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# Country report

## Non-discrimination

Germany

2017

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German



**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers  
Directorate D — Non-discrimination and Roma coordination  
Unit JUST/D1

*European Commission  
B-1049 Brussels*

# **Country report**

# **Non-discrimination**

# **Germany**

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Reporting period 1 January 2016 – 31 December 2016

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Luxembourg: Publications Office of the European Union, 2017

PDF ISBN 978-92-79-68807-2

doi:10.2838/56700

DS-01-17-460-3A-N

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**CONTENTS**

<b>EXECUTIVE SUMMARY .....</b>	<b>6</b>
<b>RÉSUMÉ .....</b>	<b>14</b>
<b>ZUSAMMENFASSUNG .....</b>	<b>23</b>
<b>INTRODUCTION .....</b>	<b>31</b>
<b>1 GENERAL LEGAL FRAMEWORK .....</b>	<b>34</b>
<b>2 THE DEFINITION OF DISCRIMINATION .....</b>	<b>35</b>
2.1 Grounds of unlawful discrimination explicitly covered .....	35
2.1.1 Definition of the grounds of unlawful discrimination within the directives .....	37
2.1.2 Multiple discrimination .....	41
2.1.3 Assumed and associated discrimination .....	41
2.2 Direct discrimination (Article 2(2)(a)) .....	42
2.2.1 Situation testing .....	46
2.3 Indirect discrimination (Article 2(2)(b)) .....	46
2.3.1 Statistical evidence .....	50
2.4 Harassment (Article 2(3)) .....	52
2.5 Instructions to discriminate (Article 2(4)) .....	54
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78) .....	54
<b>3 PERSONAL AND MATERIAL SCOPE .....</b>	<b>61</b>
3.1 Personal scope .....	61
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) .....	61
3.1.2 Natural and legal persons (Recital 16 Directive 2000/43) .....	61
3.1.3 Private and public sector including public bodies (Article 3 (1)) .....	62
3.2 Material scope .....	62
3.2.1 Employment, self-employment and occupation .....	62
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)) .....	63
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c)) .....	63
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)) .....	64
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)) .....	65
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43) .....	65
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43) .....	66
3.2.8 Education (Article 3(1)(g) Directive 2000/43) .....	67
3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43) .....	69
3.2.10 Housing (Article 3(1)(h) Directive 2000/43) .....	71
<b>4 EXCEPTIONS .....</b>	<b>73</b>
4.1 Genuine and determining occupational requirements (Article 4) .....	73
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78) .....	73
4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78) .....	78
4.4 Nationality discrimination (Article 3(2)) .....	79
4.5 Work-related family benefits (Recital 22 Directive 2000/78) .....	80

4.6	Health and safety (Article 7(2) Directive 2000/78) .....	80
4.7	Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78) .....	81
4.7.1	Direct discrimination .....	81
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities .....	82
4.7.3	Minimum and maximum age requirements .....	82
4.7.4	Retirement .....	83
4.7.5	Redundancy .....	85
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) .....	86
4.9	Any other exceptions .....	86
<b>5</b>	<b>POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78) .....</b>	<b>87</b>
<b>6</b>	<b>REMEDIES AND ENFORCEMENT .....</b>	<b>90</b>
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78) .....	90
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78) .....	91
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78) ..	93
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78) .....	94
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78) .....	94
<b>7</b>	<b>BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43) .....</b>	<b>96</b>
<b>8</b>	<b>IMPLEMENTATION ISSUES .....</b>	<b>100</b>
8.1	Dissemination of information, dialogue with NGOs and between social partners .....	100
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78) ....	100
<b>9</b>	<b>COORDINATION AT NATIONAL LEVEL .....</b>	<b>101</b>
<b>10</b>	<b>CURRENT BEST PRACTICES .....</b>	<b>102</b>
<b>11</b>	<b>SENSITIVE OR CONTROVERSIAL ISSUES .....</b>	<b>103</b>
11.1	Potential breaches of the directives (if any) .....	103
11.2	Other issues of concern .....	104
<b>12</b>	<b>LATEST DEVELOPMENTS IN 2016 .....</b>	<b>106</b>
12.1	Legislative amendments .....	106
12.2	Case law .....	107
	<b>ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION...</b>	<b>120</b>
	<b>ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS .....</b>	<b>122</b>

## List of Abbreviations

ADS	German Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes)
AGG	General Act on Equal Treatment (Allgemeines Gleichbehandlungsrecht)
BAG	Federal Labour Court (Bundesarbeitsgericht)
BBG	Federal Law on the Civil Service (Bundesbeamtengesetz)
BGB	Civil Code (Bürgerliches Gesetzbuch)
BGG	Equal Opportunities for Disabled People Act (Behindertengleichstellungsgesetz)
BPersVG	Federal Employee Representation Law (Bundespersönalvertretungsgesetz)
GG	Basic Law (Grundgesetz)
BetrVG	Works Constitution Act (Betriebsverfassungsgesetz)
BVerfG	German Federal Constitutional Court (Bundesverfassungsgericht)
SGB I	Social Code I (Sozialgesetzbuch I)
SGB III	Social Code III (Sozialgesetzbuch III)
SGB VI	Social Code VI (Sozialgesetzbuch VI)
SGB IX	Social Code IX (Sozialgesetzbuch IX)
SGB XII	Social Code XII (Sozialgesetzbuch XII)
SoldGG	Law on the Equal Treatment of Soldiers (Gesetz über die Gleichbehandlung von Soldatinnen und Soldaten)
StGB	Penal Code (Strafgesetzbuch)
ZPO	Code of Civil Procedure (Zivilprozessordnung)

## EXECUTIVE SUMMARY

### 1. Introduction

Like many other countries, Germany enjoys a plural society. It has autochthonous minorities, the Danish and the Sorbs, neither very significant in number. The Friesians of German nationality and the Sinti and Roma of German nationality are also officially recognised as minorities. However, the most significant ethnic minority groups are immigrants, including the so-called "guest workers" (*Gastarbeiter*) and their descendants. Prior to the Nazi period, most immigration was by Polish people. Since 1945, Turks, people from former Yugoslavia, Italians and Greeks have formed the largest immigration groups. In addition, in recent decades, in particular because of asylum seekers and refugees, a heterogeneous ethnic community has formed in Germany. Due to Germany's efforts in the refugee crisis, the number of foreigners in Germany has risen by 1.1 million in 2015 to 9.1 million foreigners in Germany (population around 80 million). In 2016, 280000 refugees entered the country. Statistical data show that about 21% of all German residents today have a background of immigration.

The largest religious groups in Germany are the Catholic and Protestant Churches, with about 25 million members each. Thus, about 30% of the population belong to one of the two main Christian denominations, about 60% in total. Around 1.7 million Muslims were German citizens 2015, which is approximately 2% of the population. The total number of Muslims (with or without citizenship) will be above 4.5 million because of the migration patterns of 2015 and 2016. Exact numbers are not yet available. Just under 100,000 or 0.12% people are Jewish.

Germany's past is of particular relevance for the principle of equal treatment and anti-discrimination, especially as far as race and ethnic origin are concerned, but also with regard to religion and belief, sexual orientation and disability. There is a high degree of awareness today among all sectors of society of the horrors of the Nazi period and the multifaceted crimes against people of a particular religion, belief, ethnic origin, sexual orientation or disability, among other characteristics. For many citizens of Germany, this past creates a sense of responsibility for a strongly protected culture of human rights. This sense of responsibility manifests itself in many activities by civil society, in education and in the actions of Germany's political bodies.

Germany has a well-developed social system which provides in many dimensions reasonable accommodation for people with disabilities, supported by positive action schemes. A special legal institution has been created to give same-sex partnerships a secure legal framework as an equivalent to marriage for heterosexual partners. The reform of the German Nationality Act has liberalised the rules for obtaining German citizenship to foster integration. Many people in Germany showed much solidarity for refugees.

Nevertheless, Germany has to deal with serious issues of discrimination. Racism and xenophobia continue to be manifested in many forms, even violence which has claimed several dozens of human lives since 1990. The uncovering of a neo-Nazi terrorist cell responsible for at least nine killings with racist motives was a shocking reminder of what racism can lead to. In recent years, right-wing extremists and parties with xenophobic agendas have had some political success, albeit often short-lived. The year 2016 – as previous years – saw local demonstrations with mobilised considerable numbers to express what was generally regarded as xenophobic attitudes. The refugee crisis stirred many violent acts, including numerous attacks on shelters for refugees, including arson. The Federal Criminal Police (Bundeskriminalamt) counted about 1000 such attacks on refugee shelters in 2016.<sup>1</sup>

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<sup>1</sup> Federal Criminal Police (Bundeskriminalamt), Kriminalität im Kontext von Zuwanderung, Bundeslagebild 2016, p. 60.



Although there are only a few sound empirical studies on the matter, the available data suggest that human characteristics, such as religion and belief, disability, sexual orientation and age, are also still the cause of ongoing discrimination.

## 2. Main legislation

On 18 August 2006 an anti-discrimination law was enacted, the Act Implementing European Directives Putting into Effect the Principle of Equal Treatment (*Gesetz zur Umsetzung Europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung*).<sup>2</sup> This act encompasses the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz (AGG)*), the Law on Equal Treatment of Soldiers (*Soldatinnen und Soldatengleichbehandlungsgesetz (SoldGG)*) and amendments to various legal regulations.

The law reshaped anti-discrimination law in Germany considerably. The general aim of the law is defined as being to combat discrimination based on the grounds of race, ethnic origin, sex, religion or philosophical belief (*Weltanschauung*), disability, age or sexual identity. The formulation 'on grounds of race' (*aus Gründen der Rasse*) is supposed to indicate that the German legislature does not assume the existence of different human races. It includes labour, civil and parts of public law. With regard to general civil law, philosophical belief is not part of the prohibited grounds. In principle, the law therefore goes beyond what is demanded by European law. However, there are various parts of the law which might be found to be in breach of European law. Problems of discrimination in the context of migration can be covered by these grounds, in particular race, ethnic origin or religion and belief.

The law is embedded in a legal framework that is in practical terms in some areas of greater relevance than the AGG.

