertengleichstellungsgesetz*); Section 6 of the Brandenburg Law on the Equality of the Disabled (*Brandenburgisches Behindertengleichstellungsgesetz*); Section 3 of the Bremen Law on the Equality of the Disabled (*Bremisches Behindertengleichstellungsgesetz*); Section 6.2 Hamburg Law on the Equality of the Disabled (*Hamburgisches Gesetz zur Gleichstellung behinderter Menschen*); Section 4 of the Hesse Law on the Equality of the Disabled (*Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen*); Section 5 of the Law on Promotion of Equality, Equal Participation, and Integration of Disabled People Mecklenburg-West Pomerania (*Landesgbehindertengleichstellungsgesetz Mecklenburg Vorpommern*); Section 4.2 of the Lower Saxony Law on the Equality of People with Disabilities (*Niedersächsisches Behindertengleichstellungsgesetz*); Section 3.2. North Rhine-Westfalen Law on the Equality of the Disabled (*Behindertengleichstellungsgesetz Nordrhein-Westfalen*); Section 2.2 of the Rheinland-Pfalz Law on the Equality of the Disabled (*Landesgesetz zur Gleichstellung behinderter Menschen Rheinland-Pfalz*); Section 3.2 of the Saarland Law on the Equality of the Disabled (*Saarländisches Behinderten Gleichstellungsgesetz*); Section 4.3 of the Saxony Integration Law (*Sächsisches Integrationsgesetz*); Section 2.2 of the Schleswig-Holstein Law on the Equality of the Disabled (*Landesbehindertengleichstellungsgesetz Schleswig-Holstein*); Section 4 of the Thuringian Law on the Promotion of Equality and Integration of People with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderungen*). Section 3 of the Berlin Law on the Equality of the Disabled (*Berliner Landesgleichberechtigungsgesetz*) states that any unjustified case of unequal treatment is considered to be discrimination. Unequal treatment is not justified if it is based solely or decisively on circumstances that are in indirect or direct connection with the disability. Unequal treatment shall not be deemed to occur if the consideration of disability is necessary or serves the interest of the disabled person. The similar Section 2 of the Saxony-Anhalt Law on the Equality of the Disabled (*Behindertengleichstellungsgesetz Sachsen-Anhalt*) includes cases where the development of people with disabilities is limited due to a lack of positive accommodation for their needs.



In the same decision, the Court explicitly recognised neutral provisions with discriminatory effects as indirectly discriminatory. According to this ruling, confirmed by later decisions, indirect discrimination is established if neutrally formulated regulations apply disproportionately to women (or men) and if this is caused by natural or social reasons.¹²⁹ The Court referred in this context to the respective case law of the ECJ. Again, though this ruling directly referred to discrimination based on sex, it equally applies to other grounds.

b) What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?

In legal science it is widely held that ECJ case law forms a suitable model to answer the question of justification for indirect discrimination in constitutional law.¹³⁰

This position has been adopted by the Federal Constitutional Court. It ruled that indirect discrimination is justified if objective reasons of considerable importance can be given for the indirect discrimination.¹³¹

In a more recent decision, the Court stated that the strict test of proportionality developed for cases of direct discrimination¹³² also applies to cases where the unequal treatment of facts indirectly leads to disadvantage for certain persons. The Federal Constitutional Court determines in each case whether there are reasons of such weight to justify the unequal treatment.¹³³

There are no clear contours of the grounds accepted (cf. 0.3).

c) Is this compatible with the Directives?

The AGG definition is compatible with the directive. In addition, the concept of indirect discrimination has mostly been defined in line with the definition and interpretations of the respective European law and especially the case law of the ECJ on this matter. It is to be expected, that the definition in Art. 3.2 AGG will inform the understanding of indirect discrimination of all courts.

¹²⁹ BVerfGE 97, 35 (43).

¹³⁰ See Gubelt, in: v. Münch/Kunig, Grundgesetzkomentar, 5th ed. 2000, Article 3 para 91.

¹³¹ Federal Constitutional Court (*Bundesverfassungsgericht*) 2 BvR 1476/01, 19 November 2003, www.bverfg.de.

¹³² See above 2.2.

¹³³ Federal Constitutional Court (*Bundesverfassungsgericht*) 1 BvR 1748/99 20 April 2004, www.bverfg.de.



As far as objective reasons and justifications excluding indirect and direct discriminations are concerned, there is a great variety of constellations in the case law (cf. 0.3 and previous Country reports for the European network of legal experts in the non-discrimination field by this author) that would need detailed argument to assess convincingly whether or not they are in conformity with European standards.¹³⁴

d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

There is no such clarification in the law.

e) *Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

The AGG does not contain any specification on differences in treatment based on language. There are singular cases¹³⁵ on the matter, without establishing yet clear patterns of jurisdiction.

2.3.1 Statistical Evidence

a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*

In the AGG the admissibility of statistical evidence is not explicitly regulated but presupposed.¹³⁶

b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*

Courts take routinely recourse to statistical evidence to establish indirect discrimination (cf. 2.3.1 c))

c) *Please illustrate the most important case law in this area.*

The regulation in the AGG is in line with the case law on the matter:

The Federal German Constitutional Court has used statistical evidence to establish whether or not indirect discrimination exists.¹³⁷ The data in the specific case (concerning sex) were derived from statistics provided by the defendant, the City of Hamburg.

¹³⁴ To take an example, where case law of the ECJ exists (cf. 0.3): There is an emerging jurisdiction by courts including a Chamber of the Federal German Constitutional Court that the unequal treatment of same sex couples as to certain (social) benefits is justified despite ECJ, *Tadao Maruko* because in heterosexual couples one partner is supposed to be in a greater need of financial support due the necessities of child rearing than the partner in a same sex partnership where these necessities typically do not exit and the assumed positive effects of such unequal treatment on social procreation. For critical comments M. Mahlmann, EuZW 2008, 218f. For the practically important matter on justification of unequal treatment on the ground of religion or belief cf. below.

¹³⁵ E.g. Hamm Land Labour Court (*Landesarbeitsgericht Hamm*), 17 July 2008, 16 Sa 544/08: unnecessary demand of language skill for long term employee cf. above 0.3.

¹³⁶ Cf. the explanatory report Bundestagsdrucksache 16/1780, p. 47.



The groups compared are formed according to the general doctrine of equality law on a case by case basis. It has been consistently held in case law that *essentially* equal groups have to be treated equally. It depends on the specific context which criteria are used to establish that groups are essentially equal or not. There is no settled case law as to a specific quantitative measure for establishing a disproportional application of a regulation to one group in comparison to another group.

As the examples discussed before indicate,¹³⁷ statistical evidence establishes a *prima facie* case of indirect discrimination. The statistics used are social statistics if available. In other cases, the ratio is determined for the individual case.

In legal science there are voices that regard any difference stable over some period of time as sufficient to establish indirect discrimination. If the ratio is small, the justification of this discrimination becomes easier for the employers.¹³⁸ Others propose a threshold of about 75%.¹³⁹

The groups to be compared are determined by the personal scope of the regulation challenged. For example, for a collective agreement all people bound by this agreement form the relevant group. The group of applicants is relevant for a guideline on the selection of applicants for employment though it is disputed whether all applicants should be considered or only sufficiently qualified applicants. The case law of the Federal Constitutional Court supports the former interpretation as it ruled that § 611a Civil Code (*BürgerlichesGesetzbuch*) (repealed by the AGG) not only forbids a refusal to employ someone on the grounds of a particular characteristic (in the case sex), but that it suffices if the characteristic is one of a “bundle of motives” for not choosing this applicant.¹⁴⁰ It is not far-fetched to assume that these other considerations include the applicant’s other qualifications, which precludes the possibility that only qualified applicants are considered. This has, however, not been clarified.

Sec. 71.1 Social Code IX (*Sozialgesetzbuch IX*) establishes the duty of any employer employing more than 20 employees to employ at least 5% severely disabled persons. This rule is interpreted as not directly prejudicial for individual claims, as it establishes only a general duty for the employer. If the employer does not fulfil this duty in general, it does not mean that discrimination has occurred in an individual case.

There are, however, voices in the literature that argue that at least in a case where the employer does not employ 50% of the quota prescribed by law (2.5%) this should lead to a presumption of discrimination which can shift the burden of proof.¹⁴¹ As these regulations are only a few years old, there is no settled case law on these matters.

There are no discernable reasons why these principles should not be applied to other grounds than the ones mentioned. There is, however, no authoritative case law on the matter.

¹³⁷ See BVerfGE 97, 35 (44).

¹³⁸ See above 2.3.

¹³⁹ Richardi/Annuß, Staudinger, § 611a BGB, para 38.

¹⁴⁰ Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 9th ed., 2009, § 3 AGG, para 7.

¹⁴¹ BVerfGE 89, 276 (189), see above.

¹⁴² See Großmann, *Gemeinschaftskommentar, Sozialgesetzbuch IX*, § 81, para. 240.

- d) *Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

Germany enjoys a differentiated set of statutory regulations on data protection. A great deal of case-law exists on these matters. The regulations have their constitutional basis in the interpretation of the fundamental right to the protection of the personality, Article 2.1 in conjunction with Article 1 *Grundgesetz* (Basic Law). The Federal German Constitutional Court ruled that everybody enjoys the right to *informationelle Selbstbestimmung* (informational self-determination). This right is not restricted to sensitive data. Everyone has the right to determine generally which data can be used and which not. The limits of this right are fundamentally those of the principle of proportionality. If the person concerned consents to the use of data, their use is of course permissible. Given the doctrine of the requirement for a specific statutory regulation (*Gesetzesvorbehalt*) for matters that touch upon fundamental rights, detailed legal regulations on data protection have been established in many spheres of life.

These laws encompass the relations between the State and citizens, and private relations. For public authorities, the Federal Law on the Protection of Data stipulates as a general principle that a public authority is allowed to collect data, if it is necessary for carrying out its tasks.¹⁴³ The provision sets out further restrictive conditions as a precondition for data collection for such purposes. The law groups cases according to a strict test of proportionality for data collection that serves the public good in order to protect the fundamental right to informational self-determination. These general rules are specified in legislation dealing with certain areas of public law.

The Federal Law on the Protection of Data provides further that the collection, storing, exchange and communication of personal data by private natural or legal persons is permissible, first, if these actions serve the aim of contractual relations; second, if they serve the justifiable interest of the party collecting the data, if there is no reason to assume that the other party does not have interests to the contrary which it can legitimately expect to be protected; or third, if the data are publicly accessible, if the other party does not have a legitimate interest in these actions not being taken.¹⁴⁴

Public and private actors have a duty to report on the collection of data on racial and ethnic origin, political opinion, religious and philosophical belief, membership of unions, health and sexual life.¹⁴⁵

The collection of data for purposes relating to non-discrimination policies has to respect these principles and their expression in legislation at federal and *Land* level, and more precisely the constitutional right to informational self-determination and the limits this imposes on the collection of data by public authorities and private actors.

¹⁴³ Section 13.1 Federal Law on the Protection of Data (*Bundesdatenschutzgesetz*).

¹⁴⁴ Section 28.1 Federal Law on the Protection of Data (*Bundesdatenschutzgesetz*).

¹⁴⁵ Section 4d.5 in conjunction with Section 3.9 Federal Law on the Protection of Data (*Bundesdatenschutzgesetz*). The report can be directed to the Ombudsman for Data Protection.



Germany gathers data using occasional nationwide censuses, and more frequently by so-called micro-censuses on a smaller scale and recurrent specialised statistical surveys on a representative basis to update the given data. Population data include nationality, religion, age and disability.

Section 131 Social Code IX (*Sozialgesetzbuch IX*) stipulates the collection of federal statistics on severely disabled persons, including number, personal characteristics such as age, sex, nationality and place of residence, and type, cause and grade of disability.

The Commissioners for Integration/Foreigners publish periodical reports on the situation of foreigners in Germany, including statistical data.

It should be observed that given historic experience, German authorities are explicitly reluctant to gather data for whatever purposes on certain characteristics that have been the basis of discrimination in the Nazi-Period.

As far as there are positive action measures (see below), social statistics play a role in the context of designing policies.

2.4 Harassment (Article 2(3))

a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

Sec. 3.3 AGG defines harassment as discrimination when unwanted conduct related to any of the grounds covered by the AGG intend or cause that the dignity of a person is violated and an intimidating, hostile, degrading, humiliating or offensive environment is created. According to German jurisdiction on Sec. 3.3 AGG, such an “environment” is generally not created by singular but only by continuous behaviour.¹⁴⁶

General legal provisions can cover cases of harassment as well. For example, in private law a case of harassment on the basis of ethnic origin can be regarded as violation of the right to personality, which is protected by tort law.¹⁴⁷ Such an action can give rise to compensation for material and immaterial damage. In criminal law e.g. the provisions against criminal insult can also cover cases of harassment, with the relevant sanctions.¹⁴⁸

b) *Is harassment prohibited as a form of discrimination?*

Yes, cf. 2.4 a).

¹⁴⁶ Recently: Federal Labour Court (*Bundesarbeitsgericht*), 24 April 2008, 8 AZR 347/07: unjustified dismissal as such not creating hostile environment; Düsseldorf Land Labour Court (*Landesarbeitsgericht Düsseldorf*), 18 June 2008, 7 Sa 383/08: graffiti in restroom not enough to create by itself hostile environment.

¹⁴⁷ Section 823.1 Civil Code (*Bürgerliches Gesetzbuch*). In legal science it has been argued that the protection against harassment through tort law is much wider than protection would be through a specific prohibition.

¹⁴⁸ Section 185 Penal Code (*Strafgesetzbuch*).



- c) *Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

There are no other authoritative additional sources on the concept of harassment.

2.5 Instructions to discriminate (Article 2(4))

Does national law (including case-law) prohibit instructions to discriminate?

If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?

An instruction to discriminate against persons on any of the grounds covered by the AGG shall be deemed to be discrimination, Sec. 3.5 AGG. This is especially the case, if somebody instigates somebody to a behaviour that disadvantages an employee due to one of the covered grounds, Sec. 3.5. Sentence 2 AGG.

In addition, general legal provisions can cover these cases.¹⁴⁹ Responsibility for agents in contractual relations and in tort law is relevant in this respect.¹⁵⁰ Another example from criminal law is instigation to discrimination that amounts to a criminal offence, e.g. criminal insult.¹⁵¹

The AGG does not contain any particular provision regarding the liability of legal persons. Instead, the general rule of Sec. 31 civil code (*Bürgerliches Gesetzbuch*) is applicable, according to which legal persons are liable for damage caused by executive employees.¹⁵²

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

¹⁴⁹ A first instance labour court regarded before the enactment of the AGG a dismissal as justified by an employee's behaviour in the following case: The employee in charge of recruitment was instructed by the employer not to hire more "Turks". The employee did not accept this order, arguing that everybody irrespective of origin should have the same chance. The court argued that the employer's right to give instructions covered this order, which did not violate any equality provision of German law (Article 3, principle of equal treatment of employees, European law including Directive 2000/43), and that the employee consequently had to follow these instructions. The parties settled in at the next instance, see *Arbeitsgericht Wuppertal*, 3 Ca 4927/03, 10 December 2003.

¹⁵⁰ Section 31, 278, 831 Civil Code (*Bürgerliches Gesetzbuch*).

¹⁵¹ Section 26, 185 Penal Code (*Strafgesetzbuch*).

¹⁵² Reuter, MüKo, BGB, 5th ed., 2006, § 31, para 11, 22,30.



The AGG contains no additional regulation on reasonable accommodation of a general scope, as prescribed in Art. 5 Directive 2000/78/EC for employment.

The law on disability, constitutionally buttressed by the disability clause of the Basic Law¹⁵³ and *Land* constitutions, foresees, however, reasonable accommodation in various contexts, including the following:

The social security system has the general aim of integrating disabled persons into society through individual help and accommodation to their needs¹⁵⁴ and establishes claims to material means of integration.¹⁵⁵ The German social agencies provide support for participation in the working life.¹⁵⁶ This support encompasses support for obtaining employment, including vocational training, special medical and psychological support for participation in working life, housing near the work place, transport or the creation of housing adequate for the disabled persons, to name some examples.¹⁵⁷

Section 81.4 Social Code, Part IX (*Sozialgesetzbuch IX*) imposes various duties on public and private employers in providing reasonable accommodation for severely disabled persons.¹⁵⁸ For example, the disabled have a right to:

- employment in which they can develop and use their capabilities and knowledge to the highest possible degree
- preferential consideration for in-house training for professional advancement
- reasonable help to participate in outside vocational training
- a workplace suitable for people with disabilities, including the necessary equipment and machines, and a suitable working environment and working hours, giving special consideration to the danger of accidents
- equipment of the work place with the necessary accommodation for work.

Due consideration is to be paid to the disability and its effects on employment. The Federal Labour Agency and the integration agencies support the employer in introducing measures of accommodation. The severely disabled person has no claim if these measures would be unreasonable (*unzumutbar*) for the employer or cause a disproportionate burden or are contrary to other legal regulations.¹⁵⁹ The employers are under a duty to promote part-time work.¹⁶⁰ Under certain circumstances, the severely disabled person can have a claim to part-time work.¹⁶¹ They also have a claim to additional paid holidays.¹⁶²

¹⁵³ Article 3.3 sentence 2 Basic Law (*Grundgesetz*).

¹⁵⁴ Section 10 Social Code I (*Sozialgesetzbuch I*).

¹⁵⁵ Section 4 et seq. Social Code IX (*Sozialgesetzbuch IX*) ; Sec. 53 et seq. Social Code XII (*Sozialgesetzbuch XII*). Special regulations for blind people: Section 72 Social Code XII (*Sozialgesetzbuch XII*).

¹⁵⁶ Section 97 et seq. Social Code III (*Sozialgesetzbuch III*), Section 104 Sozialcode IX (*Sozialgesetzbuch IX*).

¹⁵⁷ See e.g. Section 33 Social Code, Part IX (*Sozialgesetzbuch IX*).

¹⁵⁸ On the definition of this, see above 2.1.

¹⁵⁹ Section 81.4 sentence 3 Social Code IX (*Sozialgesetzbuch IX*).

¹⁶⁰ Section 81.5 Social Code IX (*Sozialgesetzbuch IX*).

¹⁶¹ Section 81.5 sentence 3 Social Code IX (*Sozialgesetzbuch IX*).

¹⁶² Section 125 Social Code IX (*Sozialgesetzbuch IX*).

A measure of accommodation is regarded as unreasonable for the employer in these cases if the financial burden is disproportionate despite support from the Federal Labour Agency and the integration agencies using funds from the equalisation levy.¹⁶³ There is only limited case law clarifying precise standards.¹⁶⁴

According to the Law on Promoting the Equality of the Disabled, organisations and social partners are to conclude agreements (*Zielvereinbarungen*) to provide for reasonable accommodation. This regulation is not limited to severely disabled persons.¹⁶⁵ Public and private employers are to conclude integration agreements with the representatives of disabled employees for enterprises and authorities as to the working conditions and other issues of integration of severely disabled persons.¹⁶⁶

As indicated, some of these regulations apply to *severely* disabled persons as defined above (2.1.1) only. Such a differentiation of grades of disability does not exist in Art. 5 Directive 2000/78/EC and raises therefore concerns as to conformity with Community law.¹⁶⁷ As a result, the personal scope for claiming a reasonable accommodation is as far as the above mentioned provisions limited to severely disabled persons are concerned only partly the same as for claiming protection from non-discrimination in general which is not limited in that way.

There are special regulations in the pension law, including a lower minimum age for severely disabled persons for collecting state pensions.¹⁶⁸

b) Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?

As to education, there are several dimensions to the question of integrated education. The general aim is not to separate disabled children from their social background and to educate them with children without disabilities through integrated schooling.¹⁶⁹

¹⁶³ Section 77.5, 102.3 Social Code IX (*Sozialgesetzbuch IX*).

¹⁶⁴ See from recent case law Baden-Württemberg Land Labour Court (*Landesarbeitsgericht Baden-Württemberg*), 22 June 2005, Az: 2 Sa 11/05 with further references: The duty of accommodation of the workplace includes organisational matters such as a new distribution of work if the disabled person cannot work as much as before. It has been held that an accommodation is not reasonable if it poses a disproportionate burden on the employer despite state financial help. The burden is deemed to be disproportionate if the measure demands significant financial investment even though the work relationship will end soon because of a fixed-term contract or age limits. If the measure jeopardises employment or places an undue burden on other employees, the same holds. It has been regarded as unreasonable to demand that an employer introduces a measure directed purely at the rehabilitation of an employee without a real possibility that this measure will lead in the foreseeable future to the reintegration of the person concerned, see Rhineland-Palatine Land Labour Court (*Landesarbeitsgericht Rheinland-Pfalz*), 4 March 2005, Az: 12 Sa 566/04. On the duty to create a procedural precondition for measures of accommodation in dealing with the Work Council, see Federal Labour Court (*Bundesarbeitsgericht*), 3 December, 2002, Az: 9 AZR 481/01.

¹⁶⁵ Section 5 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*). On the definition of disability in this law, cf. 2.1.1.

¹⁶⁶ Section 83 Social Code IX (*Sozialgesetzbuch IX*).

¹⁶⁷ For case law on the matter cf. Report 2007.

¹⁶⁸ Section 37 Social Code VI (*Sozialgesetzbuch VI*).

¹⁶⁹ Section 4.3 Social Code IX (*Sozialgesetzbuch IX*). The school laws of the *Länder* contain detailed regulations on the matter.



In the leading case concerning integrated schooling, the German Federal Constitutional Court held that the decision to put a child in a special school for disabled persons against the will of the parents constituted a breach of Article 3.3 sentence 2 of the Basic Law (*Grundgesetz*) if it was possible for the child to attend an ordinary school without special pedagogical help, if his or her special needs could be fulfilled using existing means and other interests worthy of protection, especially of third parties, did not weigh against integrated schooling. A general ban on integrated schooling was regarded to be unconstitutional.¹⁷⁰ Higher education in universities should take account of the needs of the disabled.¹⁷¹

There are various provisions stipulating that reasonable accommodation should be made to allow disabled persons to communicate with public authorities and in court. Severely disabled people suffering from a severe lack of mobility or orientation are granted free local and regional transport including free transport for an escort on long distance journeys (train)¹⁷² and other aspects of mobility, to name just a few examples.¹⁷³

There are special regulations for disabled persons in civil law relating to their special needs.¹⁷⁴

A special regulation of general contract law allows for valid contracts with mentally disabled persons.¹⁷⁵

There is no reference to the concept of “disproportionate burden” in those provisions. The Federal German Constitutional Court implied in its decision on integrated schooling mentioned above materially such a consideration in the framework of its weighing of interests.

c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

¹⁷⁰ See BVerfG 96, 288.

¹⁷¹ Section 2.4 sentence 2 University Framework Law (*Hochschulrahmengesetz*) which will presumably be abrogated in 2009 and corresponding regulations at the *Land* level (subject to reform).

¹⁷² Section 145-147 Social Code IX (*Sozialgesetzbuch IX*).

¹⁷³ See Section 7 – 11 Law on Promoting the Equality of the Disabled (*Behindertenleichstellungsgesetz*) and the corresponding regulations in *Land* laws on disability, on a special regulation on mobility, e.g. Section 9 of the [Berlin] Law on the Promotion of Equality of People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung*); on communication with public authorities and in court see also e.g. Section 17.2 Social Code I (*Sozialgesetzbuch I*); Section 57 Social Code IX (*Sozialgesetzbuch IX*); Section 19.1 sentence 2 Social Code X (*Sozialgesetzbuch X*); Section 186, 191a Judicature Act (*Gerichtsverfassungsgesetz*); Section 483 Code of Civil Procedure (*Zivilprozessordnung*); Section 66, 259.2 Code of Criminal Procedure (*Strafprozessordnung*); Section 22 et seq. Law on Authorisation (*Beurkundungsgesetz*) on notarial instruments; Section 2233.2 Civil Code (*Bürgerliches Gesetzbuch*).

¹⁷⁴ Section 305.2 No. 2 Civil Code (*Bürgerliches Gesetzbuch*) establishes for example the duty to pay due regard to the needs of disabled persons when general terms and conditions are included in a contract; on other matters see Section 138.6 Social Code IX (*Sozialgesetzbuch IX*); Section 5.12 Law on [nursing] homes [and homes for people with disabilities] (*Heimgesetz*).

¹⁷⁵ See Section 105a Civil Code (*Bürgerliches Gesetzbuch*).

The Federal German Constitutional Court found that disabled persons are not only discriminated against, if there is unequal treatment, but if the disadvantage results from the lack of appropriate measures to accommodate the needs of the disabled person.¹⁷⁶

d) Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?

As far as religion is concerned, public authorities are under a duty to take the special needs of religious communities and the individuals that form these communities into account.¹⁷⁷ Employers have to pay due consideration to the fundamental right to freedom of religion.¹⁷⁸ The same principle holds for belief.

Under the German Law on social security, there are provisions providing for special means to accommodate the needs of older people. These include help in the household, adaptation of the housing to the needs of older people, support for inclusion in social and cultural life, etc.¹⁷⁹

e) Does the national law clearly provides for the shift of the burden of proof, when claiming the right to reasonable accommodation?

There is no such provision in the relevant codifications.

f) Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?

¹⁷⁶ BVerfG 96, 288. This judgement is not limited to severely disabled persons.

¹⁷⁷ See e.g. Federal Constitutional Court (*Bundesverfassungsgericht*) 1 BvR 1783/99, 15.1.2002 that held: If a non-German butcher who is a pious Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to facilitate to his customers, in accordance with their religious conviction, the consumption of the meat of animals that were ritually slaughtered, the constitutionality of this activity is to be examined in accordance with Article 2.1 in conjunction with Articles 4.1 and 4.2 of the *Grundgesetz* (Basic Law). Sec. 4a.1 in conjunction with Sec. 4a.2, No. 2 of the Animal Protection Act (*Tierschutzgesetz*) provides for the possibility an exceptional permission for ritual slaughter can be granted.

¹⁷⁸ Cases include religious dress codes, e.g. Mala (*Land Labour Court (Landesarbeitsgericht)* Düsseldorf, 22 March 1984, 14 Sa 1905/83), turban of Sikhs (*Labour Court (Arbeitsgericht)* Hamburg, 3 January 1996, 19 Ca 141/95, or the head-scarf (*Federal Labour Court (Bundesarbeitsgericht)*, 10 October 2002, 2 AZR 472/01; *Labour Court (Arbeitsgericht)* Dortmund, 16 January 2003, 6 Ca 5736/02), though it is constitutional to prohibit a teacher in a public school from wearing a headscarf (*Federal Constitutional Court (Bundesverfassungsgericht)*, 2 BvR 1436/02; *Federal Administrative Court (Bundesverwaltungsgericht)*, 2 C 45/03, 24.6.2004). Other cases concern breaks for prayers (*Land Labour Court (Landesarbeitsgericht)* Hamm, 18 January 2002, 5 Sa 1782/01:balancing of interest in case of break of prayers, no obligation if disruption of process of production.

¹⁷⁹ Section 70 Social Code XII (*Sozialgesetzbuch XII*) provides for help to maintain a household; for further social security benefits for older people see Sec. 71 Social Code XII (*Sozialgesetzbuch XII*).



According to the Law on Promoting the Equality of the Disabled, the principle of *Barrierefreiheit* (lack of barriers) is the leading principle for the organisation of public services, including that new Federation buildings and major changes of existing Federation buildings should accommodate the needs of disabled persons. The same principle holds for other buildings, public streets and squares and public transport.¹⁸⁰

The *Länder* have passed laws on building standards which relate to the reasonable accommodation of buildings at *Land* level for the disabled, older people and people with small children.¹⁸¹

According to Section 554a Civil Code (*Bürgerliches Gesetzbuch*), a disabled person has the right to demand consent to changes in rented property that are necessary for his or her adequate use. The landlord can refuse consent if his or her interest in the unchanged status of the property carries more weight than the interest of the disabled person.¹⁸² The AGG incorporates in Sec. 19.1 the prohibition of discrimination on the ground of disability in its regulation of general civil law which covers in principles services etc. if governed by private law

g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

As mentioned above, Cf. 2.6 f), the leading principle in this field is *Barrierefreiheit* (lack of barriers). According to the definition in Sec. 4 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) buildings, transportation, technical objects of utility, acoustic and visual sources of information, means of communication as well as other formed areas of life (*gestaltete Lebensbereiche*) are free of barriers (*barrierefrei*) when disabled people have access to them and can make use of them in the common way without particular difficulty and generally unassisted.

As for higher education, Art 2.4 sentence University Framework Law (*Hochschulrahmengesetz*)¹⁸³ states that disabled students should preferably have unassisted access to university services.

h) *Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

¹⁸⁰ Section 8 in conjunction with Section 4 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*). Similar provisions exist at the *Land* level.

¹⁸¹ See e.g. Section 51 Berlin Regulation on Construction (*Bauordnung Berlin*). On minimum standards of homes: Regulation on Home Building (*Heimmindestbauverordnung*).

¹⁸² Case law has underlined that the claim of the disabled tenant does not suppose extreme sacrifices on his side, see Regional Court (*Landgericht*) Hamburg, April 29, 2004, Az: 307 S 159/03.

¹⁸³ Due to a general reform of the federal system in Germany, the University Framework Law (*Hochschulrahmengesetz*) will presumably be abrogated in 2009, as mentioned before.



There is a differentiated, wide ranging set of specialised norms for disabled persons, including Art. 3.3 sentence 2 of the Basic Law (*Grundgesetz*), partly referred to above.

2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

The law on disability contains provisions on sheltered accommodation and employment. There are also special regulations in social law.

Under these provisions, people with disabilities may be granted social security benefits to help them live independently in sheltered accommodation.¹⁸⁴

The provisions stipulate that vocational rehabilitation institutions and sheltered workshops should provide work opportunities for people who are unemployed or cannot find work on the labour market due to their disability.¹⁸⁵

- b) *Would such activities be considered to constitute employment under national law?*

If disabled persons take part in programmes run by these institutions of vocational rehabilitation, they do not become part of the institution staff and are not employees in the sense of the Work Constitution Act. They therefore elect special representatives. Labour law, however, is applied analogously regarding the protection of personality, limitation of liability, safety at work, protection against discrimination, holidays and equal treatment of men and women.¹⁸⁶

¹⁸⁴ Section 55.2 No. 6 Social Code IX (*Sozialgesetzbuch IX*).

¹⁸⁵ Section 33 – 43 Social Code IX (*Sozialgesetzbuch IX*).

¹⁸⁶ Sec. 36 and 138.4 Social Code IX (*Sozialgesetzbuch IX*).



3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

The AGG is not restricted to Germans or residents. It applies to all persons within the German jurisdiction.

The personal scope of the constitutional guarantee of equality is not limited to German citizens as it is a human right with universal application. Any person who is the target or is otherwise affected by an action of a public authority which is contrary to the guarantee of equality is protected.

The regulations on the special protection of severely disabled persons apply to people who are legally resident or employed in Germany.¹⁸⁷ Other special legislation applies to German citizens only.¹⁸⁸

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

As to the liability for discrimination, there is no such distinction. As to protection, Art. 7 in conjunction with Sec. 6.1 AGG protects employees, thus natural persons. The prohibition of discrimination against disabled persons in employment, now referring to the AGG, applies only to natural persons, but legal persons may also be liable.¹⁸⁹ If general law applies, depending on the circumstances, natural and legal persons can be protected or be liable.

The constitutional guarantee of equality protects natural persons. Legal persons are within the ambit of the norm to the extent that the nature of that right permits.¹⁹⁰ It is directly applicable to actions by public authorities, and indirectly to actions by private actors through the interpretation of private law. Here, legal persons can be held liable as well. Other prohibitions of public law apply to natural persons only, due to the nature of the matter concerned.¹⁹¹

¹⁸⁷ Section 2.2 Social Code IX (*Sozialgesetzbuch IX*).

¹⁸⁸ For example: Section 8.1 Federal Civil Service Law (*Bundesbeamtengesetz*), German nationality (respectively EU-citizenship apart from cases falling under Art. 39.4 EC) is a pre-requisite for employment as a civil servant.

¹⁸⁹ E.g. Section 81.2 Social Code IX (*Sozialgesetzbuch IX*).

¹⁹⁰ Article 3 in conjunction with Article 19.3 Basic Law (*Grundgesetz*).

¹⁹¹ E.g. the Anti-Discrimination clauses in the Laws on the Civil Service, or the Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*).



3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

The violation of the prohibition of discrimination by employers or employees is a violation of a contractual duty, Sec. 7.3 AGG, giving rise to contractual liability.

The AGG establishes organisational duties for the employer. According to Sec. 12.1 AGG, the employer is under a duty to provide for appropriate measures of protection against and prevention of discrimination. According to Sec. 12.2 AGG, the employer has to educate employees as to principles of non-discrimination. Sec. 12.3 AGG established the duty of the employer to act against discriminations by his or her employees through appropriate measures, including dismissal. Sec. 12.4 AGG provides that employers have the duty to take the appropriate measures to protect employees against discrimination by third parties. A wider liability of employers is – though discussed – not part of the AGG. The employer is under a duty to make the AGG in the enterprise known, Sec. 12.5 AGG.

According to Sec. 15.1 AGG employers are liable for material damages caused by violations of the prohibition of discrimination in case of fault. For immaterial damages there is strict liability.¹⁹² If the discrimination occurs while applying collective agreements, intent or gross negligence is necessary, Sec. 15.3 AGG. Equivalent claims can be based on Sec. 21.2 AGG in the case of provision of services covered by the AGG (see below 6.5.).

The general rules of responsibility of agents apply to the extension of liability.¹⁹³ There are no special rules for discrimination.¹⁹⁴ A service provider can therefore for example be liable for the action of his representative. Beyond the listed specific duties, there is no general responsibility for discrimination of third parties. An individual harasser or discriminator is liable if there is contractual or tortious liability, as outlined. The rules for responsibility for agents apply to Unions and professional associations as well.

¹⁹² There is an argument in legal commentary that – contrary to the intention of the legislator – the norm has to be interpreted as not imposing strict liability, cf. Voggenreiter in: Rudolf/Mahlmann, GleichbehandlR, § 8 para 64 et seq.

¹⁹³ Most important Sec. 31, 278 and 831 Civil Code, see above 2.5.

¹⁹⁴ In cases of sex discrimination, employers have been held liable for the actions of others, e.g. an employer for a discriminatory job advertisement by an employment agency, see Federal Labour Court (*Bundesarbeitsgericht*), 5 February, 2004, Az 8 AZR 112/03.



3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

The AGG applies in principle to all sectors of employment for all grounds (race, ethnic origin, sex, religion or belief, disability, age or sexual identity) (see in detail below 3.2.1 – 3.2.5). The military service is covered by the SoldGG. The AGG is to be applied to the civil service taking notice of its particularities, Sec. 24 AGG.