The Constitution, or Basic Law (*Grundgesetz*), is of central importance for understanding the German legal framework on discrimination. Unlike some other constitutions, the German Constitution is directly binding on all public authorities. Fundamental rights are part of this directly effective constitutional order. They are binding on the legislature, executive and judiciary as directly valid law. 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 law, but permeate other legal spheres as well, such as criminal and private law.

There are several constitutional provisions which protect human equality. Most important is the guarantee of human dignity. The core of this guarantee is respect for any human being as a person, simply by virtue of his or her humanity, irrespective of other characteristics. Case law of the German Federal Constitutional Court consistently states that each individual should be treated not only as an object of state action, but as an end in itself. Furthermore, individuals are protected against degrading or humiliating treatment. 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. The only question that arises is therefore how, by what concrete technical means, the overarching value of human dignity can be adequately protected through legal channels in various spheres of life.

Germany is a democratic and social federal state under the rule of law. As it is a social state, the state has a duty to promote the welfare of its citizens. In the field of anti-

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<sup>2</sup> BGBl. 2006, 1897.

discrimination, the principle of the social state leads to a wide range of programmes aiming to promote the inclusion of groups which face discrimination. The federal character of Germany leads to different regulations in different Länder in some areas where the Länder have legislative powers, most notably in relation to education and cultural matters or certain aspects of the law regulating civil servants employed by them.

Nevertheless, despite recent reform of the Federal order, the most important matters in public (with the exceptions mentioned) and private law remain within the competence of the Federation, either as exclusive legislative power or concurrent legislative power.

Germany has specific anti-discrimination legislation. There are various legal provisions which reiterate the fundamental guarantee of equality for areas of public law, including the law pertaining to the civil service and other public employees. In labour law, there is a general anti-discrimination clause in the Works Constitution Act (*Betriebsverfassungsgesetz*) and the fundamental principle of the equal treatment of employees has been consistently established by case law.

In addition, as regards disability, various legal instruments have been passed aiming to provide protection against discrimination and increase the social inclusion of disabled people. In the area of sexual orientation, some legal regulations have been created which either directly aim to establish protection against discrimination or do so indirectly by providing options which were not previously open to people of certain sexual orientations, for example, by introducing a legally regulated form of partnership or the possibility of adoption.

With regard to religion, special legal regulations and case law, in addition to the non-discrimination clauses in public law and labour law, deal with the reasonable accommodation of various religious beliefs, including exceptions from general laws. 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 must be interpreted in the light of the constitutional order (especially in the light of fundamental rights and, most importantly, of human dignity) which prohibits discrimination.

### **3. Main principles and definitions**

The anti-discrimination law defines direct and indirect discrimination, harassment and instruction to discriminate, following closely the definitions in the Directives. Discrimination by association is not explicitly covered. One provision deals with multiple discrimination on various grounds. It is stated that any case of such discrimination must be justified independently. Positive action is declared to be admissible if the discrimination serves to overcome existing disadvantages based on any of the grounds listed. There is an exception from the application of anti-discrimination law of dismissal, but this has been rendered without effect through case law.

#### **a) Labour law**

Justification of unequal treatment is possible if the treatment forms a genuine and determining occupational requirement. There are further grounds of justification because of the ethos and duty of loyalty as defined by a religious or philosophical belief. Some recent case law has underlined the wide discretion that religious communities enjoy as to the duties of loyalty that can justify unequal treatment.<sup>3</sup> This case law concerns a highly contested area with significant social impact given the importance of the Christian churches

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<sup>3</sup> Cf. Federal Labour Court (Bundesarbeitsgericht, BAG), 24 September 2014, 5 AZR 611/12 and related Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), 20 October 2014, 2 BvR 661/12.

and their organisations as employers. In addition, further justifications of unequal treatment exist for the ground of age, if there are objective reasons and the unequal treatment is appropriate and necessary. Examples are given for this, following the rules in Directive 2000/78/EC.

Employers have a duty to protect employees against discrimination and prevent its occurrence through organisational arrangements and the content of vocational training. They must take appropriate action against such conduct and inform employees about the legal regulations.

#### b) Civil law

In civil law, discrimination is prohibited for all grounds listed, not only for those prescribed by the Directives (race, ethnic origin and sex) with the exception of philosophical belief (*Weltanschauung*).

In the case of housing, unequal treatment is permissible for all grounds, if it serves to maintain stable social relations between inhabitants and balanced patterns of settlement and economic, social and cultural relations.

Unequal treatment is justified for religion, disability, age, sexual identity or sex in case of an objective reason for the treatment. As examples of such objective reasons, the law lists the prevention of danger and damage, the protection of privacy and of personal security, the provision of special advantages when there is no specific interest in enforcing equal treatment, and the ethos of a religion. In the case of insurance, difference in treatment – with the exception of sex – is only permissible if it is based on objective, actuarial calculations. In the case of a violation of the prohibition of discrimination, the victim has a claim of forbearance and removal of the disadvantage and can sue for an injunction. The discriminator is liable to pay damages for material loss caused by wilful or negligent wrongdoing. There is a strict liability for damages for non-material loss, the compensation for which must be appropriate. There is a time limit of two months for making any such claims, as in labour law. The burden of proof is shifted both for labour and for general civil law.

#### c) Public law

The regulations of the law are applicable to civil servants, judges and conscientious objectors, giving due consideration to the special legal status of these persons. The Law on the Equal Treatment of Soldiers contains regulations similar to those described above, together with existing legal regulations on this matter.

Other parts of the law supplement these norms of labour, civil and public law. There are some special rules on reasonable accommodation, especially for severely disabled people and others of equal status.

The jurisprudence of the courts has confirmed some important interpretations of legal provisions relevant for discrimination in 2016. A decision of the Federal German Constitutional Court concerned the permissibility of wearing an Islamic headscarf by a kindergarten teacher employed by a public authority. The court decided that the basic right to freedom of religion entitles the teacher to wear such a headscarf and held that the provisions of anti-discrimination law do not provide legal rights of the claimant beyond those derived from the fundamental right to freedom of religion. The court underlined that such a garment is by now common in Germany and a necessary consequence of a pluralist society.<sup>4</sup> The court confirms with this decision its case law on the issue of headscarves

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<sup>4</sup> Federal German Constitutional Court, 1 BvR 354/11, 18 October 2016.

worn by teachers in public education (cf. Federal German Constitutional Court, BVerfGE 138, 296) and extends it to the sphere of pre-school education.

On a related issue, the so called Burkini, the Federal German Constitutional Court handed down another decision: The complainant, a school girl, demanded dispensation from swimming lessons in a public school because of prescriptions stemming from her Muslim faith not to show her body forms to men. Although the school allows for the use of so-called burkinis, this option was not regarded as sufficient by the complainant.

The court regarded the complaint as inadmissible. The complainant did not show that the burkini is not sufficient to comply with religious rules on the concealment of the body. The fact that the complainant is exposed to the sight of male bodies in swimming suits is not sufficient to justify a dispensation from swimming lessons.<sup>5</sup> These decisions illustrate the attempt of the court to balance interests in religious freedom and accommodation and public interests, for instance of integration and individual development of pupils in schooling.

#### **4. Material scope**

##### **a) General**

The constitutional guarantees apply to all state action and, through indirect horizontal effect, to the relations of private individuals. The specialised guarantees apply to their respective field of regulation – public law, labour law, social law, etc.

##### **b) The General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz* (AGG))**

The scope of application of the anti-discrimination law encompasses labour law, social security, social benefits, education and general civil law, including insurance contracts, closely following (in part verbatim) the provisions of the Directives in this respect. For unfair dismissal, the regulations of the laws against unfair dismissal (especially the Law on Protection against Unfair Dismissal (*Kündigungsschutzgesetz*)) are supposed to take precedence over the anti-discrimination law. However, case law has interpreted the respective provision in a way that the prohibition of discrimination applies fully to dismissal.

In civil law, the prohibition of discrimination on the ground of race and ethnic origin extends to all legal transactions, i.e. the provision of goods and services, available to the public.

The prohibition on the other grounds, with the exception of belief, extends to all legal transactions which are typically concluded in a multitude of cases under comparable conditions without regard to the person, so-called bulk business (*Massengeschäfte*) or to such legal transactions where the characteristics of the person have only secondary importance. Furthermore, the prohibition of discrimination extends to private insurance.

The prohibition of discrimination does not apply to legal relations of a personal nature or if there is a special relationship of trust between the parties concerned or their relatives. In the case of housing this is supposed to be the case if the parties or their relatives live at the same premises. The prohibition of discrimination is not supposed to apply in principle (although exceptions are deemed possible) if the landlord does not let out more than 50 dwellings.

#### **5. Enforcing the law**

The means of enforcement of the anti-discrimination law are the same as for other areas of law, apart from certain special mechanisms, that is through the courts. There is a

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<sup>5</sup> Federal German Constitutional Court, 1 BvR 3237/13, 8 November 2016.

growing body of case law on various aspects of discrimination. Some aspects have not been settled and some of the case law is contradictory. There are, however, increasingly discernible contours of discrimination law that is in line with the Directives and the case law of the CJEU.

In the event of discrimination, the victim is entitled in labour law to damages for material loss if the employer is liable for wilful or negligent wrongdoing. There is a strict liability for damages for non-material loss. The amount of compensation must be appropriate. If the discrimination did not form the reason for non-employment, the compensation for non-material damage is limited to three months' salary.

There is a time limit of two months for any such claim, beginning with the receipt of the rejection of a job application or promotion and, in other cases, knowledge of the disadvantageous behaviour. The law does not establish a duty to establish a contractual relationship, unless such duty is derived from other parts of the law, e.g. tort law. Victimisation is prohibited. The law contains an appeal to the social responsibility of the social partners to realise the aim of non-discrimination. The rules of non-discrimination also apply to professional associations. In case of discrimination in this sphere, there is a duty to admit the person to the association.

Statistical evidence has been allowed in the past and can be used, according to the AGG. The former regulation on the burden of proof, now amended by the AGG, has been interpreted along the lines of ECJ (pre-Lisbon) and CJEU jurisprudence. There is no explicit regulation or meaningful legal practice yet as to the use of situational testing.