In addition, public employment (civil service and other employees) is covered by the guarantee of equality,¹⁹⁵ the guarantee of equal access,¹⁹⁶ civil service laws (which exclusively concern civil servants; not all include sexual orientation, none includes age),¹⁹⁷ prohibitions of discrimination in the law on the representation of public employees¹⁹⁸ and – as to disability – a special regulation prohibiting discrimination which applies to private employers as well.¹⁹⁹ Equal access to any kind of (self-)employment is guaranteed by the freedom of profession, Art. 12 Basic Law (*Grundgesetz*). For the public sector, there are additional duties e.g. the early registration of vacancies to facilitate the employment of disabled persons.²⁰⁰ The prohibition of discrimination in the Work Constitution Act (*Betriebsverfassungsgesetz*) applies only to certain enterprises, in particular excluding under certain conditions enterprises based on a certain religious, philosophical or political ethos (*Tendenzbetriebe*).²⁰¹ The general principle of equal treatment of employees applies in all matters of labour law, including collective agreements²⁰², though contentiously not to recruitment.²⁰³

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

¹⁹⁵ Article 3 Basic Law (*Grundgesetz*).

¹⁹⁶ Article 33.2 and 33.3 Basic Law (*Grundgesetz*).

¹⁹⁷ On sexual orientation, see Art. 1; Law on Article 10.2 of the Constitution of Berlin (*Gesetz zu Art. 10 Absatz 2 der Verfassung von Berlin*).

¹⁹⁸ See Section 67.1 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*) and the respective state regulations.

¹⁹⁹ Section 81.2. Social Code IX (*Sozialgesetzbuch IX*), now referring to the AGG.

²⁰⁰ Section 82 Social Code IX (*Sozialgesetzbuch IX*).

²⁰¹ Work Councils are formed in all enterprises with more than five employees; on the exclusion of enterprises based on an ethos, see Section 118 Work Constitution Act (*Betriebsverfassungsgesetz*).

²⁰² See Schaub, *Arbeitsrechtshandbuch*, 12th ed. 2007, § 112 with further references.

²⁰³ See Richardi, *Betriebsverfassungsgesetz*, 11th ed. 2008, § 75 para 8.



3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?

The AGG follows in Sec. 2.1 No. 1 closely the regulation of the Directives in this respect, covering all these areas. Sec. 11 AGG contains a prohibition of discriminatory job advertisements. Sec. 24 AGG provides for an application of the regulations of the AGG that takes account of the particularities of the civil service. In addition, Sec. 8.1 Federal Civil service law (*Bundesbeamtengesetz*) repeats the prohibition of discrimination for access to civil service, relevant for other areas as well, Sec. 23 Federal Civil Service law, with the exception of age, which is, however, covered through Sec. 24 AGG.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

The AGG covers employment and working conditions, including pay and dismissals, in Sec. 2.1 No. 2. For dismissals, the AGG contains a special regulation in Sec. 2.4 which provides that for dismissals only the existing general and particular regulations for dismissal are to be applied, most importantly the Law on Protection against Dismissal (*Kündigungsschutzgesetz*). As there are no prohibitions of discrimination in these norms, it seems to be hardly possible to interpret these norms due to their wording in conformity with the Directives. Henceforth, this exception is not in accordance with European Law.²⁰⁴ However, the Federal Labour Court (*Bundesarbeitsgericht*) recently argued that a discriminating dismissal may be contrary to social choice (*Sozialwidrigkeit*) and hence lead to the invalidity of the dismissal according to the Law on Protection against Dismissal (*Kündigungsschutzgesetz*).²⁰⁵ It held that such an interpretation of the German law on protection against dismissal is in conformity with the Directives.

According to Sec. 2.2 Sentence 2 AGG, for occupational pensions (*betriebliche Altersversorgung*), the Law on Occupational Pensions (*Betriebsrentengesetz*) is applicable, which contains no general prohibition of discrimination, though through case-law, some prohibitions have been established.

²⁰⁴ Accordingly, this regulation, which has been created in the very last moments of the legislative process as part of political bargaining, has been widely criticised in legal science, cf. Düwell, jurisPR-ArbR 28/2006 para 7; Thüsing/Bauer/Schunder (Thüsing) NZA 2006, 777; Däubler, Däubler/Bertzbach, AGG § 2, para 259 et seq.

²⁰⁵ Federal Labour Court (*Bundesarbeitsgericht*), 6 November 2008, 2 AZR 523/07. Düsseldorf Land Labour Court (*Landesarbeitsgericht Düsseldorf*), 16 April 2008, 2 Sa 1/08 (appeal pending with the Federal Labour Court (*Bundesarbeitsgericht*)).

This regulation can be regarded as a deficit in transposing the Directives, given the consistent ECJ-case-law regarding occupational pensions as part of pay.²⁰⁶ The only possibility to avoid this result is to interpret the norm as not excluding the applicability of the AGG, as it does not contain an explicit clause – like for comparison Sec. 2.4 AGG – that exclusively the Law on Occupational Pensions (*Betriebsrentengesetz*) is applicable.²⁰⁷ The same reasoning applies to occupational pension schemes in the public domain.

For recent case-law on pension schemes, cf. above, 0.3.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning course?

The AGG follows the regulation of the Directives closely in Sec. 2.1 No. 3. There is no explicit reference to vocational training outside employment relationships (cf. 3.2.8). Sec. 19a Social Code IV (*Sozialgesetzbuch IV*) contains a prohibition on all grounds for benefits concerning the access to all forms and levels of vocational guidance, vocational training, vocational advanced training, vocational retraining including practical work experience. In addition, Sec. 36.2 Social Code III (*Sozialgesetzbuch III*) provides that the Agency of Labour (*Agentur für Arbeit*) is only allowed to consider limitations imposed by employers on job applicants on the grounds of age (among other grounds) if they are indispensable given the kind of work. A consideration of race or ethnic origin, religion or belief, disability or sexual identity is according to this norm possible if this is allowed on the base of the AGG. The constitutional guarantee of equality is in addition applicable in public law of which social law forms a part. There are no explicit rules on harassment and instruction to discrimination in public law in this area, as the rules of the AGG are not made applicable, which might, however, depending on judicial interpretation be derived by implication from the existing norms.

²⁰⁶ There was a preliminary reference to the ECJ by the Federal Labour Court (*Bundesarbeitsgericht*) as to the question of age discrimination in the case in which a surviving dependents’ pension is not paid if the surviving spouse is 15 years younger than the employee (BAG, 27 June 2006, 3 AZR 352/05). The ECJ, however, did not answer this question since it ruled that due to the nature and time of the specific case, Community Law was not applicable, ECJ, 23.09.2008, C-427-06.

²⁰⁷ Cf. e.g. Federal Labour Court (*Bundesarbeitsgericht*), 6.11.2008, 2 AZR 523/07.



3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

The AGG follows the regulation of the Directives in Sec. 2.1 No. 4. Sec. 18 provides for the application of the regulation on labour law in the AGG in this area, including a claim to membership in these organisations, Sec. 18.2 AGG.

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

It is important to keep in mind for the following that the AGG applies in principle to all grounds. As far as general contract law is concerned, the areas covered by 3.2.6 – 3.2.8 are fully applicable for discrimination on the grounds of race and ethnic origin, Sec. 19.1 and 19.2 AGG. For other grounds, this is only so for qualified contracts (cf. 3.2.9).

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

According to Sec. 2.1 No. 5 AGG, the AGG applies - for all grounds covered - in these areas. (On the special regulation of social law, cf. 3.2.7).

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.

Sec. 2.1 No 6 AGG covers social advantages.²⁰⁸ Social advantages are understood in a wide sense. Social welfare benefits (*Sozialhilfe*) are taken to be social advantages.²⁰⁹ According to Sec. 2.2 Sentence 1 AGG Sec. 33c Social Code I (*Sozialgesetzbuch I*) and Sec. 19a Social Code IV (*Sozialgesetzbuch IV*) are applicable.²¹⁰ Given the scope of the Social Code, this regulation is applicable both to social protection and social advantages. Sec. 33c Social Code I (*Sozialgesetzbuch I*) prohibits discrimination on the grounds of race, ethnic origin and disability in the case of claiming social rights.

²⁰⁸ Cf. Eichenhofer, Däubler/Bertzbach, AGG, § 2 para 66.

²⁰⁹ Cf. Eichenhofer, Däubler/Bertzbach, AGG, § 2 para 78.

²¹⁰ On Sec. 19a Social Code IV (*Sozialgesetzbuch IV*) see above 3.2.4.



This provision is applicable to the whole social code, including social insurance, educational benefits, social compensation, benefits for families, housing allowances, support for children and adolescents, social welfare benefits, or participation of disabled persons. The norm intends to implement Directive 2000/43/EG and adds the ground of disability. The constitutional guarantee of equality is in addition applicable.

The exception in Art. 3 (3) Directive 2000/78 does not lead to an absence of any protection against discrimination.²¹¹ There are no explicit rules on harassment and instruction to discrimination in public law in this area, as the rules of the AGG are not made applicable, which might, however, depending on judicial interpretation, be derived by implication from the existing norms.

As far as social advantages in the public service are concerned, the guarantee of equality with the scope already outlined applies. It has been held²¹² that it is e.g. lawful as far as employment benefits are concerned to treat married partners better than civil servants living in a *Lebenspartnerschaft* (life partnership, registered partnership for homosexuals and lesbians) because of the special protection for marriage provided by the Basic Law.²¹³ Such jurisdiction is contrary to the regulation through the AGG.²¹⁴ The ECJ has clarified that it is a violation of the principle of non-discrimination, Art. 1, 2 Directive 2000/78/EC, if a surviving life partner has no right to receive a survivor's pension unlike a surviving spouse if life partners and spouses are in a comparable position according to national law²¹⁵ (for recent case law on this matter, cf. above 0.3 and 2.3. c).

Sec. 46.4 Social Code VI (*Sozialgesetzbuch VI*) extends the entitlements of state pensions to registered partners.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education is favoured and supported.

²¹¹ There is, however, some case law on the question what is covered by Article 3 (3) Directive 2000/78/EC, arising from the terms used in the English, French and German versions of the Directive, especially regarding whether only payments (as in the English version) or other services as well are included. See Federal Social Security Court (*Bundessozialgericht*), 29 January 2004, B 4 RA 29/03 (left open); for narrow interpretation (only monetary payments) Hesse Social Security Court (*Hessisches Landessozialgericht*), 10. June 2005, L 6/7 KA 58/04 ER: continuing position as contractual doctor of public health insurance no benefit (*Leistung*) of social security. Survivors' pensions are exempt from the application of Directive 2000/78 by Article 3.3 Federal Social Security Court (*Bundessozialgericht*), 29 January 2004, B 4 RA 29/03 R; concurrent Hesse Social Security Court (*Hessisches Sozialgericht*) 29. July 2004 L 12 RJ 12/04 compared to Düsseldorf Social Security Court (*Sozialgericht Düsseldorf*), 23 October 2003, S 27 RA 99/02; cf. ECJ, 1 April 2008, C-267/06, *Tadao Maruko* and O.3 above.

²¹² Federal Administrative Court (*Bundesverwaltungsgericht*) 2 C 43.04, 26 January 2006, NJW 2006, 1828.

²¹³ Article 6 Basic Law (*Grundgesetz*).

²¹⁴ Mahlmann, in Däubler/Bertzbach, AGG, § 24 para 50.

²¹⁵ ECJ, 1 April 2008, C-267/06, *Tadao Maruko*.



The AGG, Sec. 2.1 No. 7 covers education for all grounds. It is clear that this norm applies to any form of education provided on the base of a private contract. There is no explicit extension by the AGG to education ruled by public law as in Sec. 24 AGG for civil servants. For public education (schools, universities, universities of applied sciences etc), - the greatest part of education - the constitutional equality guarantee is thus central.²¹⁶

Education is mostly dealt with by the *Länder*. *Land* school laws on education contain special provisions against discrimination and set out the aims of the educational system with respect to values such as human dignity.²¹⁷ Private schools, possibly with a religious or philosophical ethos, have a right to equal treatment as regards state support.²¹⁸ There is an explicit prohibition in the Basic Law (*Grundgesetz*) on discrimination according to income by private schools that function as a substitute for public schools.²¹⁹ Beyond this prohibition, the organisation responsible for the school has the right to select pupils freely, e.g. according to confession, as long as pupils in the area can visit an alternative public school. There are rules on reasonable accommodation for disabled children.²²⁰ All these rules on equal treatment in schools apply irrespective of nationality, and thus to immigrants as well. There are no explicit rules on harassment and instruction to discrimination in public law in this area, as the rules of the AGG are not made applicable, which might, however, depending on judicial interpretation be derived by implication from the existing norms.²²¹ For a brief description of the concept of integrated schooling for children with disabilities cf. above 2.6 b), which varies because of federal structure of Germany among the *Länder*.

There are special regulations for autochthonous minorities in Germany,²²² which provide special protection of cultural identity, including the use of language in schools.

²¹⁶ Cf. Rudolf in Rudolf/Mahlmann, GleichbehandlungsR, § 6 para 154.

²¹⁷ See e.g. Article 7 North Rhine-Westphalia Constitution (*Landesverfassung Nordrhein-Westfalen*), Section 1.1 North Rhine-Westphalia School Law (*Schulgesetz Nordrhein-Westfalen*): no discrimination on base of economic status, origin or sex.

²¹⁸ BVerfGE 75, 40.

²¹⁹ Article 7.4 sentence 3 Basic Law (*Grundgesetz*).

²²⁰ See above 2.6.b).

²²¹ Segregation – unlike individual cases of discrimination - is therefore not an issue in the German public school system, though different educational chances of persons with migrational background are well documented, cf. Klose, Rudolf/Mahlmann, GleichbehandlungsR, § 10 for further details. Given the statements on the issue by the representatives of the Sinti and Roma community to this rapporteur, this seems to be the standpoint of the Sinti and Roma community as well. There are some independent investigations of this matter, reporting that a high percentage of Sinti and Roma children do not attend school and are over represented in remedial schools. These reports have to draw, however, in the absence of reliable statistical data from interviews and other less comprehensive data (cf. e.g. ERRC/EUMAP Joint EU Monitoring and Advocacy Program / European Roma Rights Centre Shadow Report Provided to the Committee on the Elimination of Discrimination Against Women Commenting on the fifth periodic report of the Federal Republic of Germany Submitted under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, Budapest, 09.01.04). There is the widespread perception – again including voices from the German Sinti and Roma community – that these kinds of studies do not convincingly establish any patterns of segregation, though discrimination against Sinti and Roma continues to be a problem, given some surveys on the experience of discrimination by Sinti and Roma or structures of prejudice

²²² See Footnotes 63 and 85 above and Footnote 294 et seq. below.



3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

- a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The AGG contains in Sec. 19 a prohibition of discrimination in contract law. The prohibition covers the grounds of race and ethnic origin, sex, religion, disability, age and sexual identity. Belief, though contained in the drafts, was removed from the provision because of last minute political decisions. The provision thus goes in principle beyond what is demanded by the Directive 2000/43/EC.

The prohibition of discrimination on the ground of race and ethnic origin extends to all legal transactions available to the public, Sec. 19.2 AGG. The interpretation of the term “available to the public” is contentious in legal science. Most convincing is an interpretation – in line with Community law on this matter²²³ – that regards any good or service that is offered (including an invitatio ad offerendum) to an unlimited group of people by any means as available to the public.²²⁴

The prohibition for the other grounds extends to all legal transactions that are typically concluded in a multitude of cases under comparable conditions without regard to the person (so-called *Massengeschäfte* (bulk business) or to legal transactions, where the characteristics of the person have only subordinate importance, Sec. 19.1 No. 1 AGG. The principle of non-discrimination is supposed not to apply in principle (though exceptions are supposed to be possible), if a landlord does not let more than 50 flats, as in this case a *Massengeschäft* is assumed not to be given, Sec. 19.5 sentence 3 AGG. Furthermore, the prohibition of discrimination extends to private insurances, Sec. 19.1 No. 2 AGG.

The prohibition of discrimination does not apply to legal relations of a personal kind or if there is a special relation of confidence between the parties concerned or their relatives, Sec. 19.5 sentence 1 AGG. As recital 4 of Directive 2000/43/EC underlines, and as it follows from European fundamental rights, the protection of the private sphere is a (fundamental and important) content of European law. As the Directive 2000/43/EC – unlike Art. 3.1 Directive 2004/113/EC – contains no explicit exception in this respect it is, however, questionable whether the exception in the AGG is in accordance with the legal regime of Community law pertaining to race and ethnic origin bearing in mind that any intrusion in the private sphere can be avoided by the party concerned by not making the goods and services in question available to the public, and thus rendering the AGG inapplicable.²²⁵

There are no special provisions in German law covering racial or ethnic discrimination in the provision of goods and services by public sector institutions. However, the guarantee of equality, with the scope outlined above, applies.

²²³ Cf. Mahlmann, in Rudolf/Mahlmann, GleichbehandlungsR, § 3 pra 89.

²²⁴ Cf. Armbrüster, in Rudolf/Mahlmann, GleichbehandlungsR, § 7 para 75 et seq.; explanatory report, Bundestagsdrucksache 16/1780 p. 32.

²²⁵ For the reconcilability of Sec. 19.5 sentence 1 and 2 AGG with Directive 2000/43/EC, cf. e.g. Armbrüster in Rudolf/Mahlmann, GleichbehandlungsR, § 7 para 84 et seq.



There are no explicit rules on harassment and instruction to discrimination in public law in this area, as the rules of the AGG are not made applicable, which might, however, depending on judicial interpretation be derived by implication from the existing norms. If the supply is based on a private contract, the AGG is applicable. It should be noted that the constitutional guarantee of equality also applies where public authorities provide goods or services, such as water, electricity, gas or transport on the basis of private contracts concluded between the authority and a private party (so called *Verwaltungsprivatrecht*). Where the sectors have been privatised and the goods and services are offered by private actors, the AGG is applicable.

There are laws which either allow public authorities to act against certain forms of discrimination in the private sector or require equal treatment of clients in specific market segments where specific market conditions apply. For example, insurance premiums must not be calculated on the basis of nationality or ethnic origin.²²⁶ The Law on the Transport of Persons (*Personenbeförderungsgesetz*) requires that a company must be reliable in order to receive a license, and establishes the duty to provide services to anybody who abides by the transport regulations.²²⁷ Telecommunication and postal service regulations require companies with a dominant market position to offer their services to everybody on the same conditions.²²⁸ The Licensing Law (*Gaststättengesetz*) makes authorisation to establish a restaurant dependent on the provision of rooms that reasonably accommodate the needs of disabled persons.²²⁹ The license itself can be denied in cases of discriminatory behaviour.²³⁰ There is some case law in this area.²³¹

In general private law, a prohibition of discrimination can arise through the interpretation of the general provisions of private law in the light of the guarantee of equality and the guarantee of human dignity. The case law in this respect is, however, despite some literature on the matter, limited.²³²

²²⁶ Section 81e Insurance Supervision Law (*Versicherungsaufsichtsgesetz*).

²²⁷ Section 22 Law on the Transport of Persons (*Personenbeförderungsgesetz*). Disabled persons are consequently included.

²²⁸ Section 2 Regulation on the Protection of Telecommunications Customers (*Telekommunikations-Kundenschutzverordnung*); Section 2 Regulation on the Postal Service (*Postdienstleistungsverordnung*).

²²⁹ Section 4.1 Nr. 2a Licensing Law (*Gaststättengesetz*).

²³⁰ Cf. Klose in Rudolf/Mahlmann, GleichbehandlungsR, § 6 para 177 et seq.

²³¹ Cf. Schleswig-Holstein Administrative Court (*Schleswig-Holsteinisches Verwaltungsgericht*) 27 September 2000, 12 B 81/00: no denial of license for restaurant on basis of political belief (Neo-nazi) if no crime committed; Stuttgart Administrative Court (*Verwaltungsgericht Stuttgart*), 4. October 2004, 3 K 3198/04: homosexual man of Turkish background possibly harassed, background for events leading to his dismissal from voluntary fire fighters; for further case law Klose in Rudolf/Mahlmann, GleichbehandlungsR, § 6 para 177 et seq.

²³² Examples from case law: The practise of a taxi control centre of offering “German taxi drivers” was regarded as a violation of the guarantee of equality which was held to apply indirectly to the legal relationship between the taxi driver and the taxi control centre, making joint decision in this respect null and void, see Higher Regional Court Düsseldorf (*Oberlandesgericht Düsseldorf*), 28 May 1999, 14 U 238/98; Land Court Karlsruhe (*Landgericht Karlsruhe*), 11 August 2000, 2 O 243/00: Violation of Section 826 Civil Code (*Bürgerliches Gesetzbuch*) through exclusion of gay singing club by association of such clubs; termination of contract with executive because of ethnic origin is offending against good morals and consequently null and void, Land Court (*Landgericht*) Frankfurt, 7 March 2001, 3-13 O 78/00; Land Court (*Landgericht*) Frankfurt, 17 January 2001, 3-13 O 78/00 (British citizen of Indian origin). Extraordinary termination of contract, Section 626 Civil Code (*Bürgerliches Gesetzbuch*) void if severe disability has not been duly considered, Land Labour Court (*Landesarbeitsgericht*) Brandenburg, 19 February 2003, 7 Sa 385/02.



- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

As far as financial services are provided on the basis of private contract the general rules of the AGG apply. Sec. 19.1 No. 2 AGG extends the prohibition of discrimination to private insurances. The grounds covered are race and ethnic origin, sex, religion, disability, age and sexual identity.

Discriminations on the ground of race or ethnic origin may not be justified. As to unequal treatment on the ground of religion, disability, age or sexual orientation, Sec. 20.2 sentence 3 AGG provides that a difference in treatment is only admissible, if it is based on acknowledged principles of calculations adequate to the risks, especially on actuarial evaluation of risks based on statistical surveys.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

Within the conditions set out before (3.2.9.a)), the AGG applies to housing. Unequal treatment is, however, permissible for all grounds if it serves to create and maintain stable social relations of inhabitants, and balanced patterns of settlement and economic, social and cultural relations, Sec. 19.3 AGG. According to the explanatory report, this clause is not to be interpreted as justifying the underrepresentation of any racial or ethnic minority.²³³ This question has practical importance for various groups of residents with migratory background, given the residential structures in some cities where people with such background find housing predominantly in some areas, but not others, but less so for Roma as comparable housing patterns in their case do not exist. Some measures will be justifiable as positive action insofar they increase the presence of some minority. In other cases a possible indirect discrimination on race and ethnic origin because of the application of certain socio-economic parameters might be justified by the objective reason to create a socially balanced structure of inhabitants, if these measures are proportional. Given that there is no explicit exception or possibility of justification of such unequal treatment under the Directive 2000/43/EC beyond that, the reconcilability of the clause with European law depends whether the interpretation of the clause is limited to this framework.²³⁴

²³³ Bundestagsdrucksache 16/1780 p. 42.

²³⁴ Arguing for permissibility on the ground of a teleological reduction of the regulation of the Directive 2000/43/EC as the prevention of ghettoisation is not against the telos of the directive, Armbrüster in Rudolf/Mahlmann, GleichbehandlungsR, § 7 para 109 et seq.; for the impermissibility of exclusive quotas but the permissibility of supporting quotas implying maximum representation of certain minorities, Ambrosius in Däubler/Bertzbach, AGG § 19 para 40 et seq.



As mentioned, the prohibition of discrimination in contract law does not apply to legal relations of a personal kind or if there is a special relation of confidence between the parties concerned or their relatives, Sec. 19.5 sentence 1 AGG.

In case of housing this is supposed to be the case if the parties or their relatives live on the same premises, Sec. 19.5 sentence 2 AGG. This raises the same problems discussed under 3.2.9.a) as there is no explicit exception to this extent in the Directive. The reconcilability of this clause depends on the interpretation of the Directive 2000/43/EC (cf. 3.2.9.a)).

There is a special clause enabling registered partners (*Lebenspartner*) to succeed in rental contracts after their partner's demise.²³⁵

If a public body provides housing, it is bound by the guarantee of equality.

Support to people with disabilities is granted for finding, modifying, equipping and preserving of housing adequate to their special needs (Sec. 55.2 No. 5 Social Code IX (*Sozialgesetzbuch IX*)). As mentioned above (2.7.a)) people with disabilities may be granted social security benefits to help them live independently in sheltered accommodation (Sec. 55.2 No. 6 Social Code IX (*Sozialgesetzbuch IX*)).

Further provisions provide for special means to accommodate the needs of older people, including adaptation of the housing to their needs (Sec. 70 and 71.2 No. 2 Social Code XII (*Sozialgesetzbuch XII*)).

²³⁵ Section 563.1 sentence 2 Civil Code (*Bürgerliches Gesetzbuch*).



4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

Sec. 8 AGG contains a provision on genuine and determining occupational requirements following closely the Directives.

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?

In German law an elaborate system of justifications exists for religious communities – an area of considerable social, cultural and political importance. The legal basis for this are the constitutional provisions on the status of religious communities: the Constitution separates religion and State and establishes the principle of the neutrality of the state. This principle is not explicitly stated, but implied by various constitutional provisions on freedom of religion and the legal status of churches. It has been interpreted in an “open” fashion. This concept of “open” neutrality was formulated by the Federal German Constitutional Court and means that to a certain degree, religious confessions can play a role in public life, subject to strict equal treatment of all religions.²³⁶ Article 140 Basic Law (*Grundgesetz*) incorporates several articles of the Weimar Constitution, namely Articles 136, 137, 138, 139 and 141. Articles 136 and 137 are relevant in this respect: Article 136.1 provides a regulation similar to Article 33.3 Basic Law (*Grundgesetz*) establishing the same civic duties and rights irrespective of religion and is thus practically superseded by this provision and the equality guarantee.

Article 137 of the Weimar Constitution is of particular importance. Article 137.1 Weimar Constitution abolished any “state church”. This entails the separation of the secular and religious spheres and creates a basis for the autonomy of churches. Art 137.3 Weimar Constitution forms the legal basis for this autonomy from the State. Some landmark decisions by the Federal Constitutional Court have elaborated the nature of this autonomy.²³⁷ The church is autonomous in organisation and administration.

²³⁶ The head scarf issue is in its core not conceptualised by the Federal German Constitutional Court as a matter relating to unequal treatment of religions, but instead as relating to possible limits on the freedom of religion, see Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 1436/02 para 32 et passim. Even the yardstick for the guarantee of equality of Article 33.3 Basic Law (*Grundgesetz*) is the compatibility of a regulation with freedom of religion, *ibid.* para 39. The Court, however, emphasises that any prohibition of religious symbols has to respect the strictly interpreted equality of religions, *ibid.* para 43, 71. The Federal German Administrative Court confirmed this principle of equal treatment in its second head scarf decision, Federal Administrative Court (*Bundesverwaltungsgericht*), 2 C 45/03, 24.6.2004 para 35, on further cases cf. 0.3. On the general legal framework cf. Kunig and Mager in Mahlmann/Rottleuthner (eds.), *Ein neuer Kampf der Religionen?*, 2006, p. 161 et seq.; 185 et seq.

²³⁷ BVerfGE 46, 73 (Application of the Work Constitution Act (*Betriebsverfassungsgesetz*) to a Catholic hospital); BVerfGE 57, 220 (Access of Unions to religious institutions); 70, 138 (Dismissal on the basis of a breach of the duty of loyalty in religious institutions).



This is not only limited to the internal organisation of churches but extends to all institutions related to the church, regardless of their legal form. The only precondition is an inner relationship to the religious mission of the church. Whether such an inner relationship exists is not to be determined by state institutions, most importantly by the courts. It is solely up to the churches to determine the scope and limit of its religious mission. For example, for Christian churches it is accepted that due to the principle of charity, all charitable activities (such as running kindergartens, hospitals etc.) are encompassed by the religion mission of the Christian faith. Acts concerning the internal workings of a church are not acts by public authorities and thus not regulated by public law.

Given this autonomy, provisions of law do not apply to religious communities without qualification. For example, according to the Federal Constitutional Court, the Work Constitution Act (*Betriebsverfassungsgesetz*) is not applicable to hospitals as employers if their operation is part of the religious mission of a religious community. The Work Constitution Act contains a general provision in this respect that exempts from its scope all organisations that are of a directly or predominantly confessional nature, among others.²³⁸ Another provision in the Law directly exempts religious communities.²³⁹

According to Article 140 Basic Law and Article 137.3 Weimar Constitution, the autonomy of a church is limited by the laws applicable to all. This provision has been narrowly interpreted by the Federal Constitutional Court. These laws are understood as laws that have the same meaning for a church as for everybody else. For example, given the special mission of churches, labour laws do not have the same meaning for churches as for anybody else. These laws cannot therefore limit the autonomy of churches, without paying due regard to their special status when interpreting them, the Court argued.

This special legal position is of considerable practical importance. For example, religious communities are not generally exempted from legislation on protection against dismissal. The Federal Constitutional Court held that churches are free to choose the legal form by which they regulate their affairs.²⁴⁰ If, however, they take advantage of private autonomy, they are in principle regulated by general labour law.²⁴¹ The special position of the church, has, however, to be considered in this application. For example, a church can expect that employees respect special duties of loyalty as determined by the church itself. As mentioned above, churches are free to determine the precise content of these duties of loyalty. It is dependent on the internal structure of the church which authority can make this type of decision.

The legal autonomy of the churches is limited by the laws applicable to all (for example the laws regulating the termination of contracts) but these laws are interpreted in the light of their autonomy.

²³⁸ Section 118.1 Work Constitution Act (*Betriebsverfassungsgesetz*). This provision applies if the character of the organisations justifies the exemption.

²³⁹ Section 118.2 Work Constitution Act (*Betriebsverfassungsgesetz*).

²⁴⁰ BVerfGE 70, 138, 164.

²⁴¹ Ibid.

For example, courts have ruled that there are special reasons for terminating employment contracts if special duties and obligations of loyalty are violated.²⁴² Thus a doctor in a religious hospital can be dismissed if she leaves the church concerned or marries a divorced man if this contradicts the ethos of the church concerned. Another pertinent issue is homosexuality of employees.

However, the Federal Constitutional Court set important limits on this regulatory autonomy of the churches. It does not allow arbitrariness, the violation of *bona fide* principles and the *ordre public*, including the application of fundamental rights.²⁴³

It should be noted that this privilege is not limited to Christian churches, but open to any other religion.

Sec. 9 AGG contains an exception for religion mirroring this general legal framework: A difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity, Sec. 9.1. The prohibition of different treatment on the grounds of religion or belief shall be without prejudice to the right of the religious community referred to under Section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation, Sec. 9.2 AGG.

This general legal regime is in principle in accordance with the regime of exceptions in Article 4 (2) and – relevant as well – Art. 4.1²⁴⁴ of Directive 2000/78. There are, however, problems as to details of the regulations. The AGG regulation is problematic in this respect. Sec. 9.1 AGG refers to the *Selbstverständnis* (self-understanding, the ethos) *or* the nature of the particular activity, whereas the Directive combines both: The requirement has to be justified through a test of proportionality implied in Art. 4.2 Directive 2000/78/EC both as to the self-understanding *and* as to the kind of work concerned.

²⁴² Cf. for some recent case law 0.3: Rhineland-Palatine Land Labour Court (*Landesarbeitsgericht Rheinland-Pfalz*), 2 July 2008, 7 Sa 250/08: no discrimination if employee in a nursing home which is attached to a Church is dismissed because the employee leaves the Church as this is justified by breach of duty of loyalty.

²⁴³ BVerfGE 70, 138, 168.

²⁴⁴ On the complicated and unclear structure of the regime of exceptions on the grounds of religion and belief in Directive 2000/78/EC, cf. Mahlmann in Rudolf/Mahlmann, GleichbehandlungsR, § 3, para 110 et seq. Differentiations based on religious motives, e.g. as to sexual orientation, have to be justified according to Art. 4.1 Directive 2000/78/EC, not 4.2, as they are not differentiation on the ground of religion, but on the ground of sexual orientation.

A regulation like Sec. 9.1 AGG which seems not to differentiate necessarily between kinds of work seems therefore not in accordance with European Law.²⁴⁵ Sec. 9.1 AGG refers only to justified (*gerechtfertigt*) not to legitimate and justified requirements, as the Directive, though this might not lead to any difference through judicial interpretation. As in German labour law, the persons with a religious office (e.g. priests) are regularly not regarded as employees, the AGG does not apply to them.²⁴⁶ Though professional requirements in this core area of the activities of the religious community will be justifiable under Art. 4.1 and .2 Directive 2000/78/EC, the Directive does not have an exception in this respect.

- b) *Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

As mentioned, one of the practically important issues is the right of religious communities to dismiss homosexual employees, if this sexual orientation is contrary to the ethos of the respective community, cf. above 4.2 a),

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

The SoldGG covers – as mentioned above – all grounds with the exception of age and disability, taking advantage of the exception for the military service in Art. 3.4 Directive 2000/78. Sec. 18.1 SoldGG, however, provides for a prohibition of discrimination for severely disabled soldiers, provided that physical function, mental ability or psychic health is not a genuine and determining occupational requirement for the military service. Sec. 18.2 SoldGG provides for compensation for a violation of this prohibition.

²⁴⁵ It should be noted that the Federal German Constitutional Court accepted as constitutional that it is up to the religious communities to determine to which kind of work their specific requirements applies to, including the possibility that all requirements apply fully to all kinds of work, cf. BVerfGE 70, 138, 162 et seq. It is a matter of debate, whether this regime is in accordance with Directive 2000/78/EC and other regulations of Community Law on the status of religious communities, including the (not binding) 11th Declaration on the status of churches and non-confessional organisations annexed to the Treaty of Amsterdam and the corresponding regulation in Article 17 of the (not yet ratified) Treaty on the functioning of the European Union as amended by the Treaty of Lisbon (former Article I-52 of the Treaty establishing a Constitution of Europe), cf. for further details Mahlmann, in Rudolf/Mahlmann, GleichbehandlungsR, § 3 para 110 et seq. A recent case, Labour Court Hamburg (*Arbeitsgericht Hamburg*), 4 December 2007, 20 Ca 105/07, has modified this approach differentiating as to the kind of work concerned, concluding that under Community Law it is not a justified requirement that for work that does not belong to the core area of the activity of a religious community only members of that religious community are employed. This decision was overturned by Hamburg Land Labour Court (*Landesarbeitsgericht Hamburg*) on 29 October 2008, 3 Sa 15/08 (for the reasoning see above 0.3). An appeal to the Federal Labour Court (*Bundesarbeitsgericht*) against the reversal is currently pending.

²⁴⁶ As to recent case law on the matter, cf. O.3 of Report 2007.