According to anti-discrimination law, a victim of discrimination is entitled to be supported in legal proceedings by associations dealing with matters of discrimination. They must have at least 75 members or be an association of at least seven other associations concerned with anti-discrimination. The main examples of positive actions stem from disability law. There are various forms of dialogue, partly institutionalised, of governmental agencies and civil society. An *actio popularis* exists only in certain fields of anti-discrimination law, in particular in disability law (Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*)).<sup>6</sup>

## **6. Equality bodies**

The anti-discrimination law established the Federal Anti-discrimination Agency (*Antidiskriminierungsstelle des Bundes*) from the moment it entered into force in August 2006, although the body only started to operate in 2007. Its mandate covers all the grounds listed in the law, notwithstanding the powers of specialised governmental agencies dealing with related subject matters. The body is organisationally associated with the Ministry of Family Affairs, Senior Citizens, Women and Youth. The head of the agency is appointed by the Minister of Family Affairs, Senior Citizens, Women and Youth, following a proposal by the government, which happened for the first time in spring 2007. In 2009 a new head was appointed and confirmed in 2014. The head 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.

The role of the Agency is to support people to protect their rights against discrimination, especially to inform them about legal recourse against discrimination, to arrange legal advice by other agencies, to mediate between the parties, to provide information to the public in general, to take action for the prevention of discrimination, to produce scientific studies and (every four years) to issue a report on the issue of discrimination, together with the Commissioners dealing with related matters. These agencies can give recommendations and can jointly commission scientific studies. The Agency can demand a

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<sup>6</sup> Last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

statement of position in cases of discrimination from the alleged discriminator, if the alleged victim of discrimination agrees.

Other public agencies are obliged to support the Agency in its work. The Agency must co-operate with NGOs and other associations. An advisory body has been created and the Agency has a budget of around €3 million. The Agency has a public presence, for example, through conferences, publications and commissioned surveys and studies on particular issues, such as empirical findings on discrimination, discrimination on religious grounds, multiple discrimination, positive action or the situation of Sinti and Roma in Germany.

In addition, other bodies exist in Germany which deal with issues of discrimination, most importantly the Commissioners for Integration/Foreigners, for Immigrants of German Ethnic Origin (*Aussiedler*) and National Minorities and for Disabled People.

## 7. Key issues

Germany has established in principle a comprehensive legal framework to combat acts of discrimination, that is constantly evolving.<sup>7</sup> There are some shortcomings:

- a) the exception of dismissal from the application of the prohibition of discrimination, Section 2.4, AGG, though mitigated by case law;
- b) the possible non-application of the AGG to occupational pension schemes, Section 2.2, Sentence 2, AGG, depending, however, on the judicial interpretation of the respective norm;
- c) the exception from the material scope of the provision of goods and services of all transactions concerning a special relationship of trust and proximity between the parties or their family, including the letting of flats on the premises of the landlord for all grounds including race and ethnic origin, Section 19.5, AGG, which raises problems under the Racial Equality Directive, albeit depending on its contentious interpretation in this respect;
- d) the exception in relation to housing, including unequal treatment on the ground of race and ethnic origin, to provide for socially and culturally balanced settlements, Section 19.3, AGG, depending on judicial interpretation;
- e) the formulation of the justification of unequal treatment for religion and belief, depending on judicial interpretation, Section 9.1, AGG;
- f) there is no special prohibition of victimisation in civil law, as foreseen in Article 9, Racial Equality Directive (2000/43/EC);
- g) 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, is contrary to ECJ jurisprudence in this respect;
- h) 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 with regard to harassment and the instruction to discriminate, depending on judicial interpretation;
- i) there is no general regulation of reasonable accommodation.

The challenge ahead is to interpret and apply the legal framework in a consistent way realising the purposes of anti-discrimination law that are, as indicated above part of fundamental values enshrined in the German constitutional order, foremost human dignity.

The case law is still, in absolute terms, limited. There are indicators that this is due to informal barriers to access to justice and problems of proof. Another issue of concern is the prevention of attitudes that give rise to discrimination. Recent events, including xenophobic demonstrations of a significant scale, despite a strong reaction of civil society,

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<sup>7</sup> Law on the improvement of inclusion and self-determination of persons with disabilities (Gesetz zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen, BTHG), BGBl. I, 3234, which will enter into force from 2017 onwards.

government and political actors give reasons to believe that persistent efforts may be of great importance in this respect, not the least in the context of the refugee crisis and the xenophobic reactions it sometimes provokes. In addition, one should be mindful of the threat of religiously motivated terror that tragically struck Germany in 2016 and that may augment these problems.

## RÉSUMÉ

### 1. Introduction

Comme beaucoup d'autres pays, l'Allemagne est une société plurielle. Elle compte deux minorités autochtones, les Danois et les Sorbs, peu importantes l'une et l'autre en termes numériques. Les Frisons de nationalité allemande ainsi que les Sinti et les Roms de nationalité allemande sont, eux aussi, officiellement reconnus en tant que minorités. Les groupes minoritaires ethniques les plus importants sont toutefois les «travailleurs immigrés» (*Gastarbeiter*) et leurs descendants. Avant la période nazie, les immigrants étaient surtout Polonais. À partir de 1945, ce sont les Turcs, les ressortissants de l'ex-Yougoslavie, les Italiens et les Grecs qui ont constitué les groupes d'immigration les plus importants. Une communauté ethnique hétérogène s'est en outre formée en Allemagne au cours des dernières décennies en raison plus particulièrement de la présence de demandeurs d'asile et de réfugiés. Les efforts consentis par l'Allemagne dans le cadre de la crise des réfugiés font que le nombre d'étrangers vivant dans le pays a augmenté de 1,1 million en 2015 pour atteindre 9,1 millions (sur une population de 80 millions d'habitants environ); 280 000 réfugiés sont entrés dans le pays en 2016. Les données statistiques montrent que 21 % environ de l'ensemble des habitants actuels de l'Allemagne sont issus de l'immigration.

Les deux confessions chrétiennes principales, à savoir l'Église catholique et l'Église protestante, comptent chacune quelque 25 millions de membres en Allemagne: elles représentent donc respectivement 30 % de la population et conjointement 60 % de l'ensemble des habitants. On recensait quelque 1,7 million de citoyens allemands musulmans en 2015, soit 2 % environ de la population. Par suite des mouvements migratoires de 2015 et 2016, le nombre total de Musulmans (ayant ou non la citoyenneté allemande) devrait dépasser les 4,5 millions. Les chiffres précis ne sont pas encore disponibles. L'Allemagne compte près de 100 000 Juifs, soit 0,12 % de sa population.

Le passé de l'Allemagne présente un intérêt particulier dans la perspective du principe de l'égalité de traitement et de la lutte contre la discrimination, non seulement en ce qui concerne la race et l'origine ethnique, mais également pour ce qui touche à la religion et aux convictions, à l'orientation sexuelle et au handicap. L'Allemagne d'aujourd'hui a, dans tous les secteurs de la société, une conscience aigüe des horreurs commises durant l'ère nazie et des crimes perpétrés sous des formes diverses à l'encontre de personnes en raison de leur religion, conviction, origine ethnique, orientation sexuelle ou handicap, ou présentant d'autres caractéristiques. Ce passé éveille chez bon nombre de citoyens allemands le sentiment de devoir protéger fermement une culture des droits de l'homme, et ce sens des responsabilités se manifeste au travers d'un grand nombre d'activités menées dans le cadre de la société civile, dans l'éducation et dans les actions des instances politiques allemandes.

L'Allemagne s'est dotée d'un système social élaboré, qui fournit à bien des égards un aménagement raisonnable aux personnes handicapées, et qui est étayé par des programmes d'action positive. Une institution juridique spéciale a été créée afin de donner aux partenariats entre personnes du même sexe un cadre légal sûr correspondant au mariage pour les unions hétérosexuelles. La réforme de la loi sur la nationalité allemande a libéralisé les règles d'obtention de la citoyenneté allemande en vue de favoriser l'intégration. De nombreuses personnes font preuve en Allemagne de beaucoup de solidarité à l'égard des réfugiés.

L'Allemagne n'en est pas moins confrontée à de graves problèmes de discrimination. Le racisme et la xénophobie continuent de se manifester sous des formes diverses, y compris des violences qui ont coûté la vie à plusieurs dizaines de personnes depuis 1990. La mise au jour d'une cellule terroriste néonazie responsable d'au moins neuf assassinats ayant une motivation raciste, a été un rappel brutal de ce que le racisme peut engendrer. Des



partisans de l'extrême droite et des partis aux programmes xénophobes ont remporté un certain succès politique ces dernières années, mais souvent de courte durée. L'année 2016 a été marquée – comme les précédentes – par des manifestations locales mobilisant un nombre important de participants pour exprimer ce qui a été généralement perçu comme des attitudes xénophobes. La crise des réfugiés a généré de nombreux actes de violences visant entre autres des centres d'accueil (incendies criminels notamment). L'Office fédéral de police criminelle (*Bundeskriminalamt*) a recensé en 2016 un millier de ces attaques à l'encontre de centres d'accueil.<sup>8</sup>

Même si les études empiriques dûment étayées restent rares en la matière, les données disponibles conduisent à penser que des caractéristiques personnelles telles que la religion et les convictions, le handicap, l'orientation sexuelle et l'âge restent également la cause d'une discrimination persistante.

## 2. Législation principale

Une loi antidiscrimination a été votée le 18 août 2006. Il s'agit de la loi transposant les directives européennes mettant en œuvre le principe de l'égalité de traitement (*Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung*),<sup>9</sup> qui englobe la loi générale sur l'égalité de traitement (*Allgemeines Gleichbehandlungsgesetz* - AGG), la loi sur l'égalité de traitement dans les forces armées (*Soldatinnen und Soldatengleichbehandlungsgesetz* - SoldGG) et les modifications apportées à diverses règles juridiques.