There is in addition in the Soldiers Act (*Soldatengesetz*) a legal prohibition of discrimination against soldiers on the grounds of sexual identity, parentage, race, faith, belief, religious or political opinion, ethnic origin, amongst others.²⁴⁷ According to social law, the legal status of severely disabled soldiers is as to certain legal provisions the same as for other severely disabled persons. The provisions for severely disabled persons are applied as far as they are compatible with the special requirements of military service.²⁴⁸

b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

There are no such exceptions.

c) *Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both ?*

According to Art. 7.3 sentence 2 Basic Law (*Grundgesetz*) religious instruction in public schools is – with the exception of non-denominational schools – organised in harmony with the principle of religious communities. This creates no directional competencies for religious communities but implies various modes of influence, including agreement as to the appointment of teachers teaching the particular religion. The details are regulated in *Land* school laws or special agreements with the religious communities.

There are some equivalent rules as to Chairs in Theology in public universities. Apart from that, on the basis of special contractual agreements (concordats) with the Holy See the consent of the Catholic Church is needed in some *Länder* (mainly Bavaria) as to appointment of chairs of other subjects than theology (philosophy, history, pedagogy). In practice, these chairs are not necessarily limited to catholic applicants as a protestant applicant has been appointed on one of these chairs with the consent of the Catholic Church. The Catholic Church enjoys a veto as to the appointment but not as to the exercise of the professorship (e.g. the actual content of teaching), which has no “*missio canonica*”. In 1980, the Constitutional Court of Bavaria has decided that these regulations do not violate constitutional norms, among them the neutrality of the state. The Court argued that this form of cooperation with the Church is necessary in order to reach the educational goals (*Bildungsziele*) in public schools laid down in Sec. 131 and 135 of the Bavarian Constitution (among others the awe of God, respect for religious convictions and human dignity as well as an education according to the principles of the Christian denominations). It held that for future teachers in order to be able to educate according to the principles of the Christian denominations, it is necessary to provide corresponding course offerings at university level.²⁴⁹

²⁴⁷ Section 3.1 Soldiers Act (*Soldatengesetz*): *Der Soldat ist nach Eignung, Befähigung und Leistung ohne Rücksicht auf Geschlecht, sexuelle Identität Abstammung, Rasse, Glauben, Weltanschauung, religiöse oder politische Anschauungen, Heimat, ethnische oder sonstige Herkunft zu ernennen und zu verwenden.*, last amendment: 31.07.2008, (BGBl. I 2008, 1629).

²⁴⁸ Section 128.4 Social Code IX (*Sozialgesetzbuch IX*).

²⁴⁹ Constitutional Court of Bavaria (*Bayerischer Verfassungsgerichtshof*), BayVerfGHE 33, p. 65 et seq.

However, the question of the legitimacy of those chairs continues to be highly contentious. While proponents follow mainly the reasoning of the Bavarian Constitutional Court, arguing that as long as there is a need for denominational informed teachers these agreements are legitimate²⁵⁰ opponents criticize breaches of the constitutional principles of neutrality and separation of state and church, of the constitutional guarantee of equal access to public employment irrespective of religious denomination, of the constitutional freedom of sciences as well as of Directive 2000/78/EC and of the AGG.²⁵¹

In a recent case, the actions of seven applicants for an appointment to a professorship of philosophy for which the Catholic Church exercises a veto right, were dismissed on the base of procedural issues. It stated, in addition that given the non-discriminatory practise of the university not considering the religion of the applicants no unequal treatment has been substantiated by the applicant.²⁵²

The protestant church has concluded contracts with Bavaria that the Land has to take into account the need of theology students when appointing chairs of church law at two of its universities.²⁵³

4.4 Nationality discrimination (Art. 3(2))

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

- a) *How does national law treat nationality discrimination? Does this include stateless status?*
What is the relationship between ‘nationality’ and ‘race or ethnic origin’, in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well?)

In German law there is a differentiated system of treatment of non-German nationals. On the most fundamental level, their status is protected by fundamental rights in the German constitution that are human rights and therefore applicable to every human being in his or her relation to German state authorities. Most import is here the guarantee of human dignity.²⁵⁴ The bearers of other fundamental rights are only Germans, though special laws might grant the respective freedom for non German citizens as well.²⁵⁵

²⁵⁰ E.g. von Campenhausen, in Mangold/Klein/Starck, GG (2005), Art. 136 WRV, para 26 et seq for philosophy and pedagogy but not history; Ehlers, in Sachs, GG, Art. 140, 136, para 3, both with further references to the extensive discussion.

²⁵¹ Jeand’Heur/Korioth, Grundzüge des Staatskirchenrechts, para 338 et seq.; Morlok, in Dreier, GG, Art. 140/136 WRV para 18; Czermak, Religions- und Weltanschauungsrecht (2008), para 406 both with further references.

²⁵² Ansbach Bavarian Administrative Court (*Bayerisches Verwaltungsgericht Ansbach*), 11 December 2008, AN 2 E 08.0085 and AN 2 E 08.00925 – 930 – AN 2 E08.000930. Appeals to the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgeschichtshof*) are currently pending.

²⁵³ Cf. Hollerbach, HStR VI, § 140 para 54.

²⁵⁴ Article 1 Basic Law (*Grundgesetz*).

²⁵⁵ As for example in the case of freedom of assembly, see Section 1 Law on Assembly (*Versammlungsgesetz*).



Citizens of the Member states are treated like Germans in most respects due to community law. German law differentiates between Germans and non-Germans in various legal spheres, as residence rights, work permits or some social security rights.²⁵⁶ Some professions are open only to Germans and specified groups of non-Germans, such as EU citizens and stateless people.²⁵⁷ Nationality discrimination, including the example cited, can however be judged unlawful, if it is not justifiable under the general guarantee of equality.

Under the AGG, nationality discrimination is generally regarded as possible indirect discrimination on the base of race or ethnic origin and as such forbidden. There are prohibitions of discrimination that list nationality as forbidden ground, e.g. Sec. 75.1 Work Constitution Act (*Betriebsverfassungsgesetz*, see above 2.1). In other spheres of law, unequal treatment on the basis of nationality can be considered a breach of the general provisions of private law.

b) Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?

There is no explicit exception in anti-discrimination law. It is, however, generally accepted that the AGG does not apply to the issues listed in Art. 3 (2), cf. 4.4 a).

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) Does national law permit an employer to provide benefits that are limited to those employees who are married?

Due to the principle of freedom of collective bargaining²⁵⁸, contracting partners are free to include provisions based on marriage in collective agreements.

²⁵⁶ Some examples: The federal scheme to support educational costs through grants is not only open to Germans, but to non-Germans of various legal status as well as persons entitled to asylum, refugees, long term legal residents, and persons enjoying exceptional leave to remain, see Section 8.1 No. 2 – No. 7; 8.2 Federal Law on Promotion of Education (*Bundesausbildungsförderungsgesetz*). See also Section 63.1 and 63.2 Social Code III (*Sozialgesetzbuch III*).

²⁵⁷ See Section 3.1 No. 1 Federal Medical Regulation (*Bundesärzteordnung*): admission to medical practice only for German citizens according to Article 116 Basic Law (*Grundgesetz*), citizens of EU Member States, contractual parties to the Treaty on the European Economic Area, other contractual partners in this respect or stateless people; there are similar regulations in other areas, for example pharmacists, see Section 2.1 Nr. 1 Law on Pharmacies (*Apothekengesetz*); whereas Section 4.2 No. 2 Law on the Trade of Chimney Sweeps (*Gesetz über das Schornsteinfegerwesen*), which granted permission to work as a chimney sweep only to German citizens according to Article 116 Basic Law (*Grundgesetz*), citizens of EU Member States, and contractual parties to the Treaty on the European Economic Area was recently abrogated by amending law on 11 December 2008, BGBl I 2008, 2242.

²⁵⁸ Article 9.3 Basic Law (*Grundgesetz*).

There has to be, however, a connection to the professional tasks or working conditions.²⁵⁹ Marriage in this context can only refer to the status of family, not to its reproductive function.

b) *Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

The family status of registered life partnerships (*eingetragene Lebenspartnerschaft*) is not covered by the law on the remuneration of civil servants.²⁶⁰ The case law so far has been restrictive.²⁶¹ Because of the ECJ decision *Tadao Maruko* the differential treatment of spouses and life partners within the scope of Directive 2000/78/EC has to be considered as violating community law.²⁶²

4.6 Health and safety (Art. 7(2) Directive 2000/78)

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

There are general legal rules on health and safety measures that are relevant for aspects of personal appearance influenced by religion or ethnic origin, for example regulations on hair cuts for policemen or soldiers but no special regulations in this respect on discrimination. Other examples include such such measures in the case of disability. Any such exceptions would have to be in agreement with Sec. 8 AGG on genuine and determining occupational requirements. For disability, the duty for reasonable accommodation has to be considered in this respect. For soldiers there is a special regulation in Sec. 18.1. SoldGG cf. 4.3. a). For general civil law contracts outside labour relations covered by the Directive 2000/78/EC, justification can be based on Sec. 20.1 No. 1 AGG (see 2.2.c)).

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*

Sec. 10 AGG contains a detailed provision to justify direct discrimination on the ground of age, see above 2.2.b). Sec. 10 AGG implies a test of proportionality which is at the core of *Mangold*.

²⁵⁹ Federal Labour Court (*Bundesarbeitsgericht*), 29 April, 2004, Az: 6 AZR 101/03.

²⁶⁰ Section 40 Law on the Salaries of Federal Employees (*Bundesbesoldungsgesetz*).

²⁶¹ Cf. above 0.3 as well as chapter 0.3 in the previous country reports.

²⁶² ECJ, 1 April 2008, C-267/06, *Tadao Maruko* (for recent case law on this matter and comments, cf. above 0.3; 2.3. c); 3.2.7.



The regulations follow in Sec. 10 No. 1 – 4 AGG the regulations of the Directives. Sec. 10 No. 5 and 6 AGG cover additional (exemplary) grounds.²⁶³ Sec. 10 No. 6 seems to be justifiable in the light of Art. 6 of the Directive as opportunities in the labour market and levels of social security appear to be acceptable grounds for justification. It follows existing legal practice.²⁶⁴ For Sec. 10 No. 5 on retirement ages see below 4.7.4.

According to the equality guarantee, any different treatment on the ground of age as a personal unchangeable characteristic through legislation or other acts of public authorities falls in principle under a strict scrutiny of proportionality. This matches the Mangold-test, which is a test of proportionality, as other existing case law.²⁶⁵

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

As explained, cf. 4.7.1 a), this possibility exists, implementing the framework of Directive 2000/78/EC and its judicial interpretation

c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?

The regulation in Sec. 10 No. 4 AGG provides for this possibility.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

²⁶³ The norms name as examples

- an agreement, that provides for the termination of an employment relation without dismissal at the time, when the employee is entitled to apply for pension on the ground of age, notwithstanding the regulations in Sec. 41 Social Code VI (*Sozialgesetzbuch VI*), Sec. 10 No. 5 AGG.

- differentiations of benefits in social plans in the sense of the Work Constitution Act (*Betriebsverfassungsgesetz*), if the parties have created a settlement graduated according to age and staff membership in a firm, in which the chances on the labour market, which are essentially dependent on age, are visibly considered, or excluded employees who are economically secure from benefits of the social plan, as they are entitled to pensions, be it after reception of unemployment benefits, Sec. 10 No. 6 AGG.

²⁶⁴ Cf. the issue is contentious in legal science, for discussion cf. Brors in Däubler/Bertzbach, AGG, § 10 para 129 et seq.; Voggenreiter in Rudolf/Mahlmann, GleichbehandlungsR, § 8 para 46 (both: admissible).

²⁶⁵ See 0.3. Report 2007 for some examples.

There are various measures that aim to integrate older and younger workers.²⁶⁶ There are provisions protecting persons with caring responsibilities, e.g. parents, and, in addition, Sec. 10.1 AGG mentioned above, provides for the possibility for preferential treatment of these persons.²⁶⁷

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

There is a plethora of minimum and maximum age requirements in German law.²⁶⁸

²⁶⁶ The provisions under scrutiny in the Mangold case are an example of this. The legal provision at the centre of this case was introduced by the Law on part-time work and fixed-term contracts, amending and repealing provisions of employment law (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen*) of 21 December 2000, the “TzBfG”, last amendment: 19 April 2007, BGBl. I, 538. This legislation establishes the principle that a fixed-term contract may only be concluded if there are objective reasons for doing so (Sec. 14.1 of the TzBfG). As an exception, the Law provided that the conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 52 by the time the fixed-term employment relationship begins (former Sec. 14.3 of the TzBfG). This threshold was lowered from 58 to 52 till 31 December 2006. This exception did not apply if there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Consequently, fixed-term contracts could be concluded until 31 December 2006 without the need to be objectively justified if the worker had reached the age of 52 and a close connection to a previous employment contract of indefinite duration did not exist. As the employee was 56 years old when the fixed-term contract was concluded, this rule applied to him. The purpose of this regulation was to include older worker in the labour market. This aim was accepted by the ECJ; the means to achieve it, however, were deemed disproportionate. Recent amendment has lowered the age to 52 permanently and added the qualification that the fixed term contract with the formerly unemployed person is of up to 5 years of duration, Sec. 14.3. For other example from the case law cf. 0.3 Report 2007, e.g. on age limits intended to integrate younger workers.

²⁶⁷ See above 2.2.c).

²⁶⁸ Examples include:

Federal President: minimum: 40 years, no maximum, Article 54.1 Basic Law (*Grundgesetz*).

Judges: maximum: 65 years: Sec. 21.2 No 3, 5 (dismissal) and Sec. 48 (retirement) Law on Judges (*Deutsches Richtergesetz*). Note that this maximum age requirement is lifted to 67 by amending law from 5 February 2009 (after cut-off date of this report), BGBl. 2009 I S. 160.

Constitutional Judges: minimum 40: Sec. 3.1; maximum: 68 years: Sec. 4 Federal Constitutional Court Law (*Bundesverfassungsgerichtsgesetz*).

Federal civil servants: maximum: 65 years, Sec. 41 Federal Civil Servants Law (*Bundesbeamtengesetz*). Age requirement can be neglected for official purposes, maximum however then 68. Note that the *Bundesbeamtengesetz* was amended, newly arranged and published after the cut-off date of this report on 5.2.2009. The new Sec. 51 and 53 Federal Civil Servants Law (*Bundesbeamtengesetz*) provide for a maximum of 67 (respectively 70) years. Further amendments were made in 2009 to other provisions listed below in this footnote (e.g. the *Bundeslaufbahnverordnung*).

Application for federal service training (*Beamtenausbildung*): maximum: normally 32 years, Sec. 14.2 Regulation on Careers in Federal Service (*Bundeslaufbahnverordnung*); correspondingly Sec. 16 Regulation on Service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung*), and many others.

Promotion to a higher service level (*Aufstieg in eine höhere Laufbahn*) of federal employees through training: maximum: 44 years, Sec. 33a.1 Regulation on Careers in Federal Service (*Bundeslaufbahnverordnung*); Federal Criminal Police Servants: maximum: 44 years, Sec. 25 Regulation on Service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung*).

Promotion to a higher service level of federal servants after practical experience: minimum 45 years, maximum 57 years, Sec. 33b.1 Regulation on Careers in Federal Service (*Bundeslaufbahnverordnung*); Federal Criminal Police Servants: minimum: 45 years, maximum: 52 years, Sec. 26 Regulation on Service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung*).

The maximum age requirement of 68 years for physicians, dentists and psychotherapists as far as their licence for the public health system (*gesetzliche Krankenversicherung*) is concerned (Sec. 95.7 sentence 3 Social Code V (*Sozialgesetzbuch V*)) was abrogated in 2008.²⁶⁹

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

In 2008 the normal state pension age was raised from 65 to 67 for both women and men.²⁷⁰ However, the new threshold fully applies only to those who were born in 1964 or later. The state pension age of age cohorts from 1947 to 1963 will be lifted gradually. Employees are entitled to a (reduced) pension from the age of 63 if they decide to stop working after they have worked for 35 years or more. In 1989 and 1996, two laws were passed²⁷¹ to change the normal pension age for women to a universal level of 65 (now 67).

Federal Criminal Police: appointment of other applicants: minimum 30 years, maximum: 45 years, Sec. 27 Regulation on Service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung*).

Executive police service (*Polizeivollzug*) maximum: 60 years, Sec. 5 Federal Executive Police Service Law (*Bundespolizeibeamtengesetz*), subject to reform in 2009.

Universal compulsory military service (*Wehrpflicht*), minimum: 17, maximum: between 23 and 31 years, Sec. 5.1 Law on Universal Compulsory Military Service (*Wehrpflichtgesetz*).

Military Service: common maximum: 61 years, maximum corresponding to the military rank: 39 to 61 years, Sec. 45 Soldier Law (*Soldatengesetz*).

Air craft personnel: maximum: 60 years, Sec. 41.1 sentence 2 Service Regulations for Air Craft Personnel (*Betriebsordnung für Luftfahrtgerät*).

Midwives: maximum: 70 years, Sec. 29 Law on Midwives (*Hebammengesetz*). The minimum requirement of 17 years (former Sec. 7) was abrogated in 2008 (cf. amending law, 30.9.2008 BGBl I 2008, 1910).

Chimney Sweeps: maximum: 65 years, Sec. 9 Law on Chimney Sweeps (*Schornsteinfegergesetz*).

Education support (*Ausbildungsförderung*): maximum: 29 years, Sec. 10.3 Law on Federal Educational Support (*Bundesausbildungsförderungsgesetz*).

Federal Ombudsman on Data Protection: minimum 35 years, Sec. 22 Federal Law on Data Protection (*Bundesdatenschutzgesetz*).