Cette loi remanie considérablement la législation allemande en matière de lutte contre la discrimination. Elle a pour objectif général de combattre la discrimination fondée sur le motif de la race, de l'origine ethnique, du sexe, de la religion ou des convictions philosophiques (*Weltanschauung*), du handicap, de l'âge ou de l'identité sexuelle. La formulation «sur le motif de la race» (*aus Gründen der Rasse*) est censée indiquer que le législateur allemand ne suppose pas l'existence de différentes races humaines. Elle couvre le droit du travail, le droit civil et certains volets du droit public. La conviction philosophique ne figure pas parmi les motifs interdits en ce qui concerne le droit civil général. Si la loi va donc en principe au-delà des exigences du droit européen, il se pourrait néanmoins que certains de ses volets n'y soient pas conformes. Les problèmes de discrimination dans le contexte migratoire peuvent relever des motifs susmentionnés, et en particulier de ceux de la race, de l'origine ethnique ou de la religion et des convictions.

La loi s'inscrit dans un cadre juridique qui revêt, dans la pratique, davantage de pertinence que l'AGG dans un certain nombre de domaines.

La Constitution ou loi fondamentale (*Grundgesetz*) s'avère déterminante pour comprendre le cadre juridique allemand en matière de discrimination. À la différence de certaines autres constitutions, la Constitution allemande lie directement toutes les autorités publiques. Les droits fondamentaux font partie de cet ordre constitutionnel d'effet direct et lient donc les pouvoirs législatif, exécutif et judiciaire au même titre qu'une loi directement applicable. La Constitution a mis les droits fondamentaux au cœur de l'ordre juridique en général: ils ne sont donc pas seulement d'application en droit public, mais également dans d'autres sphères juridiques telles que le droit pénal et le droit privé.

Plusieurs dispositions constitutionnelles protègent le principe d'égalité entre les êtres humains, la plus importante étant la garantie de la dignité humaine. L'essence même de cette garantie est le respect de l'être humain en tant que personne, simplement parce qu'il appartient au genre humain et indépendamment d'autres caractéristiques. La jurisprudence de la Cour constitutionnelle fédérale allemande déclare invariablement que

<sup>8</sup> Office fédéral de police criminelle (*Bundeskriminalamt*), «*Kriminalität im Kontext von Zuwanderung*», Bundeslagebild 2016, p. 60.

<sup>9</sup> BGBl. 2006, 1897.

tout individu doit être traité non seulement comme un sujet mais également comme une fin des actions de l'État. Les personnes individuelles sont en outre protégées contre tout traitement dégradant ou humiliant. La garantie de la dignité humaine est la valeur centrale du droit allemand, autrement dit sa règle prépondérante et sa norme suprême. Il s'agit donc d'un point de référence majeur pour la législation nationale antidiscrimination, d'autant plus qu'elle oriente l'interprétation de la garantie constitutionnelle de l'égalité et fournit des critères normatifs à d'autres domaines de la loi. Il importe de noter qu'au travers de la garantie de la dignité humaine, le droit allemand affirme avec fermeté qu'aucune distinction n'est faite quant à la valeur d'un être humain, quelles que soient ses caractéristiques. La seule question est donc de savoir comment, autrement dit à l'aide de quels moyens techniques concrets, la valeur primordiale que constitue la dignité humaine peut être suffisamment protégée par des voies juridiques dans les diverses sphères de la vie.

L'Allemagne est un État fédéral démocratique et social régi par la primauté du droit. Comme il s'agit d'un État social, il est tenu de promouvoir le bien-être de ses citoyens. En ce qui concerne la lutte contre la discrimination, le principe de l'État social s'accompagne d'un large éventail de programmes visant à promouvoir l'inclusion des groupes confrontés à des discriminations. Le caractère fédéral de l'Allemagne donne lieu à des réglementations différentes selon les *Länder* dans certains domaines où ceux-ci ont une compétence législative – laquelle porte principalement sur les questions éducatives et culturelles, ainsi que sur certains aspects de la législation réglementant l'emploi de leurs fonctionnaires. Les matières les plus importantes du droit public (moyennant les exceptions mentionnées) et du droit privé continuent néanmoins, en dépit d'une récente réforme de l'ordre fédéral, de relever de la compétence de l'État fédéral, soit dans le cadre de son pouvoir législatif exclusif, soit dans celui d'une compétence législative parallèle.

L'Allemagne est dotée d'une législation spécifique en matière de lutte contre la discrimination. Diverses dispositions légales réitèrent la garantie fondamentale de l'égalité dans les domaines relevant du droit public, et notamment la loi relative à la fonction publique et aux autres fonctionnaires; la législation du travail comporte une clause générale anti-discrimination inscrite dans la loi sur la constitution des entreprises (*Betriebsverfassungsgesetz*) et le principe fondamental de l'égalité de traitement des travailleurs a été systématiquement consacré par la jurisprudence.

Divers instruments juridiques ont en outre été adoptés en rapport avec le handicap en vue de protéger les personnes handicapées contre la discrimination et d'améliorer leur inclusion sociale. Quant à l'orientation sexuelle, certaines réglementations ont été instaurées: elles prévoient à la fois une protection directe contre la discrimination et une protection indirecte se concrétisant par des options antérieurement inaccessibles aux personnes ayant certaines orientations sexuelles (l'instauration d'une forme de partenariat juridiquement réglementé ou la possibilité d'adopter notamment).

En ce qui concerne la religion, outre les clauses de non-discrimination inscrites dans le droit public et la législation du travail, des réglementations juridiques spéciales et la jurisprudence portent sur des mesures raisonnables d'adaptation aux diverses confessions religieuses, y compris des dérogations aux lois générales. Selon une opinion largement répandue dans la doctrine juridique (qui a donné lieu à plusieurs cas de jurisprudence), les clauses générales du droit civil offrent en droit privé des contrats et en droit de la responsabilité civile des recours contre la discrimination fondée sur tout motif portant atteinte aux droits fondamentaux de la personnalité. Ces clauses générales doivent être interprétées à la lumière de l'ordre constitutionnel (et plus particulièrement à la lumière des droits fondamentaux et surtout de la dignité humaine), qui interdit la discrimination.

### 3. Principes généraux et définitions

La loi antidiscrimination définit la discrimination directe et indirecte, le harcèlement et l'injonction de discriminer en suivant de près les définitions énoncées dans les directives. La discrimination par association n'est pas explicitement couverte. Une disposition traite de la discrimination multiple et prévoit que cette forme de discrimination, fondée sur plusieurs motifs, doit être justifiée de manière distincte pour chacun de ceux-ci. L'action positive est déclarée admissible si la discrimination sert à remédier à des désavantages existants découlant de l'un des motifs énumérés. Une exception à l'application de la loi antidiscrimination est prévue pour le licenciement, mais elle a été privée d'effet utile par la jurisprudence.

#### a) Droit du travail

Une inégalité de traitement peut être admise si elle constitue une exigence professionnelle essentielle et déterminante. Il existe d'autres motifs de justification liés à l'éthique et au devoir de loyauté tels que ceux qui sont déterminés par une conviction religieuse ou philosophique. Plusieurs cas de jurisprudence ont récemment mis en lumière le large pouvoir discrétionnaire dont jouissent les communautés religieuses pour ce qui concerne les devoirs de loyauté susceptibles de justifier une inégalité de traitement.<sup>10</sup> Cette jurisprudence concerne un domaine fortement contesté et est appelée à avoir une incidence sociale majeure, étant donné l'importance des églises chrétiennes et de leurs organisations en tant qu'employeurs. Des justifications existent en outre en ce qui concerne l'âge pour autant qu'elles se fondent sur des raisons objectives et que l'inégalité de traitement soit appropriée et nécessaire. La législation fournit des exemples respectant les règles énoncées dans la directive 2000/78/CE.

Les employeurs sont tenus de protéger les travailleurs contre la discrimination et de prévenir celle-ci au niveau des modalités organisationnelles ou du contenu de la formation professionnelle. Ils doivent prendre les mesures appropriées contre un comportement de ce type et informer les travailleurs des réglementations juridiques en vigueur.

#### b) Droit civil

En droit civil, la discrimination est interdite pour tous les motifs énumérés, et pas seulement pour ceux prescrits par les directives (race, origine ethnique et sexe), à l'exception de la conviction philosophique (*Weltanschauung*).

Pour ce qui concerne le logement, l'inégalité de traitement est admise pour tous les motifs si elle sert à maintenir des rapports sociaux stables entre les habitants ainsi qu'un équilibre au niveau des structures d'habitat et des relations économiques, sociales et culturelles.

L'inégalité de traitement est justifiée pour ce qui concerne la religion, le handicap, l'âge, l'identité sexuelle ou le sexe à condition qu'elle réponde à une raison objective – cette raison pouvant être, en vertu des exemples cités par la loi, la prévention du danger et des dommages, la protection de la vie privée et de la sécurité personnelle, l'offre d'avantages spéciaux en l'absence d'un intérêt spécifique dans l'application de l'égalité de traitement et les principes éthiques d'une religion. En ce qui concerne les assurances, une différence de traitement — à l'exception du sexe — n'est admise qu'à condition de se baser sur des calculs actuariels objectifs. En cas de non-respect de l'interdiction de discrimination, la victime peut réclamer la cessation et la suppression du traitement désavantageux en cause, et entamer une action pour obtenir une injonction à cette fin. L'auteur de la discrimination est tenu au versement de dommages-intérêts pour le préjudice matériel causé si sa responsabilité est engagée, que ce soit par un acte délibéré ou par négligence.

<sup>10</sup> Voir Cour fédérale du travail (*Bundesarbeitsgericht, BAG*), arrêt 5 AZR 611/12 du 24 septembre 2014, et Cour constitutionnelle fédérale (*Bundesverfassungsgericht, BVerfG*), arrêt 2 BvR 661/12 du 20 octobre 2014 lié à la même affaire.

Il existe une responsabilité stricte en dommages-intérêts pour préjudice moral, dont l'indemnisation doit être appropriée. Comme dans le cas du droit du travail, la victime dispose d'un délai de recours de deux mois. Il y a renversement de la charge de la preuve tant en droit du travail qu'en droit civil.

#### c) Droit public

Les règles de droit s'appliquent aux fonctionnaires, juges et objecteurs de conscience en tenant dûment compte du statut juridique particulier de ces personnes. La loi sur l'égalité de traitement des soldats contient des règles similaires à celles décrites ci-dessus, en sus de celles déjà en vigueur en la matière.

D'autres domaines de la loi viennent compléter ces normes établies par le droit du travail, le droit civil et le droit public. Ainsi des règles spéciales portent-elles sur l'aménagement raisonnable et visent-elles plus particulièrement les personnes gravement handicapées ou de statut équivalent.

La jurisprudence des cours et tribunaux a confirmé en 2016 plusieurs interprétations importantes de dispositions légales pertinentes en matière de discrimination. Ainsi un arrêt de la Cour constitutionnelle fédérale allemande a affirmé le caractère licite du port du foulard islamique par une institutrice de maternelle employée par une autorité publique. La Cour a considéré que le droit fondamental à la liberté de religion autorise l'enseignante à porter ce type de foulard et que les dispositions de la législation antidiscrimination ne confèrent pas à la partie requérante d'autres droits que ceux découlant du droit fondamental à la liberté de religion. La Cour a insisté sur le fait que ce type de vêtement est désormais courant en Allemagne et qu'il s'agit d'une conséquence inéluctable d'une société pluraliste.<sup>11</sup> Elle confirme par cet arrêt sa propre jurisprudence sur la question du port du foulard par des enseignantes de l'enseignement public (cf. Cour constitutionnelle fédérale allemande, BVerfGE 138, 296) et l'étend à l'éducation préscolaire.

La Cour constitutionnelle fédérale allemande a également prononcé un arrêt sur une question connexe, à savoir celle du «burkini»: la requérante, écolière dans un établissement public, réclamait une dispense du cours de natation parce que les prescriptions liées à sa foi musulmane lui interdisent de montrer les formes de son corps à des hommes. L'école autorise le port des «burkinis», mais cette option n'était pas jugée suffisante par la plaignante.

La Cour a considéré la plainte irrecevable – la partie requérante n'ayant pas démontré que le «burkini» ne suffisait pas à assurer la conformité aux règles religieuses relatives à la dissimulation du corps. Le fait que la plaignante soit exposée à la vue de corps masculins en maillots de bain ne suffit pas à justifier une dispense des cours de natation.<sup>12</sup> Ces arrêts illustrent la volonté de la Cour de trouver un juste équilibre entre l'intérêt à protéger la liberté religieuse et les aménagements à cet égard, et l'intérêt public que constituent notamment l'intégration et le développement individuel des élèves dans le cadre scolaire.

## 4. Champ d'application matériel

#### a) Généralités

Les garanties constitutionnelles s'appliquent à toute action de l'État et, par effet horizontal indirect, aux relations entre particuliers. Les garanties spécialisées s'appliquent à leurs domaines respectifs de réglementation – droit public, droit du travail, droit social, etc.

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<sup>11</sup> Cour constitutionnelle fédérale allemande, 1 BvR 354/11, 18 octobre 2016.

<sup>12</sup> Cour constitutionnelle fédérale allemande, 1 BvR 3237/13, 8 novembre 2016.

b) La loi générale sur l'égalité de traitement ou AGG (*Allgemeines Gleichbehandlungsgesetz*)

Le champ d'application de la loi antidiscrimination couvre le droit du travail, la sécurité sociale, les prestations sociales, l'enseignement et le droit civil général, y compris les contrats d'assurance, suivant de près (parfois mot pour mot) les dispositions des directives à cet égard. Pour ce qui concerne le licenciement abusif, les dispositions des lois en la matière (et de la loi sur la protection contre le licenciement [*Kündigungsschutzgesetz*] en particulier) sont censées primer sur la loi antidiscrimination. La jurisprudence a cependant interprété la disposition en cause en ce sens que l'interdiction de discrimination s'applique pleinement au licenciement.

En droit civil, l'interdiction de discrimination fondée sur la race et l'origine ethnique s'étend à toutes les transactions juridiques, à savoir la fourniture de biens et de services mis à la disposition du public.

L'interdiction de discrimination fondée sur les autres motifs, à l'exception des convictions, s'étend à toutes les transactions juridiques généralement conclues «en masse» (*Massengeschäfte*) à des conditions similaires indépendamment de la personne concernée, ainsi qu'aux transactions juridiques dans le cadre desquelles les caractéristiques de la personne ne revêtent qu'une importance secondaire. L'interdiction de discrimination s'étend en outre à l'assurance privée.

L'interdiction de discrimination ne s'applique pas aux relations juridiques à caractère personnel ou lorsqu'il existe un rapport particulier de confiance entre les parties concernées ou leurs proches. Tel est par exemple le cas, en ce qui concerne le logement, lorsque les parties ou leurs proches vivent sous le même toit. L'interdiction de discrimination est censée ne pas s'appliquer en principe (bien que des exceptions soient possibles) si le propriétaire ne loue pas plus de 50 logements.

## **5. Mise en application de la loi**

Hormis certains mécanismes spéciaux, les moyens de faire appliquer la loi antidiscrimination sont les mêmes que ceux des autres domaines du droit, à savoir le recours aux tribunaux. On dispose d'une jurisprudence de plus en plus abondante sur toute une série d'aspects de la discrimination. Certains aspects n'ont cependant pas encore été réglés et la jurisprudence est parfois contradictoire. On discerne néanmoins une évolution de plus en plus perceptible de la législation antidiscrimination vers une conformité aux directives et à la jurisprudence de la CJUE.

En droit du travail, une victime de discrimination a droit à des dommages-intérêts pour préjudice matériel si la responsabilité de l'employeur est engagée, que ce soit par négligence ou par un acte délibéré. Il existe une responsabilité stricte en dommages-intérêts pour préjudice moral. Le montant de l'indemnisation doit être approprié. Si la discrimination n'est pas la cause du non-emploi, l'indemnisation pour préjudice moral se limite à trois mois de rémunération.

Le délai de recours est fixé à deux mois à compter de la réception du refus d'une candidature ou d'une promotion et, dans d'autres cas, de la prise de connaissance du comportement donnant lieu à un préjudice. La législation ne prévoit pas l'obligation d'établir une relation contractuelle sauf si cette obligation découle d'autres volets législatifs, tel le droit de la responsabilité civile. Les rétorsions sont interdites. La loi fait appel à la responsabilité sociale des partenaires sociaux pour atteindre l'objectif de la non-discrimination. Les règles de non-discrimination s'appliquent également aux associations professionnelles lesquelles sont tenues, lorsqu'une discrimination est constatée, d'admettre la personne en leur sein.

Les preuves statistiques ont été admises par le passé et peuvent être utilisées en vertu de l'AGG. L'ancienne réglementation relative à la charge de la preuve, désormais modifiée par l'AGG, a été interprétée conformément aux décisions de la Cour de justice européenne (avant Lisbonne) et de la jurisprudence de la CJUE. Il n'existe pas encore de réglementation explicite ni de pratique juridique concernant la recevabilité du test de situation.

Selon la loi antidiscrimination, une victime de discrimination a le droit de bénéficier dans le cadre d'une action en justice du soutien d'associations ayant un intérêt dans les questions de discrimination. Elles doivent compter 75 membres au moins ou regrouper un minimum de sept autres associations concernées par la lutte contre la discrimination. Les principaux exemples d'action positive proviennent de la législation relative au handicap: il s'agit de diverses formes de dialogue, partiellement institutionnalisées, entre organismes gouvernementaux et société civile. Une «*actio popularis*» existe uniquement dans certains domaines du droit antidiscrimination, et notamment en droit relatif au handicap (loi sur l'égalité des chances pour les personnes handicapées (*Behindertengleichstellungsgesetz, BGG*)).<sup>13</sup>

## **6. Organismes de promotion de l'égalité de traitement**

Dès son entrée en vigueur en août 2006, la loi antidiscrimination a institué l'agence fédérale de lutte contre la discrimination (*Antidiskriminierungsstelle des Bundes*), laquelle n'est cependant devenue opérationnelle qu'en 2007. Son mandat couvre tous les motifs énumérés dans la loi, nonobstant les compétences d'agences gouvernementales spécialisées qui traitent de matières apparentées. L'agence est associée sur le plan organisationnel au ministère des Affaires familiales, des personnes âgées, des femmes et de la jeunesse. Son directeur est nommé par le ministre des Affaires familiales, des personnes âgées, des femmes et de la jeunesse sur proposition du gouvernement. La première nomination est intervenue au printemps 2007. Un nouveau directeur a été nommé en 2009 et confirmé en 2014. La personne ainsi désignée est indépendante et n'obéit qu'à la loi. La durée du mandat de la direction de l'agence correspond à la période législative du *Bundestag*.

L'agence a pour mission d'aider les personnes à défendre leurs droits contre la discrimination, de les informer plus particulièrement sur les recours juridiques dont ils disposent à cette fin, d'obtenir des conseils juridiques de la part d'autres agences, de procéder à une médiation entre parties, de fournir des informations au grand public, de prendre des mesures préventives contre la discrimination, de réaliser des études scientifiques et, tous les quatre ans, de produire un rapport sur la problématique de la discrimination en concertation avec les commissaires chargés de questions apparentées. Ces agences peuvent adresser des recommandations et commanditer conjointement des études scientifiques. L'agence fédérale antidiscrimination peut exiger, moyennant l'accord de la victime présumée, que l'auteur allégué d'une discrimination expose sa prise de position.

D'autres organismes publics sont tenus de soutenir l'agence dans son travail et elle-même doit coopérer avec des ONG et d'autres associations. Un organisme consultatif a été mis en place et l'agence dispose d'un budget d'environ trois millions d'euros. Elle fait connaître son action auprès du public, notamment au travers de conférences, de publications et d'études et enquêtes qui lui sont commanditées sur des questions particulières telles que des constatations empiriques en matière de discrimination, la discrimination fondée sur la religion, la discrimination multiple, l'action positive ou la situation des Sintis et des Roms en Allemagne.

L'Allemagne compte par ailleurs plusieurs organismes qui traitent de questions liées à la discrimination; on peut principalement citer à ce titre les commissaires en charge de

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<sup>13</sup> Modifiée en dernier lieu le 23 décembre 2016 (BGBl. I, 3234 (n° 66)).

l'intégration/des étrangers, des immigrés d'origine ethnique allemande (*Aussiedler*) et des minorités nationales, et des personnes handicapées.