²⁶⁹ The abrogation came into force retroactively by 1 October 2008, cf. Art. 1 Nr. 1 i. and Art. 7 Abs. 3 *Gesetz zur Weiterentwicklung der Organisationsstrukturen in der gesetzlichen Krankenversicherung (GKV-OrgWG)*, 15.12.2008, Bundesgesetzblatt 2008, Teil I, S. 2426 (2427f. and 2444). A preliminary reference on the same provision made before it was abrogated is pending with the ECJ (C-341/08). The submitting court (Dortmund Social Court (*Sozialgericht Dortmund*), 25 June 2008, S 16 KR 117/07) argued that an unjustified discrimination might be assumed since the provision does not take into account individual differences in deterioration of performance because of age.

²⁷⁰ Section 35 Social Code VI (*Sozialgesetzbuch VI*), amended on 20 April 2007, BGBl. I, 554.

²⁷¹ See Pension Reform Law (*Rentenreformgesetz*) 1992 (Bundesgesetzblatt 1989 I, 2261), Law on Promoting Development and Employment (*Wachstums- und Beschäftigungsförderungsgesetz*) 1996 (Bundesgesetzblatt 1996 I, 1461).

Prior to that, women could (and, for a transitional period depending on their age, still can) collect pensions before 65.²⁷² This gradual process will be accomplished in 2009. The Federal Constitutional Court held the different treatment to be constitutional as it would compensate for the typical disadvantages faced by female employees, such as an unequally distributed family burden and discriminatory patterns in working life, including during education.²⁷³

There is no restriction on individuals working at the same time as receiving a normal state pension after the age of 67. There is, however, a limit on how much money can be earned if an individual is receiving a pension before this age.²⁷⁴

b) *Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

Usually payments start from the same time as state pensions.²⁷⁵ It has been held constitutional to regulate occupational pension schemes according to the state pension regulation. Hence, women and men can be treated unequally in this context.²⁷⁶ However, this will only be acceptable for a transitional period.²⁷⁷

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

There is no general state-imposed mandatory retirement age, but there are various special regulations.²⁷⁸

d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

German law allows for employment contracts to be ended at a certain age by individual agreement and by collective bargaining. In both cases, an objective reason must exist for the respective agreements to be valid.²⁷⁹

²⁷² See Sec. 237a Social Code VI (*Sozialgesetzbuch VI*).

²⁷³ Federal Constitutional Court (*Bundesverfassungsgericht*), 28 January, 1987, Az: 1 BvR 455/82, *Neue Juristische Wochenschrift* 1987, 1541; Federal Constitutional Court, *Bundesverfassungsgericht*, January 19, 2001, Az: 1 BvR 2130/00, *Neue Zeitschrift für Sozialrecht* 2001, 357.

²⁷⁴ Sec. 34.2 Social Code VI (*Sozialgesetzbuch VI*).

²⁷⁵ See Sections 2, 6 Law on Work Pensions (*Betriebsrentengesetz*).

²⁷⁶ Federal Constitutional Court (*Bundesverfassungsgericht*), 19 January, 2001, Az: 1 BvR 2130/00, *Neue Zeitschrift für Sozialrecht* (2001), 357.

²⁷⁷ Federal Labour Court (*Bundesarbeitsgericht*), 18 March, 1997, Az: 3 AZR ; *Bundesarbeitsgericht*, 3 June, 1997, Az: 3 AZR, both ruling that ex-Article 119 EC and ECJ, C-262/88 Barber ruling is only applicable as far as time worked after 1990 is concerned.

²⁷⁸ See above 4.7.3.

²⁷⁹ See Section 14.1 Law on Part-time Work and Fixed Term Contracts (*Teilzeit- und Befristungsgesetz*). No such objective reason is needed if the employee is older than 51, Section 14.3 Law on Part-time Work and Fixed Term Contracts (*Teilzeit- und Befristungsgesetz*), though there are some qualifications (see Footnote 266).

Such objective reasons are widely held to exist for ending an employment contract at the age of 65, subject to reconsideration given the new pension age.²⁸⁰ In addition, cf. 4.7.1.a) and 4.7.4 e) below.

- e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?*

The laws on protection against dismissal apply in principle to all ages, though exceptions exist, see above 4.7.1.a). The claim to a state pension does not constitute a reason for dismissal by the employer.²⁸¹ Age is a factor within social choice (*Sozialauswahl*): age is a legitimate factor in selection for dismissal on social grounds in the sense that older employees may legitimately be retained in preference to others..²⁸² However, the entitlement to state pension, and therefore indirectly the age of an employee, can count as a consideration within social choice (*Sozialauswahl*) facilitating privileged dismissal. Before the age of entitlement, age might have the similar effect within selection procedures for redundancy though there is conflicting case law.²⁸³ The interest of the employer in maintaining an age balance among employees was also held to be reasonable.²⁸⁴ The regulation in this respect can be interpreted in accordance with Community law as a concretisation of the general clause of Art. 6 Directive 2000/78/EC, as long as there is no schematic preferential treatment of age groups.²⁸⁵ On the new regulations of the AGG, compare 4.7.2.

4.7.5 Redundancy

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

Cf. 4.7.4. e). In addition, Sec. 622.2 sentence 2 Civil Code (*BürgerlichesGesetzbuch*) provides that employment periods under the age of 25 are not taken into account when determining notice periods.

²⁸⁰ Reasons cover entitlement to a state pension and consequently social security, decreased performance typical of this age, and the need for intergenerational planning of the workforce, Müller-Glöge, Erfurter Kommentar, 9th ed. 2009, § 14 TzBfG para 56; Federal Labour Court (*Bundesarbeitsgericht*), October 20, 1993, Az: 7 AZR 135/93; Federal Labour Court (*Bundesarbeitsgericht*), 1 December 1993, 7 AZR 428/93; Federal Labour Court (*Bundesarbeitsgericht*), 19 November 2003, 7 AZR 296/03; Before that age, special requirements can justify early retirement.

²⁸¹ Section 41 Social Code VI (*Sozialgesetzbuch VI*).

²⁸² See Sec. 1.3 sentence 1 Law on Protection against Dismissal (*Kündigungsschutzgesetz*). In case of dismissal due to urgent entrepreneurial reasons, the dismissal is – among others – not justified if the employer does not take or does not take sufficiently account of the age of the person concerned. On recent case law, cf. 0.3.

²⁸³ See Land Labour Court, Lower Saxony (*Landesarbeitsgericht Niedersachsen*), 28 May, 2004, Az: 10 Sa 2180/03, arguing that a guideline according to which employees older than 55 can be more easily dismissed is not in violation with Directive 2000/78 because these employees can live more easily with a higher risk of unemployment due to social security. See Land Labour Court, Düsseldorf (*Landesarbeitsgericht Düsseldorf*) 21 January 2004, Az: 12 Sa 1188/03: Proximity to the pension age no reason for choosing older employee for dismissal and case law 0.3.

²⁸⁴ Federal Labour Court (*Bundesarbeitsgericht*), 23 November 23, 2000, Az: 2 AZR 533/99: employee working in a kindergarten.

²⁸⁵ Cf. Brors, Däubler/Bertzbach, AGG, § 10 para 100.



This regulation is not reconcilable with Art. 6 Directive 2000/78/EC and is currently subject to scrutiny in the context of a preliminary reference to the European Court of Justice.²⁸⁶

b) If national law provides compensation for redundancy, is this affected by the age of the worker?

Age can play a role in social plans for redundancy, cf. 4.7.1.a).

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?

There is no general exception of this kind in national law, though such considerations would enter into the existing regime of exceptions.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

The regime of exceptions has been outlined above

²⁸⁶ ECJ, C-555/07 (*Küçükdeveci*). On case law on the matter cf. 0.3.



5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic*

Sec. 5 AGG provides that unequal treatment as positive action is permissible – notwithstanding the justification on other grounds – if through suitable and appropriate measures existing disadvantages caused by one of the covered grounds are to be prevented or compensated.

Positive action by public authorities including legislation has to be reconcilable with the constitutional guarantee of equality.²⁸⁷ Explicit regulations make permissible positive action promoting the equality of men and women and disabled persons.²⁸⁸ There is debate over whether positive action is permissible within the scope of the guarantee of equality for other written and unwritten grounds of discrimination (the latter cover for example sexual orientation).²⁸⁹ This has not been authoritatively clarified by the Federal Constitutional Court. Positive action in form of preferential employment is legally regulated according to the relevant ECJ case law,²⁹⁰ which allows such treatment in principle, as long as the schemes allow for individual cases to be assessed.²⁹¹

The issue is highly contentious, especially as far as rigid quota systems are concerned. It has been extensively discussed regarding discrimination on the ground of sex. There has been no comparable debate regarding other grounds.

There are various special regulations on positive action, partly mentioned above.²⁹² Work Councils and the staff councils of public authorities have the competence to promote the integration of disabled persons, older and foreign workers and to initiate measures against racism and xenophobia.²⁹³

²⁸⁷ Article 3, 33.2 and .3 Basic Law (*Grundgesetz*).

²⁸⁸ Article 3.2 sentence 2, Article 3.3. sentence 2 Basic Law (*Grundgesetz*). On *Land* constitutions see Footnote 63. The disability law provides for the explicit admissibility of positive action, see Section 7.1 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*).

²⁸⁹ For this see: Gubelt in: v. Münch/Kunig, GGK I, Article 3 para 104; Ebsen, in: *Handbuch des Verfassungsrechts*, 2. ed. 1994, § 8, para 23; Osterloh in: Sachs, GG, Article 3 para 241 et. seq., 254; against: Sachs, in: Isensee/Kirchhof, HStR V, § 126 para 52 et seq.

²⁹⁰ See ECJ, ECR 1995, I-3069, *Kalanke*, ECJ, ECR I-6363, *Marschall*, ECJ, ECR 2000, I-5539 *Abrahamsson*, cf. Mahlmann, in Rudolf/Mahlmann, Gleichbehandlungsgesetz, § 3 para 70.

²⁹¹ Compare for such legislation e.g. Section 8.1 sentence 3 Federal Civil Service Law (*Bundesbeamtengesetz*).

²⁹² See above 2.6.

²⁹³ Section 80.1 No. 4 Work Constitution Act (*Betriebsverfassungsgesetz*): integration of severely disabled persons, No. 6: integration of older employees, No. 7: integration of foreign workers, initiating measures against racism and xenophobia and see Section 68 No. 4, 5, 6 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*).

There are provisions on positive action, including institutional arrangements for autochthonous minorities, the promotion of their language, the protection of their territory etc., preferential rules for political representation and so on,²⁹⁴ constitutionally buttressed by basic policy clauses of the constitutions of the *Länder*.²⁹⁵

According to the Law on Protection against Dismissal, the preferential treatment of older employees under certain circumstances in case of dismissals is to be taken into account in the context of social choice (see above 4.7.4 e).²⁹⁶ Employers and Work Councils have to ensure vocational training for older workers.²⁹⁷

Section 71.1 in conjunction with Sec. 73 Social Code IX (*Sozialgesetzbuch IX*) establishes the duty of any employer employing more than 20 employees to employ at least 5% severely disabled persons. This rule is interpreted as not being directly prejudicial for individual claims, as it establishes only a general duty for the employer. If the employer does not fulfil this duty, as indicated before, it does not mean that discrimination has occurred in a specific case.²⁹⁸ Social security law grants state funding to help people with disabilities participate in working life in areas such as training and education, equipment and transport,²⁹⁹ and also gives financial assistance to the employer for costs such as training and education, equipment and costs relating to integration.³⁰⁰ A disabled person can uphold his/her right against the employer to suitable working conditions, for example regarding working hours, equipment, general working conditions, and risk of accident.³⁰¹

²⁹⁴ See on the regulations of the *Land* constitutions, above Footnote 63; for *Land* laws, e.g. Law on the Rights of the Sorbs (Wends) in the *Land* of Brandenburg (*Gesetz zur Ausgestaltung der Rechte der Sorben (Wenden) im Land Brandenburg*) 7.7.1994, GVBl 1994, 294; Brandenburg / Saxony: State Agreement on the Foundation of a "Foundation for the Sorbian People" (*Gesetz zum Staatsvertrag über die Errichtung der "Stiftung für das sorbische Volk"*), Date: 09.12.1998, Sächsisches Gesetz- und Verordnungsblatt 1998, 629; Saxony: Law on the Rights of the Sorbs in the Free State of Saxony (*Gesetz über die Rechte der Sorben im Freistaat Sachsen*), Date: 31.03.1999, Sächsisches Gesetz- und Verordnungsblatt 1999, 161; Schleswig-Holstein: Law on the Promotion of Frisian in the Public Sphere (*Gesetz zur Förderung des Friesischen im öffentlichen Raum*), Date: 13.12.2004, Gesetz- und Verordnungsblatt 2004, 481; Schleswig-Holstein: Schleswig-Holstein School Law (*Schleswig-Holsteinisches Schulgesetz*), Gesetz- und Verordnungsblatt 1990, 451, last amendment: 12.12.2008, GVBl 2008, 791; Law on the Legal Status and Financing of Fractions in the Schleswig-Holstein Parliament (*Gesetz zur Rechtsstellung und Finanzierung der Fraktionen im Schleswig-Holsteinischen Landtag*), Date: 18.12.1994, Gesetz- und Verordnungsblatt 1995, 4, last amendment: 26.5.1999, GVBl 134; Electoral Law for the Schleswig-Holstein Parliament (*Wahlgesetz für den Landtag Schleswig-Holstein*), Date: 07.10.1991, Gesetz- und Verordnungsblatt 1991, 442, last amendment: 10.01.2008, Gesetz- und Verordnungsblatt 2008, 25.

²⁹⁵ See Footnote 63. Brandenburg *Land*: Constitution of Brandenburg (*Verfassung von Brandenburg*): Article 25: Rights of the Sorbs (Wends) (*Rechte der Sorben [Wenden]*). Law on the Definition of the Rights of the Sorbs in the *Land* of Brandenburg (*Gesetz zur Ausgestaltung der Rechte der Sorben (Wenden) im Land Brandenburg* (GVBl 1994, 294)): Sec 1: Right to national identity; Section 2 sentence 3: No disadvantage because of commitment to ethnic group; Section 5: Council for Sorbian affairs; Section 10: Education, see 3.2.8; Schleswig-Holstein: Danes, Frisians: Article 5 Constitution of Schleswig Holstein (*Verfassung des Landes Schleswig-Holstein*): minorities and ethnic groups (*Minderheiten und Volksgruppen*).

²⁹⁶ Sec. 1.3 Law on Protection against Dismissal (*Kündigungsschutzgesetz*).

²⁹⁷ Sec. 96.2 sentence 2 Work Constitution Act (*Betriebsverfassungsgesetz*).

²⁹⁸ The general employment quota applies to all employers employing 20 employees or more in average, Sec. 71, 73 Social Code IX (*Sozialgesetzbuch IX*). There are modifications for smaller companies. If the quota is not met, penalties/payments up to €260 for every disabled person who should have been employed are possible, *ibid* Sec. 77.

²⁹⁹ Section 33 Social Code IX (*Sozialgesetzbuch IX*).

³⁰⁰ Section 34 Social Code IX (*Sozialgesetzbuch IX*).

³⁰¹ Section 81.3 and .4 Social Code IX (*Sozialgesetzbuch IX*).

The disabled person can claim preferential treatment regarding promotion and training. The employer is under a duty to check if qualified disabled persons are available for posts which are vacant.³⁰² S/he is under a duty to communicate and co-operate with public authorities. People with disabilities have the right to part-time work if it is necessary for reasons related to their disability.³⁰³ There is furthermore the duty to conclude integration agreements,³⁰⁴ which are concrete binding legal provisions. There exists a claim to such agreements, but the law does not offer a mechanism to solve conflicts in cases where no agreement is reached.³⁰⁵

There is an obligation to create a representative body for severely disabled persons if there are at least five severely disabled workers.³⁰⁶ Severe disability has to be taken into account within social choice (*Sozialauswahl*) in case of dismissals (*betriebsbedingte Kündigungen*).³⁰⁷ There is a special procedure involving public authorities in the case of an ordinary dismissal of a disabled person.³⁰⁸ The employer is under an obligation to cooperate with the representative body of disabled persons and the integration authority to avoid dismissal.³⁰⁹

It is part of the task of the Work Councils to promote equal treatment,³¹⁰ as it is for the representative bodies of public employees³¹¹ or of severely disabled persons.³¹²

b) Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted., classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.

Apart from action taken on the ground of the provisions listed under a), there are other policy programmes, e.g. to foster integration of ethnic minorities. There are quotas for disabled persons (cf. 5.a)), but not for Sinti and Roma. It should be noted that representatives of the Sinti and Roma community have voiced scepticism to this author about the usefulness of such quotas in the German situation because of potential labelling and disintegrative effects of such measures. The Sinti and Roma community pursues a decisively integrative policy that focuses on non-discrimination, not positive action. There are in consequence no quotas for Sinti and Roma or other “hard” positive action measures.

³⁰² Section 81.1 Social Code IX (*Sozialgesetzbuch IX*).

³⁰³ Section 81.5 sentence 3 Social Code IX (*Sozialgesetzbuch IX*).

³⁰⁴ Section 83 Social Code IX (*Sozialgesetzbuch IX*).

³⁰⁵ On all this see above 2.6.

³⁰⁶ Sec. 94 Social Code IX (*Sozialgesetzbuch IX*).

³⁰⁷ Section 1.3 Law on Protection against Dismissal (*Kündigungsschutzgesetz*).