## 7. Points essentiels

L'Allemagne a instauré en principe un cadre juridique complet pour lutter contre les actes de discrimination. Ce cadre en évolution permanente<sup>14</sup> présente toutefois certaines déficiences:

- a) l'exemption du licenciement de l'application de l'interdiction de discrimination (article 2, paragraphe 4 de l'AGG), en dépit d'une certaine privation d'effet utile par la jurisprudence;
- b) la non-application éventuelle de l'AGG aux régimes professionnels de retraite (article 2, paragraphe 2, 2e phrase, de l'AGG), selon, toutefois, l'interprétation judiciaire de la norme concernée;
- c) l'exemption du champ matériel de la fourniture de biens et de services de toutes les transactions impliquant une relation spéciale de confiance et de proximité entre les parties ou les membres de leur famille, y compris la location d'appartements chez le propriétaire des lieux, quel que soit le motif, c'est-à-dire race et origine ethnique incluses (article 19, paragraphe 5, de l'AGG), ce qui pose problème par rapport à la directive sur l'égalité raciale, en fonction toutefois de son interprétation contentieuse à cet égard;
- d) l'exemption liée au logement, y compris un traitement différencié fondé sur la race et l'origine ethnique, dans le but de mettre en place des structures d'habitat socialement et culturellement équilibrées (article 19, paragraphe 3 de l'AGG), selon l'interprétation judiciaire;
- e) la formulation de la justification d'une inégalité de traitement en raison de convictions religieuses et autres, selon l'interprétation judiciaire (article 9, paragraphe 1, de l'AGG);
- f) le droit civil ne prévoit aucune interdiction spéciale de rétorsion telle que visée à l'article 9 de la directive sur l'égalité raciale (2000/43/CE);
- g) le fait que l'indemnisation pour préjudice matériel dépende de l'existence d'une faute (intentionnelle ou commise par négligence) ou d'une négligence grave (article 15, paragraphes 1 et 3, et article 21, paragraphe 2, de l'AGG) va à l'encontre de la jurisprudence de la CJE en la matière;
- h) en droit public, la mise en œuvre de dispositions relatives à la race et l'origine ethnique dans les domaines de la sécurité sociale et des prestations sociales, de l'enseignement et de la fourniture de biens et de services est incomplète pour ce qui concerne le harcèlement et l'injonction de discriminer, selon l'interprétation judiciaire;
- i) il n'existe pas de réglementation en matière d'aménagement raisonnable.

Le grand défi va consister à interpréter et appliquer le cadre juridique de manière cohérente pour atteindre les objectifs de la loi antidiscrimination qui s'inscrivent, comme indiqué plus haut, dans les valeurs fondamentales consacrées par l'ordre constitutionnel allemand et parmi lesquelles la dignité humaine figure au premier plan.

La jurisprudence reste, en termes absolus, peu abondante et certains éléments font penser que cette situation s'explique par l'existence d'obstacles pour accéder à la justice et de problèmes en matière de preuves. La prévention d'attitudes à l'origine de discriminations est un autre sujet de préoccupation et de récents événements, telles des manifestations xénophobes de grande envergure, font penser qu'en dépit de vives réactions de la part de la société civile, du gouvernement et d'acteurs politiques, des efforts doivent impérativement être poursuivis à cet égard – surtout dans le contexte de la crise des

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<sup>14</sup> Loi sur l'amélioration de l'inclusion et de l'autodétermination des personnes handicapées (*Gesetz zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen*, BTHG), BGBl. I, 3234, qui prendra ses effets en 2017.

réfugiés et des réactions xénophobes qu'elle suscite parfois. Il convient en outre d'être attentif à la menace de terreur motivée par des considérations religieuses, qui a frappé l'Allemagne de façon tragique en 2016 et qui pourrait amplifier ces problèmes.



## **ZUSAMMENFASSUNG**

### **1. Einleitung**

Wie viele Länder hat Deutschland eine pluralistische Gesellschaft. Die autochthonen Minderheiten des Landes, die Dänen und Sorben, sind relativ klein. Auch die Friesen und die Sinti und Roma werden offiziell als deutsche Minderheiten anerkannt. Die größten ethnischen Minderheiten sind jedoch Zuwanderer, insbesondere die so genannten „Gastarbeiter“ und deren Nachkommen. Vor der Nazizeit stammte die größte Gruppe der Einwanderer aus Polen. Seit 1945 gehören Türken, Menschen aus dem ehemaligen Jugoslawien, Italiener und Griechen zu den größten Einwanderergruppen. Dadurch ist in den letzten Jahrzehnten, auch durch den Zustrom von Asylsuchenden und Flüchtlingen, in Deutschland eine multiethnische Gesellschaft entstanden. Aufgrund der deutschen Anstrengungen während der Flüchtlingskrise ist die Zahl der in Deutschland lebenden Ausländer im Jahr 2015 um 1,1 Millionen auf 9,1 Millionen gestiegen (Gesamtbevölkerung rund 80 Millionen). Im Jahr 2016 kamen 280 000 Flüchtlinge ins Land. Statistiken zeigen, dass heute rund 21 % der deutschen Bevölkerung einen Migrationshintergrund haben.

Die größten religiösen Gemeinschaften in Deutschland sind die katholische und die protestantische Kirche mit jeweils rund 25 Millionen Mitgliedern. Das heißt jeweils 30 % der Bevölkerung gehören einer der beiden großen christlichen Konfessionen an, das sind 60 % insgesamt. 2015 waren rund 1,7 Millionen Muslime deutsche Staatsbürger, was rund 2 % der Bevölkerung entspricht. Aufgrund der Migrationsmuster von 2015 und 2016 wird sich die Gesamtzahl der Muslime (mit oder ohne Staatsbürgerschaft) auf über 4,5 Millionen belaufen. Genaue Zahlen liegen noch nicht vor. Knapp 100 000 Menschen oder 0,12 % der Bevölkerung sind Juden.

Die deutsche Vergangenheit beeinflusst die Haltung zum Grundsatz der Gleichbehandlung und zum Diskriminierungsverbot, insbesondere in Bezug auf Rasse und ethnische Zugehörigkeit, aber auch auf Religion und Weltanschauung, sexuelle Orientierung und Behinderung. In allen gesellschaftlichen Bereichen ist die Erinnerung an die Schrecken der Nazi Herrschaft und deren zahlreiche Verbrechen gegen Menschen einer bestimmten Religion, Weltanschauung, ethnischen Herkunft oder sexuellen Orientierung bzw. Menschen mit Behinderung oder anderen Merkmalen äußerst präsent. Für viele deutsche Bürger bedeutet diese Vergangenheit eine große Verantwortung für den Schutz einer Kultur der Menschenrechte. Dieses Verantwortungsgefühl kommt in vielen zivilgesellschaftlichen Aktionen, im Bildungswesen und in den Handlungen der politischen Organe in Deutschland zum Ausdruck.

Deutschland hat ein hoch entwickeltes Sozialsystem, das Menschen mit Behinderungen in vielen Bereichen durch angemessene Vorkehrungen unterstützt, die durch Fördersysteme finanziert werden. Für gleichgeschlechtliche Partnerschaften wurde ein spezielles Rechtsinstitut geschaffen, das dieselbe Rechtssicherheit gewährt wie eine Ehe für heterosexuelle Paare. Die Reform des Staatsangehörigkeitsgesetzes hat die Regeln für die Erlangung der deutschen Staatsbürgerschaft liberalisiert; Ziel der Reform war unter anderem die Förderung der Integration. Zahlreiche Menschen in Deutschland haben gegenüber den Flüchtlingen viel Solidarität gezeigt.

Dennoch ist Diskriminierung in Deutschland ein ernst zu nehmendes Problem. Rassismus und Fremdenfeindlichkeit sind weiterhin anzutreffen und drücken sich auch in fremdenfeindlicher Gewalt aus, die seit 1990 mehrere Dutzend Todesopfer gefordert hat. Das Bekanntwerden einer neonazistischen Terrorzelle, die für mindestens neun rassistisch motivierte Morde verantwortlich ist, war eine schockierende Erinnerung an die möglichen Folgen von Rassismus. In den letzten Jahren konnten rechtsextreme Gruppierungen und Parteien mit fremdenfeindlichen Zielen einige politische Erfolge verbuchen, die jedoch meist nur von kurzer Dauer waren. 2016 kam es – wie schon in früheren Jahren – an einigen Orten zu gut besuchten Demonstrationen, in denen fremdenfeindliche

Einstellungen zum Ausdruck gebracht wurden. Im Zuge der Flüchtlingskrise kam es zu zahlreichen Gewalttaten, darunter auch zu vielen Angriffen auf Flüchtlingsheime, einschließlich Brandstiftungen. 2016 verzeichnete das Bundeskriminalamt rund 1000 solcher Angriffe auf Flüchtlingsheime.<sup>15</sup>

Obwohl nur wenige umfassende empirische Studien zu diesem Thema vorliegen, deuten die verfügbaren Daten darauf hin, dass in Deutschland weiterhin Menschen aufgrund bestimmter Merkmale, wie Religion und Weltanschauung, Behinderung, sexueller Orientierung und Alter, diskriminiert werden.

## **2. Wichtigste Gesetze**

Am 18. August 2006 wurde ein umfassendes Antidiskriminierungsgesetz verabschiedet, das Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung (EUGleichbUmsG).<sup>16</sup> Mit diesem Gesetz wurden das Allgemeine Gleichbehandlungsgesetz (AGG) und das Gesetz über die Gleichbehandlung der Soldatinnen und Soldaten (SoldGG) zusammengeführt und zahlreiche weitere gesetzliche Vorschriften geändert.

Das Gesetz bedeutete eine erhebliche Umgestaltung des Antidiskriminierungsrechts in Deutschland. Sein Ziel ist es, Benachteiligungen aus Gründen der Rasse oder wegen der ethnischen Herkunft, des Geschlechts, der Religion oder Weltanschauung, einer Behinderung, des Alters oder der sexuellen Identität zu verhindern oder zu beseitigen. Mit der Formulierung „aus Gründen der Rasse“ möchte der deutsche Gesetzgeber ausdrücken, dass er die Vorstellung unterschiedlicher menschlicher Rassen nicht unterstützt. Mit dem Gesetz wurden auch Teile des Arbeitsrechts, des Zivilrechts und des öffentlichen Rechts geändert. Nach allgemeinen zivilrechtlichen Grundsätzen gehört „Weltanschauung“ nicht zu den geschützten Diskriminierungsgründen. Im Prinzip geht das Gesetz daher über die Vorgaben der europäischen Rechtsvorschriften hinaus. Allerdings gibt es mehrere Teile des Gesetzes, die möglicherweise gegen europäisches Recht verstoßen. Probleme mit Diskriminierung im Kontext von Zuwanderung können mit den geschützten Gründen – vor allem Rasse, ethnische Zugehörigkeit bzw. Religion oder Weltanschauung – erfasst werden.

Das Gesetz ist in einen Rechtsrahmen eingebettet, der in praktischer Hinsicht teilweise mehr Relevanz hat als das AGG.

Für das Verständnis der deutschen Rechtsordnung im Bereich Diskriminierung ist das Grundgesetz entscheidend. Anders als andere Verfassungen ist das deutsche Grundgesetz für alle öffentlichen Organe bindend. Die Grundrechte sind Teil dieser direkt anwendbaren verfassungsrechtlichen Ordnung. Sie sind für Legislative, Exekutive und Judikative als direkt anwendbares Recht verbindlich. Durch das Grundgesetz bilden die Grundrechte den sachlichen Kern der allgemeinen Rechtsordnung. Daher sind sie nicht nur für das öffentliche Recht relevant, sondern durchdringen sämtliche Rechtsbereiche, wie das Strafrecht und das Privatrecht.

Im Grundgesetz finden sich mehrere Bestimmungen, die die Gleichheit der Menschen schützen. Am wichtigsten ist hierbei die Garantie der Menschenwürde. Den Kern dieser Garantie bildet der Respekt vor dem Menschen an sich, einfach aufgrund seiner Menschlichkeit, ungeachtet aller anderen Eigenschaften. Die Rechtsprechung des Bundesverfassungsgerichts betont immer wieder, dass jeder Mensch nicht als Objekt staatlicher Handlungen behandelt werden darf, sondern einen Zweck an sich darstellt. Außerdem hat jeder Mensch Anspruch auf Schutz vor Herabwürdigungen und Beleidigungen. Der Schutz der Menschenwürde ist das zentrale Werturteil des deutschen

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<sup>15</sup> Bundeskriminalamt, Kriminalität im Kontext von Zuwanderung, Bundeslagebild 2016, S. 60.

<sup>16</sup> BGBl. 2006, 1897.

Rechts und seine wichtigste und oberste Norm. Deshalb ist er auch ein wichtiger Referenzpunkt für das deutsche Antidiskriminierungsrecht, nicht zuletzt weil er die Auslegung des im Grundgesetz verankerten Gleichheitsgrundsatzes prägt und einen normativen Maßstab für andere Rechtsbereiche bietet. Es ist wichtig zu verstehen, dass das deutsche Recht durch die Garantie der Menschenwürde verbindlich verbietet, beim Wert von Menschen Unterschiede zu machen, ungeachtet aller besonderer Eigenschaften. Die einzige Frage ist daher, mit welchen technischen Mitteln das übergreifende Ziel der Menschenwürde durch rechtliche Kanäle in den einzelnen Lebensbereichen angemessen geschützt werden kann.

Deutschland ist ein demokratischer, sozialer und rechtsstaatlicher Föderalstaat. Als Sozialstaat hat das Land die Pflicht, die Wohlfahrt seiner Bürger zu fördern. Im Bereich der Antidiskriminierung führt das Prinzip des Sozialstaats zu einer Vielzahl von Programmen zur Eingliederung bestimmter Gruppen, die Diskriminierung ausgesetzt sind. Durch die föderale Struktur des Landes gibt es in einigen Rechtsbereichen, die unter die Zuständigkeit der Länder fallen, uneinheitliche Rechtsvorschriften, insbesondere in den Bereichen Bildung und Kultur und bei den Gesetzen, die die Angestellten der Länder betreffen.

Trotz der jüngsten Reform der bundesstaatlichen Ordnung fallen jedoch die meisten wichtigen Bereiche des öffentlichen Rechts (mit den oben genannten Ausnahmen) und des Privatrechts unter das alleinige oder konkurrierende Gesetzgebungsrecht des Bundes.

Deutschland hat ein spezielles Antidiskriminierungsrecht. Es gibt mehrere Bestimmungen im öffentlichen Recht, die die grundlegende Gleichbehandlungsgarantie wiederholen, z. B. im Gesetz über den öffentlichen Dienst und andere öffentliche Angestellte. Im Arbeitsrecht enthält das Betriebsverfassungsgesetz (BetrVG) ein allgemeines Diskriminierungsverbot und der Grundsatz der Gleichbehandlung von Angestellten wird auch in der Rechtsprechung konsequent verteidigt.

In Bezug auf Behinderung wurden mehrere Rechtsinstrumente eingeführt, die vor Diskriminierung schützen und die soziale Eingliederung von Menschen mit Behinderung fördern. Im Bereich sexuelle Orientierung wurden Rechtsvorschriften geschaffen, die entweder direkt Schutz vor Diskriminierung gewähren oder aber indirekt Möglichkeiten eröffnen, die Menschen mit einer bestimmten sexuellen Orientierung vorher nicht offen standen, etwa durch Einführung einer rechtlich anerkannten Form der Partnerschaft oder der Möglichkeit von Adoption.

Was die Religion betrifft, so ermöglichen spezielle Rechtsvorschriften und das Fallrecht einerseits angemessene Vorkehrungen für die Berücksichtigung religiöser Weltanschauungen und andererseits gewisse Ausnahmeregelungen vom allgemeinen Diskriminierungsverbot im öffentlichen Recht und im Arbeitsrecht. Nach der allgemeinen Rechtsauffassung (die auch im Fallrecht zum Ausdruck kommt), begründen die allgemeinen Bestimmungen des Zivilrechts Rechtsmittel im Privatrecht und im Deliktrecht gegen Diskriminierung wegen sämtlicher Diskriminierungsgründe, die die persönlichen Grundrechte verletzen. Diese allgemeinen Bestimmungen sind vor dem Hintergrund des Grundgesetzes zu sehen (insbesondere der Grundrechte und vor allem der Menschenwürde), das Diskriminierung verbietet.

### **3. Wichtigste Grundsätze und Begriffe**

Das Antidiskriminierungsgesetz definiert unmittelbare und mittelbare Diskriminierung, Belästigung und Anweisung zur Diskriminierung und hält sich dabei eng an den Wortlaut der Richtlinien. Diskriminierung durch Assoziierung wird nicht ausdrücklich erwähnt. Eine Bestimmung behandelt das Thema Mehrfachdiskriminierung wegen mehrerer Gründe und besagt, dass eine unterschiedliche Behandlung nur gerechtfertigt werden kann, wenn sich die Rechtfertigung auf alle Gründe erstreckt. Positive Maßnahmen sind zulässig, wenn

durch die unterschiedliche Behandlung bestehende Nachteile wegen eines der genannten Gründe verhindert oder ausgeglichen werden sollen. Kündigungen sind vom Geltungsbereich des Antidiskriminierungsgesetzes ausgeschlossen, diese Bestimmung wird jedoch im Fallrecht nicht angewendet.

#### a) Arbeitsrecht

Eine Ungleichbehandlung ist zulässig, wenn der Grund eine wesentliche und entscheidende berufliche Anforderung darstellt. Außerdem gibt es weitere Ausnahmeregelungen wegen des Ethos und der Loyalitätspflicht, die einer Religion oder Weltanschauung entspringen. Einige aktuelle Urteile haben gezeigt, dass religiöse Gemeinschaften die Loyalitätspflichten, die eine unterschiedliche Behandlung begründen, sehr weit auslegen können.<sup>17</sup> Dieses Fallrecht betrifft einen äußerst umstrittenen Bereich, der angesichts der Bedeutung der christlichen Kirchen und deren Organisationen als Arbeitgeber von hoher gesellschaftlicher Relevanz ist. Weitere Ausnahmen betreffen eine unterschiedliche Behandlung wegen des Alters, wenn sie objektiv und angemessen und durch ein legitimes Ziel gerechtfertigt ist. Nach den Vorgaben der Richtlinie 2000/78/EG sind hierfür konkrete Beispiele angegeben.

Arbeitgeber sind verpflichtet, ihre Arbeitnehmer durch organisatorische Maßnahmen und den Inhalt der beruflichen Aus- und Fortbildung vor Benachteiligungen zu schützen. Sie müssen Maßnahmen zur Unterbindung der Benachteiligung ergreifen und ihre Arbeitnehmer über die geltenden Rechtsvorschriften informieren.

#### b) Zivilrecht

Im Zivilrecht ist Diskriminierung wegen sämtlicher aufgeführter Diskriminierungsgründe verboten, nicht nur wegen der in den Richtlinien vorgegebenen Gründen (Rasse, ethnische Herkunft und Geschlecht), mit Ausnahme der Weltanschauung.

Bei der Bereitstellung von Wohnraum ist eine Ungleichbehandlung aus allen Gründen zulässig, wenn sie der Schaffung sozial stabiler Bewohnerstrukturen und ausgewogener Siedlungsstrukturen sowie ausgeglichener wirtschaftlicher, sozialer und kultureller Verhältnisse dient.

Ungleichbehandlung aufgrund von Religion, Behinderung, Alter, sexueller Identität oder Geschlecht ist zulässig, wenn ein sachlicher Grund vorliegt. Als Beispiel für sachliche Gründe führt das Gesetz die Vermeidung von Gefahren und Schäden, den Schutz der Intimsphäre oder der persönlichen Sicherheit, die Gewährung besonderer Vorteile, wenn ein Interesse an der Durchsetzung der Gleichbehandlung fehlt, und das Ethos einer Religion an. Bei Versicherungen ist eine Ungleichbehandlung – außer wegen des Geschlechts – nur dann zulässig, wenn sie auf objektiven versicherungsmathematischen Berechnungen beruht. Bei Verstößen gegen das Benachteiligungsverbot kann das Opfer die Beseitigung der Beeinträchtigung verlangen und auf Unterlassung und Schadensersatz klagen. Die diskriminierende Partei muss Schadensersatz für Schäden leisten, die er vorsätzlich oder fahrlässig verursacht hat. Auch für einen Schaden, der kein Vermögensschaden ist, haftet der Verursacher mit einer angemessenen Entschädigung. Wie im Arbeitsrecht müssen entsprechende Ansprüche innerhalb einer Frist von zwei Monaten geltend gemacht werden. Sowohl im Arbeitsrecht als auch im allgemeinen Zivilrecht ist die Beweislast umgekehrt.