³⁰⁸ Sec. 85 et seq. Social Code IX (*Sozialgesetzbuch IX*). There is a period of 3 months between dismissal and conclusion of employment (comparable with a period of notice), § 89.1 Social Code IX (*Sozialgesetzbuch IX*); an extraordinary dismissal is nevertheless admissible.

³⁰⁹ Section 84 Social Code IX (*Sozialgesetzbuch IX*).

³¹⁰ See Section 75, 88 No. 4 Work Constitution Act (*Betriebsverfassungsgesetz*).

³¹¹ See 67.1 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*).

³¹² See 95 Social Code IX (*Sozialgesetzbuch IX*).



There are, however, some state policies by the Federation and the *Länder* that might be mentioned in the context of positive action.³¹³

³¹³ The organisations representing Sinti and Roma have received publicly funded financial support since 1991 as has the Documentation and Cultural Centre of the Sinti and Roma both by the Federation and on the Land level. A special topic is the promotion of the language of the Sinti and Roma, given the perception of parts of the community that their linguistic heritage should be handed down only within the community. There are some initiatives by the local Sinti and Roma organisations (with the mentioned public support) to foster the achievements of Sinti and Roma in school, e.g. through supplementary lessons. There are initiatives for adult education as well. Educational and awareness-raising initiatives include trips to memorial sights of the Sinti and Roma holocaust or exhibitions on the topic. There are various initiatives to promote cultural events by public subsidies. Further activities include social counselling.



6. REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In relation to each, of the following questions please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?

Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

According to Sec. 13 AGG, employees have a right to complaint to the competent body within the enterprise. In the case of harassment, they have according to Sec. 14 AGG the right to withhold their services insofar this is necessary for their protection.

There are no special procedures for discrimination claims, only general procedures, including administrative review in public matters and finally leading to binding court decisions. There is the possibility of alternative dispute solution. Procedures of mediation enjoy an increasing interest in Germany that will certainly encompass the rather new discrimination matters.

In some procedure there is the necessity to instruct a lawyer (e.g. higher instance civil procedures). For persons of need, legal aid can be granted.

There are no statistics on the number of cases related to discrimination brought to justice.³¹⁴

b) *Are these binding or non-binding?*

Administrative acts and court decisions are binding. The binding power of alternative dispute resolution depends on circumstance. Mediation e.g. often (though not always) leads to a binding settlement.

c) *Can a person bring a case after the employment relationship has ended?*

A claim can be brought after employment has ended, within the limits of general law, especially the statute of limitations.³¹⁵

³¹⁴ In the empirical EU/German government commissioned study undertaken this year by the author and Prof. Dr. Hubert Rottleuthner mentioned above data are collected in this respect, results are not available yet.

³¹⁵ A dismissal protection case needs to be brought within 3 weeks, Section 4 Law on Protection against Dismissal (*Kündigungsschutzgesetz*); partly particular regulations for disabled persons, Section 4 sentence 4 Law on Protection against Dismissal (*Kündigungsschutzgesetz*) in conjunction with Section 85 Social Code IX (*Sozialgesetzbuch IX*).



In addition, the AGG foresees special time-limits to bring claims, two months for claiming material or immaterial damages in labour or civil law, Sec. 15.4 and 21.5 AGG.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

a) in support of a complainant

Sec. 23 AGG provides for legal support through anti-discrimination associations (*Antidiskriminierungsverbände*). Anti-discrimination associations are defined as associations of persons that promote by way of their charter the interests of persons or groups of persons discriminated on the grounds covered by the AGG on a non-commercial basis, Sec. 23.1 AGG. They have to have at least 75 members or have to be the association of seven associations of such purposes. Legal personality of these associations is not a precondition. They have to operate permanently, and not only on an ad hoc basis to support one claim.³¹⁶

Until recently, Anti-discrimination associations were entitled to support plaintiffs in court proceedings only if there were no mandatory representations through advocates, former version of Sec. 23.2 sentence 1 AGG.³¹⁷ Since 1 July 2008, however, the associations are able to do so even if representations through advocates are mandatory.³¹⁸ These associations are allowed to conduct legal matters for the plaintiff, Sec. 23.3 AGG, most importantly give legal advice. In the case of representation by the association, Sec. 90.2 Code of Civil Procedure (*Zivilprozessordnung*) regulates that the acts of the counsel are taken as acts of the party, if the latter does not contradict.³¹⁹ These rules apply to other court proceedings as well.

In disability law, associations have legal standing as representative action is possible. This concerns the duties of public bodies to provide an environment free of barriers as specified in various legal regulations and the anti-discrimination law for disabled persons.³²⁰

There are general regulations concerning standard form contracts (*Allgemeine Geschäftsbedingungen*).

³¹⁶ These preconditions are not explicitly prescribed by the Directives. The non-profit orientation may be justified by the intent not to foster inflationary claims, minimum requirement of size and stability by considerations of protection of claimants.

³¹⁷ Advocates are mandatory in various constellation, in civil law e.g. for all cases pending before the *Landgericht* (Higher Regional Courts), Sec. 78.1 sentence 1 Law on Civil Proceedings (*Zivilprozessordnung*). The amendment of Sec. 23.2 AGG from 12.12.2007 (BGBl. I S. 2840) came into force on 1.7.2008. At the same time, Sec. 157 Law on Civil Proceedings (*Zivilprozessordnung*), which provided for another mechanism of exclusion of representatives (cf. Fn. 283 in the 2007-country report), has been amended, 12.12.2007 BGBl. I 2840, entry into force: 1.7.2008.

³¹⁸ Art. 19.10, 20 sentence 3 Law on reform of the Act on Legal Advice (*Gesetz zur Neuregelung des Rechtsberatungsgesetzes*), 12.12.2007, BGBl. 2007, 2840. They are then able to act in support of the plaintiff in addition to an advocate.

³¹⁹ These acts encompass both factual declarations as to the matter of the case and procedural acts (recognition etc.).

³²⁰ See Section 13 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*): right to action against violation of law. If individual is concerned as well, right is only existing if case has general importance; Section 63 Social Code IX (*Sozialgesetzbuch IX*) Right of Action by Organisations (*Klagerecht der Verbände*): organisation has legal standing in place of disabled person with her consent.



A violation of the AGG can give rise to an action by associations, which have to be included in register for this purpose.³²¹ Similar possibilities exist as to consumer protection.³²²

The Work Council or a union represented in enterprises that are subject to the Work Constitution Act, have, according to Sec. 17.2 AGG in conjunction with Sec. 23.3 Work Constitution Act (*Betriebsverfassungsgesetz*) the right to take court action against severe cases of discrimination.

b) on behalf of one or more complaints (please indicate if class actions are possible)

The initial draft of the AGG foresaw the possibility of representation of complainants in court proceedings. This regulation was changed due to last minute political compromise.

There is no class action in German law – one cannot file suit with one or several named plaintiffs on behalf of a putative class. On the limited cases of representative action, cf. 6. 2b).

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

Sec. 22 AGG regulates the burden of proof. According to this norm, the complainant has to prove facts of circumstantial evidence that make it reasonable to assume unequal treatment on one of the grounds covered by the AGG, so that the defendant carries the burden of proof, that no violation of the regulations for the protection against discrimination has occurred.

There is some debate, how such clause has to be interpreted. There is general agreement that one has to distinguish as elements the unequal treatment, the causality of the characteristic and the possible given objective reasons or justification for the unequal treatment. It is mostly argued that the plaintiff has to fully prove the unequal treatment. The plaintiff has to prove, in contrast, the preponderant probability of the causality of the characteristic for the unequal treatment. If this is achieved, the defendant has to fully prove the existence of objective or justifying reasons for the treatment.³²³

In public law proceedings inquisitorial principles are to be applied. Because of Sec. 24 AGG, Sec. 22 AGG is applicable to law suits arising under civil service law.

³²¹ Cf. for details the Law on Prohibitory Action (*Unterlassungsklagengesetz*).

³²² Cf. for details the Law on Unfair Competition (*Gesetz gegen unlauteren Wettbewerb*).

³²³ Cf. e.g. Federal Labour Court (*Bundesarbeitsgericht*), 16. September 2008, 9 AZR 791/07; Bertzbach in Däubler/Bertzbach, AGG, § 22 for discussion, arguing himself, that on the level of the establishment of the unequal treatment, a preponderant probability suffices, para 15 et seq.

The regulation has implications modified according to the inquisitorial system.³²⁴ Here, too, however, a preponderant probability for the causality of the characteristic is enough, whereas the unequal treatment and the existence of objective reasons or justification have to be proved to the full conviction of the court. In addition, it is relevant in *non liquet* situations.³²⁵ The Directives foresee the possibility of the non-application of the burden of proof regulations in inquisitorial proceedings, Art. 8.5 Directive 2000/43/EC, 10.5 Directive 2000/78/EC. It forms therefore not a deficit under European Law that the burden of proof regulation is not extended to all law suits under public law, especially as to social benefits, education and the provision of goods and services in the case of discriminations on the ground of race and ethnic origin, as these law suits are such inquisitorial proceedings.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)

Sec. 16 AGG prohibits victimisation in employment relations. The employer is not allowed to disadvantage employees because of claiming rights flowing from the AGG or because of refusing to follow an order contrary to the AGG, Sec. 16.1 sentence 1 AGG. The same principle holds for persons supporting the employee or witnesses, Sec. 16.1 sentence 2 AGG. Sec. 16.2 AGG provides that the refusal or acquiescence of a discriminating act is not to be used as the base of a decision against the employee. Parallel provisions exist in Sec. 13 SoldGG.

There are further prohibitions of victimisation in other legal norms.³²⁶ There is no special prohibition in civil law as foreseen in Art. 9 RL 2000/43/EC which forms a deficit of implementation.³²⁷ Apart from civil service law – through Sec. 24 AGG – and public employees directly covered by the AGG, there is no regulation of victimisation in other public law areas (e.g. social law, public education, provision of goods and services through public bodies). Given the authoritative standards of the rule of law, Art. 20.3 Basic Law (*Grundgesetz*), any victimisation is, however, illegal. It is thus tenable to assume that no breach of European law exists in this respect.

³²⁴ Some state disability law contain such regulations for public law, see Section 3.2 [Berlin] Law on Promoting Equality between People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung*); Section 3.3 Law on Equal Opportunities and against Discrimination of Disabled People in Saxony-Anhalt (*Gesetz für Chancengleichheit und gegen Diskriminierung behinderter Menschen im Land Sachsen-Anhalt*); Section 7.2 Thüringer Law on Promoting Equality and Improving the Integration of People with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderung*).

³²⁵ Cf. Mahlmann, in Däubler/Bertzach, AGG, § 24 para 77 et seq.

³²⁶ Cf. e.g. prohibition on reprimand and disciplinary action in cases where employees pursue their lawful enjoyment of rights in the Civil Code, Sec. 612a Civil Code (*Bürgerliches Gesetzbuch*); persons of confidence (persons representing the interests of the disabled employees) are specially protected in disability law so that they are not discriminated against because of their function, Section 96 Social Code IX (*Sozialgesetzbuch IX*).

³²⁷ Cf. Armbrüster, in Rudolf/Mahlmann, GleichbehandlungsR, § 9 para 6.



6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

Sec. 15 AGG provides a regulation of compensation. In case of discrimination, the victim is entitled to damages for material loss if the employer is liable for fault (wilful or negligent wrongdoing), Sec. 15.1 sentence 2 AGG. There is strict liability for damages for non-material loss, Sec. 15.2 sentence 1. If the employer applies collective agreements he is only liable in the case of gross negligence or intent, Sec. 15.3 AGG.

There is a time limit of two months for any such claim, beginning with the reception of the rejection of a job application or promotion, in other cases the knowledge of the disadvantageous behaviour.³²⁸ The Act does not establish a duty to contract, unless such duty is derived from other parts of the law, Sec. 15.6 AGG, e.g. tort law.

These norms are applied analogously according to civil service law, Sec. 24 AGG.³²⁹

In case of a violation of the prohibition of discrimination in general civil law, the victim has a claim of forbearance (omission of the discriminatory act) and removal of the disadvantage and can sue for an injunction, Sec. 21.1 AGG. The discriminator is liable to pay damages for material loss caused for fault (wilful or negligent wrongdoing), Sec. 21.2 sentence 2 AGG. There is strict liability for damages for non-material loss, Sec. 21.2. Sentence 3 AGG. There is a time limit of two months for making any such claims, as in labour law, Sec. 21.5.

Given the case law of the ECJ³³⁰ demanding strict liability in the case of awarded damages in civil law for discrimination, the regulations in 15.1 sentence 2 and Sec. 21.2 sentence 2 AGG are in breach of European Law.³³¹

In addition, other norms of law can be the base of compensation, Sec. 15.5 AGG. Sec. 21.3 AGG mentions only tort law, though other claims are not excluded by the application of the AGG.³³²

Other violations of public law norms can give rise to state liability.

³²⁸ Art. 15.4 foresees that the time limit starts with the reception of the refusal to employ a person or the knowledge of the discriminatory circumstance. Given among others the ECJ jurisdiction on the matter of effective pursuit of claims there is an argument that the rule has to be interpreted in such a manner that the earliest beginning of the time limit is the reception of the refusal. Otherwise the rule is contrary to European Law, cf. Deinert, in Däubler/Bertzbach, AGG, § 15 para 109 the shortness of which should anyway be a matter of concern.

³²⁹ For details, cf. Mahlmann in Däubler, Bertzbach, AGG, § 24 para 66 et seq.

³³⁰ Cf ECJ, ECR 1997, I-2195, *Draehmpaehl*, para 37.

³³¹ It may be argued that the same extends to Sec. 15.3 AGG as to collective agreements.

³³² For comments on civil law, cf. Armbrüster, in Rudolf/Mahlmann, GleichbehandlungsR, § 7 para 199 et seq.



b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

In the case of immaterial damage in labour law, the amount of compensation has to be appropriate. If the discrimination was not a causal factor for the decision not to recruit an individual the compensation for non-material loss is limited to a maximum of three monthly salaries, Sec. 15.2 sentence 2 AGG.

The compensation in civil law for immaterial damage has equally to be appropriate, Sec. 21.2 sentence 3 AGG. It has been held that the damages of a discrimination do not encompass the difference between the salary of the previous employment and the lower, current salary till retirement.³³³

c) *Is there any information available concerning:*

- *the average amount of compensation available to victims*
- *the extent to which the available sanctions have been shown to be - or are likely to be effective, proportionate and dissuasive, as is required by the Directives?*

As the AGG has been enacted not a very long time ago, there is no such information yet. There is some experience with existing rules – apart from sex, not covered by this report – e.g. on disability discrimination.³³⁴ The norms of the AGG would, however, enable the Courts to apply sanctions that are effective, proportionate and dissuasive.

³³³ Cf. Wiesbaden Labour Court (*Arbeitsgericht Wiesbaden*), 18. December, 2008, 5 Ca 46/08.

³³⁴ Berlin Labour Court (*Arbeitsgericht Berlin*), 13. July, 2005, Az: 86 Ca 24618/04, (not final): immaterial damages: 3 monthly salaries. Berlin Labour Court (*Arbeitsgericht Berlin*), 10 October, 2003, Az: 91 Ca 17871/03 held that as a general minimum for cases in which a disabled applicant possibly would have been employed is the equivalent of three months' salary, finally (after decision by Federal Labour Court (*Bundesarbeitsgericht*)) confirmed by Regional Labour Court Berlin (*Landesarbeitsgericht Berlin*), 31.01.2008, 5 Sa 1755/07. Frankfurt am Main Labour Court (*Arbeitsgericht Frankfurt am Main*), 19. February 2003, Az: 17 Ca 8469/02: 1.5 months' salary as compensation for mere failure to give reasons for the rejection of a disabled applicant, cf. Düwell, jurisPR-ArbR 1/2004 Anm. 6.



7. SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) *Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin?(Body/bodies that corresponds to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

According to Sec. 25 AGG a Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*) has been created in August 2006 in Berlin. There are in addition various agencies concerned with some of the tasks, most notably the federal and *Land* Commissioners for Integration/Foreigners and the Commissioner for National Minorities and Immigrants of German Ethnicity, for Disabled Persons, or the German Institute for Human Rights on the federal and regional level which do advisory work for the government and other public bodies, publish (extensive) reports and give to a limited degree individual advice to victims of discrimination.

- b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*

The Federal Anti-Discrimination Agency is organisationally associated with the Ministry of Family, Senior Citizens, Women and Youth, Sec. 26 AGG. The head of the agency is appointed by the Minister of Family, Senior Citizens, Women and Youth after a proposal by the Government. He or she is independent and only subject to the law. The tenure of the head of the agency is the same as the legislative period of the *Bundestag*. These latter regulations might raise concerns as to the independence of the head of the body. Given the tenure, the head will always be appointed by the respective government. This is a source of possible informal influence on the policies of the Agency by the government. As, however, the head is by explicit regulation legally independent and can only be removed in exceptional circumstances of breach of official duties, this Agency can still be regarded as independent in the sense of the Directives. Funding is provided through the Ministry of Family, the financial means (about 5 Mio Euro), however, are to be administered independently by the Agency.

- c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

The agency has the task of supporting persons to protect their rights against discrimination on all grounds regulated by the AGG (race, ethnic origin, sex, religion, belief, disability, age, sexual identity), notwithstanding, however, the competencies of specialised governmental agencies dealing with related subject matters.



According to Sec. 27 AGG this encompasses specially to inform complainants about the legal means against discrimination, to arrange legal advice by other agencies, to mediate between the parties, to provide information to the public in general, take action for the prevention of discrimination, produce scientific studies, and – every four years – a report on the issue of discrimination, together with the Commissioners dealing with related matters, Sec. 27.4 AGG (e.g. Commissioners for Integration). The agencies can give recommendations and can commission together scientific studies. The agency can demand a statement of position in case of discrimination from the alleged discriminator, if the alleged victim of discrimination agrees, Sec. 28.1 AGG. Other public agencies have to support the agency in their work, Sec. 28.2 AGG. The agency is to co-operate with NGOs and other associations, Sec. 29 AGG. An advisory body for the Agency has been created, including stake holders and some experts.³³⁵ From January till December 2008 the Agency had 1351 contacts concerning the AGG, since August 2006 3946 contacts, including 173 on multiple discrimination.³³⁶ The agency has organised conferences, distributed information about matters of discrimination and published studies (e.g. about “discrimination in everyday life” or “benefits and costs of the AGG”) as well as an English translation of the AGG on its website.³³⁷

d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

As indicated, Cf. 7 c), the Agency enjoys these competencies

e) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

The agency has no such competencies.³³⁸

f) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)*

As mentioned above, Sec. 27.2 sentence 2 No. 3 states that the agency endeavours to achieve an out-of-court settlement between the involved parties. According to Sec. 28.1 AGG, in that case, the agency can demand a statement of position in case of discrimination from the alleged discriminator, if the alleged victim of discrimination agrees. However, there is no legal duty for submission of such statements.³³⁹ Other public agencies have a duty to collaborate with the Agency, Sec. 28.2 AGG. The Agency cannot issue binding decisions and does not possess the power to impose any sanctions against the parties. In consequence, it can not be regarded as a quasi-judicial institution.

³³⁵ <http://www.antidiskriminierungsstelle.de/bmfsfj/generator/ADS/antidiskriminierungsstelle.html>.

³³⁶ Cf. Antidiskriminierungsstelle des Bundes, Kumulierte Statistik 2008.

³³⁷ <http://www.antidiskriminierungsstelle.de/bmfsfj/generator/ADS/Service/downloads.html>.

³³⁸ Cf. Hühn in Rudolf/Mahlmann, GleichbehandlungsR, § 10 para 27.

³³⁹ Ernst, Däubler/Bertzach, AGG, § 28 para 1.



g) *Is the work undertaken independently?*

As indicated above, the work is conducted independently, cf. 7 b).

h) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

The body has not developed any special programme as to Sinti and Roma in Germany. A representative of the Sinti and Roma community is, however, part of the advisory body.



8. IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

- a) *to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

The Agency has produced information material and has conducted conferences on this matter.³⁴⁰ Other programs do not focus on the legal framework of the AGG but rather on social issues of inclusion and equality.

- b) *to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and*

There are various initiatives against discrimination in Germany on a quite significant scale, most importantly in the case of discrimination on the ground of race and ethnic origin including (institutionalised) dialogue with NGOs and social partners.³⁴¹ Legislative consultations processes are routinely including a wide range of NGOs

- c) *to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

The Anti-Discrimination Agency e.g. has tried to communicate the value of anti-discrimination policies for an efficient economy through a conference on the matter and respective publications

- d) *to specifically address Roma and Travellers*

As mentioned above (cf. 7 h), there is no special programme of the Agency concerning Sinti and Roma. A member of the representation of the Sinti and Roma of Germany is member of the advisory committee of the Agency.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment?*

³⁴⁰ On activities of the Agency, cf.:

<http://www.antidiskriminierungsstelle.de/bmfsfj/generator/ADS/antidiskriminierungsstelle.html>

³⁴¹ An example is the *Bündnis für Demokratie und Toleranz* (Alliance for Democracy and Tolerance) founded 2000, which unites with active support of the German state currently about 1300 initiatives working among others against racism and xenophobia. The legislative process of implantation was accompanied with several consultations and parliamentary hearings.



These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

Sec. 7.2 AGG provides that (individual or collective) agreements contrary to the prohibition of discrimination in labour law are void. According to Sec. 21.4. AGG, the discriminating person can not rely on a discriminating agreement in civil law matters. Sec. 134 Civil Code (*Bürgerliches Gesetzbuch*) is applicable, that makes such acts void, in civil law only for unilateral juristic acts and agreements with discriminatory effects on third parties.³⁴² The common rules to solve collisions of legal rules apply.

b) Are any laws, regulations or rules contrary to the principle of equality still in force?

As explained, various laws can be considered to be in breach of the Directives, Cf. 0.2. There is has been no systematic survey by public authorities whether or not norms exist that are contrary to the Directives.

³⁴² Cf. Bundestagsdrucksache 16/1780, p. 47; Armbrüster, in Rudolf/Mahlmann, GleichbehandlungsR, § 9 para 202 et seq.



9. CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

There is no body which has centralised authority in this regard. The authorities concerned with issues of discrimination are Federal Ministries, the new Federal Anti-Discrimination Agency, the Commissioners for Integration/Foreigners, and the committees of the German Parliament, to name just a few.



ANNEX

1. Table of key national anti-discrimination legislation
2. Table of international instruments

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Germany

Date: 31 December 2008

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Basic Law (<i>Grundgesetz</i>) ³⁴³ , Article 3 Section 3 sentence 1	05/1949	Sex, Parentage, race, language, homeland, origin, faith, religious or political views	Constitutional law	Public authorities, indirect horizontal effect between private parties	Prohibition of discrimination
Ibid., Article 3 Section 3 sentence 2	10/1994	Disability	Constitutional law	Public authorities, indirect horizontal effect between private parties	Prohibition of discrimination
Ibid., Article 33 Section 3	05/1949	Religious faith, belief (<i>Weltanschauung</i>)	Constitutional law	Public Service	Prohibition of discrimination

³⁴³ Date: 23.05.1949, last amendment: 08.10.2008, Bundesgesetzblatt I 2008, 1926..



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
Ibid., Article 140, in conjunction with German Constitution from 11.08.1919 (Weimar Constitution), Article 136	05/1949	Religious faith	Constitutional law	Public authorities	Equal access to employment in public service irrespective of the applicant's religion
General Law on Equal Treatment (<i>Allgemeines Gleichbehandlungsgesetz-AGG</i>) ³⁴⁴	08/2006	Race or ethnic origin, sex, religion or belief (Weltanschauung), disability, age, sexual identity	Esp. labour law (public and private), partially private contract law (not belief)	Relationship between public and private employers employees, incl. civil servants and judges; partially contractual relationship between private parties	Prohibition direct and indirect discrimination regarding employment, including access to employment and career advancement, regarding conditions of employment incl. wages, membership in associations, social protection and advantages, education, provision of goods and services. Prohibition of harassment and instructions to discriminate. Further content:

³⁴⁴ Date: 14.08.2006, Bundesgesetzblatt I 2006, 1897, last amendment: 12.12.2007, Bundesgesetzblatt I 2007, 2840 (amendment after cut-off date: 5.2.2009 (BGBl I 2009, 160)).

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
					Duties of employer, right to complaint, material and immaterial damage compensation, victimisation, burden of proof, creation of independent supervisory body
Law on Equal Treatment of Soldiers, (<i>Gesetz über die Gleichbehandlung der Soldatinnen und Soldaten</i>) ³⁴⁵	08/2006	Race, ethnic origin, religion, belief, sexual identity	Public law	Soldiers	Prohibition of discrimination (cf. AGG)
Federal Law on Civil Servants (<i>Bundesbeamtengesetz</i>) ³⁴⁶ , Section 8.1	09/1953	Sex, parentage, race or ethnic origin, disability, religion or belief (<i>Weltanschauung</i>), political opinion, origin, relations, or sexual identity (corresponding provisions of the <i>Länder</i> may name	Public labour law / administrative law	Public Service (Federal authorities)	Prohibition of discrimination in civil service

³⁴⁵ Date: 14.08.2006, Bundesgesetzblatt I 2006, 1897, 1904, amended 9.8.2008, BGBl I 2008, 1629.

³⁴⁶ Date: 31.03.1999, Bundesgesetzblatt I 1999, 675, last amendment: 17.6.2008, BGBl I 1010 (after cut-off date entirely revised and newly published on 05.05.2009, BGBl I 2009, 160).

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
		sexual identity or sexual orientation) ³⁴⁷			
Work Constitution Act (<i>Betriebsverfassungsgesetz</i>) ³⁴⁸ , Section 75	01/1972 amendment 08/2006	Race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitudes, sex or sexual identity	Collective labour law	Private employment	Prohibition of discrimination
Federal Employee Representation Law (<i>Bundespersonalvertretungsgesetz</i>) ³⁴⁹ , Sections 67, 105	04/1974 amendment 08/2006	Race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitudes, sex, or sexual	Public employment (federal authorities)	Prohibition of discrimination	

³⁴⁷ See Brandenburg: Law on the Civil Service for the *Land of Brandenburg (Beamten-gesetz für das Land Brandenburg)*, Date: 08.10.1999, Gesetz- und Verordnungsblatt I 1999, 446, last amendment: Gesetz- und Verordnungsblatt I 2005, S. 214, Sections 12, 13; Bremen: Bremen Law on the Civil Service (*Bremisches Beamten-gesetz*), Date: 15.09.1995, Bremisches Gesetzblatt 1995, 387, last amendment: 08.07.2008, Bremisches Gesetzblatt 2008, 231 and 2008, 1, Section 9; Hamburg: Hamburg Law on the Civil Service (*Hamburgisches Beamten-gesetz*), Date: 29.11.1977, last amendment: 6.2.2008, HmbGVBl. 2008, 63 (amendment after cut-off date: 17.02.2009, Hamburgisches Gesetz- und Verordnungsblatt 2009, 29); Lower Saxony: Lower Saxony Law on the Civil Service (*Niedersächsisches Beamten-gesetz*), Date: 19.02.2001, Niedersächsisches Gesetz- und Verordnungsblatt 2001, 33, last amendment: 19.12.2008, Niedersächsisches Gesetz- und Verordnungsblatt 2008, 408, Section 8; Saarland: Law on the Civil Service (*Saarländisches Beamten-gesetz*), Date: 11.07.1962, Amtsblatt 1997, 301, last amendment: 04.07.2007, Amtsblatt 2007, 1450, Section 9; Saxony: Saxony Law on the Civil Service (*Sächsisches Beamten-gesetz*), Date: 14.06.1999, Sächsisches Gesetz- und Verordnungsblatt 1999, 370, last amendment: 20.06.2008, Sächsisches Gesetz- und Verordnungsblatt 2008, 371, Section 12.1; Saxony-Anhalt: Law on the Civil Service Saxony-Anhalt (*Beamten-gesetz Sachsen-Anhalt*), Date: 09.02.1998, Gesetz- und Verordnungsblatt Sachsen-Anhalt 1998, 50, last amendment: 12.08.2008, Gesetz- und Verordnungsblatt Sachsen-Anhalt 2008, 290, Section 8.1.

³⁴⁸ Date: 19.01.1972, newly published Bundesgesetzblatt I 2001, 2518, last amendment: 12.08.2008 Bundesgesetzblatt 2008, 1666.

³⁴⁹ Date: 01.04.1974 Bundesgesetzblatt I 1974, 693, last amendment: 14.8.2006, BGBl I 2006, 1897 (amendment after cut-off date: 05.02.2009, BGBl I 2009, 160).



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
		identity (respective provisions of the <i>Länder</i> may name sexual identity or sexual orientation ³⁵⁰)			
Law on Promoting the Equality of the Disabled (<i>Behindertengleichstellungsgesetz</i>) ³⁵¹	05/2002	Disability	Administrative law	Public actors, access to services	Prohibition of discrimination, obligation to provide hindrance-free access (public buildings, public transport, public streets, means of communication / right to use sign language / Braille); specialized body to promote and coordinate equalization development: Federal Government

³⁵⁰ Hamburg: Hamburg Employee Representation Law (*Hamburgisches Personalvertretungsgesetz*), Date: 16.01.1979, new wording: Hamburgisches Gesetz- und Verordnungsblatt 1997, 444 (27.08.1997), last amendment: 22.12.2006, Hamburgisches Gesetz- und Verordnungsblatt 2006, 614, Section 77; Lower Saxony: Lower Saxony Employee Representation Law (*Niedersächsisches Personalvertretungsgesetz*) Date: 22.01.1998, Niedersächsisches Gesetz- und Verordnungsblatt 1998, 19, 581, last amendment: 15.12.2008, Niedersächsisches Gesetz- und Verordnungsblatt 2008, 408, Section 59; Saarland: Saarland Employee Representation Law (*Saarländisches Personalvertretungsgesetz*), Date: 09.05.1978, Amtsblatt 1989, 413, last amendment: 19.11.2008, Amtsblatt 2008, 1944, Section 70.2; Saxony-Anhalt: Saxony-Anhalt Land Employee Representation Law (*Landespersonalvertretungsgesetz Sachsen-Anhalt*), Date: 16.04.2004, Gesetz- und Verordnungsblatt Land Sachsen Anhalt 2004, 205, last amendment: 13.11.2007, GVBI LSA 356 (amendment after cut-off date: 18.02.2009, GVBI LSA 2009, 48f.).

³⁵¹ Date: 27.04.2002, Bundesgesetzblatt I 2002, 1467, 1468, last amendment: 19.12.2007, Bundesgesetzblatt I 2007, 3024.



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
					Disability Commissioner (Beauftragter für die Belange behinderter Menschen)
Law on Protection against Dismissal (<i>Kündigungsschutzgesetz</i>) ³⁵² , Section 1.3	amendment 10/1996 (age) amendment 01/2004 (severe disability)	Age, disability (severe disability)	Labour law	Public and private employment	Preferential treatment of older employees in case of dismissals (age has to be taken into account within social choice); same for severe disability
Social Code VI (<i>Sozialgesetzbuch VI</i>) ³⁵³ , Section 41	01/1992	Age	Labour law	Public and private employment	Restrictions of dismissals because of age and restriction of age limit agreements
Social Code IX (<i>Sozialgesetzbuch IX</i>) ³⁵⁴	07/2001	Disability (severe disability)	Labour law / social law	Public and private employment	General legal protection of (severely) disabled persons, including

³⁵² Date: 01.09.1969, newly published Bundesgesetzblatt I 1969, 1317, last amendment: 26.03.2008, Bundesgesetzblatt I 2008, 444.

³⁵³ Date: 18.12.1989, Bundesgesetzblatt I 1989, 2261, Bundesgesetzblatt I 1990, 1337, newly published Bundesgesetzblatt I 2002, 754, 1404, 3384, last amendment: 22.12.2008, BGBl I 2008, 2959 (amendment after cut-off date: 5.2.2009, Bundesgesetzblatt I 2009, 160).

³⁵⁴ Date: 19.06.2001, Bundesgesetzblatt I 2001, 1046, last amendment: 22.12.2008, Bundesgesetzblatt I 2008, 2959.



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
					<p>prescribed general employment quota 5%; financial assistance for integration into working life, equipment, transportation etc.; prescription of suitable employment accommodation, working times etc. for the disabled; duty to employ disabled persons and to check if there are qualified disabled persons registered as “unemployed”; duty to create integration agreements; special dismissal provisions; specialised body (<i>Schwerbehindertenvertretung</i>) in every company with 5 or more severely disabled employees;</p>



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
					promotion of common education of disabled and not disabled children
Civil Code (<i>Bürgerliches Gesetzbuch</i>) ³⁵⁵ , Sec. 554a	amendment 09/2001	Disability	Civil law	Housing (public and private landlords)	Right to convert rented space into hindrance-free space
Licensing Law (<i>Gaststättengesetz</i>) ³⁵⁶ , Sec. 4.1 sentence 1 No. 2a	05/2002	Disability	Administrative law	Private actors, access to services	Barrier-free access to restaurants

³⁵⁵ Date: 02.01.2002, Bundesgesetzblatt I 2002, 42 and 2909 (corr.), Bundesgesetzblatt I 2003, 738, last amendment: 10.12.2008 Bundesgesetzblatt I 2008, 441.

³⁵⁶ Date: 05.05.1970, Bundesgesetzblatt I 1970, 465, 1298, newly published Bundesgesetzblatt I 1998, 3418, last amendment: .07.09.2007, Bundesgesetzblatt I 2007, 2399.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Germany

Date: 31 December 2008

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes	Yes	None	Yes	As statutory law ³⁵⁷
Protocol 12, ECHR	Yes	No			
Revised European Social Charter	Yes	No		Not ratified collective complaints protocol	
International Covenant on Civil and Political Rights	Yes	Yes	None ³⁵⁸ ; declaration under article 41.		As statutory law
Framework Convention for the Protection of National Minorities	Yes	Yes	None		As statutory law
International Convention on Economic, Social and Cultural Rights	Yes	Yes	None		As statutory law

³⁵⁷ See Federal Constitutional Court (*Bundesverfassungsgericht*), 14 October 2004, Az: 2 BvR 1481/04.

³⁵⁸ Derogations do not concern equality and non-discrimination but see Article 2 (1), 14 (3)(d), 14 (5), 15 (1), 19, 21 and 22.

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	None	Yes	As statutory law
Convention on the Elimination of Discrimination Against Women	Yes	Yes	None	Yes	As statutory law
ILO Convention No. 111 on Discrimination	Yes	Yes	None		As statutory law
Convention on the Rights of the Child	Yes	Yes	None		As statutory law
Convention on the Rights of Persons with Disabilities	Yes	No ³⁵⁹			

³⁵⁹ The convention was ratified on 24 February 2009 (after cut-off date of this report).