#### c) Öffentliches Recht

Diese gesetzlichen Bestimmungen gelten für Beamte, Richter und Zivildienstleistende und berücksichtigen dabei den unterschiedlichen rechtlichen Status dieser Gruppen. Das Gesetz

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<sup>17</sup> Siehe Bundesarbeitsgericht, BAG, 24. September 2014, 5 AZR 611/12 und entsprechend Bundesverfassungsgericht, BVerfG, 20. Oktober 2014, 2 BvR 661/12.

über die Gleichbehandlung der Soldatinnen und Soldaten enthält ähnliche Bestimmungen wie oben erläutert und ältere Rechtsvorschriften zu diesem Bereich.

Weitere Teile des Gesetzes führen entsprechende Normen in das Arbeitsrecht, Zivilrecht und das öffentliche Recht ein. Es gibt einige spezielle Bestimmungen über angemessene Vorkehrungen, insbesondere für Menschen mit schweren Behinderungen und andere Gruppen mit einem ähnlichen Status.

Die Rechtsprechung der Gerichte hat 2016 einige wichtige Auslegungen diskriminierungsrelevanter Rechtsvorschriften bestätigt. In einer Entscheidung des Bundesverfassungsgerichts ging es um die Zulässigkeit des Tragens eines islamischen Kopftuchs seitens einer bei einem öffentlichen Träger beschäftigten Erzieherin. Das Gericht entschied, dass das Grundrecht auf Religionsfreiheit die Erzieherin dazu berechtige, ein solches Kopftuch zu tragen, und erklärte, dass sich aus den Bestimmungen des Antidiskriminierungsrechts für die Beschwerdeführerin keine weitergehenden Rechte ergäben als diejenigen, die aus dem Grundrecht auf Religionsfreiheit folgten. Das Gericht unterstrich, dass ein solches Kleidungsstück in Deutschland inzwischen üblich und zwangsläufige Folge einer pluralistischen Gesellschaft sei.<sup>18</sup> Das Gericht bestätigt mit dieser Entscheidung seine Rechtsprechung im Streit um das Tragen von Kopftüchern durch Lehrkräfte an öffentlichen Schulen (vgl. Bundesverfassungsgericht, BVerfGE 138, 296) und dehnt diese auf den Bereich der Vorschulerziehung aus.

Bei einem ähnlichen Thema, dem sogenannten Burkini, hat das Bundesverfassungsgericht eine andere Entscheidung getroffen: Mit der Begründung, die Gebote ihres muslimischen Glaubens würden es ihr verbieten, Männern ihre Körperkonturen zu zeigen, forderte die Beschwerdeführerin, eine Schülerin, die Befreiung vom Schwimmunterricht an einer staatlichen Schule. Die Schule erlaubte zwar die Benutzung sogenannter Burkinis, diese Option wurde von der Beschwerdeführerin jedoch als nicht ausreichend angesehen.

Das Gericht wies die Verfassungsbeschwerde als unzulässig zurück. Die Beschwerdeführerin habe nicht dargelegt, weshalb der Burkini zur Wahrung religiöser Vorschriften über die Verhüllung des Körpers nicht genügen sollte. Die Tatsache, dass die Beschwerdeführerin mit dem Anblick männlicher Körper in Badebekleidung konfrontiert sei, reiche nicht aus, um eine Befreiung vom Schwimmunterricht zu rechtfertigen.<sup>19</sup> Diese Entscheidungen verdeutlichen das Bemühen des Gerichts, Interessen der Religionsfreiheit und Akkomodation mit öffentlichen Interessen – Integration, individuelle Entwicklung von Schülern im Schulunterricht usw. – in Einklang zu bringen.

#### **4. Sachlicher Geltungsbereich**

##### **a) Allgemein**

Die im Grundgesetz verankerte Garantie gilt für alle staatlichen Handlungen und, mit mittelbarer horizontaler Wirkung, auch für die Beziehungen zwischen Privatpersonen. Die speziellen Garantien gelten für ihren jeweiligen Rechtsbereich, d. h. für das öffentliche Recht, Arbeitsrecht, Sozialrecht usw.

##### **b) Das Allgemeine Gleichbehandlungsgesetz (AGG)**

Unter den Anwendungsbereich des Allgemeinen Gleichbehandlungsgesetzes fallen das Arbeitsrecht, soziale Sicherheit, soziale Vergünstigungen, Bildung und allgemeines Zivilrecht, einschließlich von Versicherungsverträgen, wobei die Aufzählung sich eng (zum Teil wörtlich) an die Vorgaben der Richtlinien hält. Für diskriminierende Kündigungen haben die Bestimmungen zum allgemeinen und besonderen Kündigungsschutz (insbesondere des

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<sup>18</sup> Bundesverfassungsgericht, 1 BvR 354/11, 18. Oktober 2016.

<sup>19</sup> Bundesverfassungsgericht, 1 BvR 3237/13, 8. November 2016.

Kündigungsschutzgesetzes) Vorrang vor dem Allgemeinen Gleichbehandlungsgesetz. In der Rechtsprechung wird diese Bestimmung jedoch so ausgelegt, dass das Diskriminierungsverbot auch für Kündigungen uneingeschränkt gilt.

Im Zivilrecht gilt das Verbot von Diskriminierung aus Gründen der Rasse oder ethnischen Herkunft für alle Rechtsgeschäfte, z. B. für den Zugang zu Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen.

Das Verbot von Diskriminierung aus anderen Gründen, ausgenommen des Glaubens, gilt außerdem für alle Rechtsgeschäfte, die typischerweise ohne Ansehen der Person zu vergleichbaren Bedingungen in einer Vielzahl von Fällen zustande kommen (Massengeschäfte) oder bei denen das Ansehen der Person eine nachrangige Bedeutung hat. Außerdem gilt das Verbot für privatrechtliche Versicherungen.

Das Diskriminierungsverbot findet keine Anwendung auf Rechtsgeschäfte, bei denen ein besonderes Nähe- oder Vertrauensverhältnis der Parteien oder ihrer Angehörigen begründet wird. Bei Mietverhältnissen kann dies insbesondere der Fall sein, wenn die Parteien oder ihre Angehörigen Wohnraum auf demselben Grundstück nutzen. In der Regel gilt das Diskriminierungsverbot nicht für die Vermietung von Wohnraum, wenn der Vermieter insgesamt nicht mehr als 50 Wohnungen vermietet (obwohl Ausnahmen möglich sind).

## **5. Rechtsdurchsetzung**

Von bestimmten Mechanismen abgesehen sind die Mittel zur Durchsetzung des Allgemeinen Gleichbehandlungsgesetzes dieselben wie für andere Rechtsvorschriften, das heißt durch Klage vor Gericht. Es gibt inzwischen ein umfassendes Fallrecht für verschiedene Aspekte von Diskriminierung. Allerdings herrschen bei manchen Aspekten noch keine endgültige Klarheit und eine widersprüchliche Rechtsprechung. Zunehmend sind jedoch Umriss eines Diskriminierungsrechts zu erkennen, das mit den Richtlinien und mit der Rechtsprechung des EuGH in Einklang steht.

Nach dem Arbeitsrecht haben Opfer von Diskriminierung Anspruch auf Schadensersatz, wenn der Arbeitgeber durch vorsätzliche oder fahrlässige Handlungen für die Diskriminierung haftet. Dabei haftet der Arbeitgeber auch für Schäden, die keine Vermögensschäden sind. Die Höhe der Entschädigung muss angemessen sein. Die Entschädigung darf bei einer Nichteinstellung drei Monatsgehälter nicht übersteigen, wenn der oder die Beschäftigte auch bei benachteiligungsfreier Auswahl nicht eingestellt worden wäre.

Sämtliche Ansprüche müssen innerhalb von zwei Monaten geltend gemacht werden, wobei die Frist bei einer Bewerbung oder einem beruflichen Aufstieg mit dem Zugang der Ablehnung und in den sonstigen Fällen zu dem Zeitpunkt beginnt, in dem der oder die Beschäftigte von der Benachteiligung Kenntnis erlangt. Das Gesetz begründet keinen Anspruch auf Begründung eines Vertragsverhältnisses, es sei denn, ein solcher ergibt sich aus einem anderen Rechtsgrund, z. B. dem Deliktrecht. Viktimisierung ist verboten. Das Gesetz enthält einen Appell an die soziale Verantwortung der Sozialpartner für die Durchsetzung des Gleichbehandlungsgrundsatzes. Das Diskriminierungsverbot gilt auch für berufliche Vereinigungen. Diese Vereinigungen sind verpflichtet, jedem ohne Diskriminierung eine Mitgliedschaft zu gewähren.

Statistische Daten wurden bereits vor Gericht verwendet und sind nach dem AGG auch zulässig. Die ehemalige Regel zur Beweislast und deren Neufassung nach dem AGG wurden in Übereinstimmung mit der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften bzw. später des Europäischen Gerichtshofs ausgelegt. Zu Situationstests gibt es weder eine ausdrückliche Regelung noch eine Rechtspraxis.

Nach dem Allgemeinen Gleichbehandlungsgesetz können sich Opfer von Diskriminierung vor Gericht durch Antidiskriminierungsverbände in gerichtlichen Verfahren unterstützen lassen. Diese Verbände müssen mindesten 75 Mitglieder haben oder einen Zusammenschluss aus mindestens sieben Verbänden bilden. Die wichtigsten Beispiele für positive Maßnahmen stammen aus dem Behindertengesetz. Es gibt viele Formen des Dialogs zwischen Regierungsstellen und der Zivilgesellschaft, die teilweise auch institutionalisiert sind. Die Möglichkeit einer Popularklage existiert nur in bestimmten Bereichen des Antidiskriminierungsrechts, vor allem im Behindertenrecht (Behindertengleichstellungsgesetz, BGG).<sup>20</sup>

## **6. Gleichbehandlungsstellen**

Die Antidiskriminierungsstelle des Bundes wurde mit dem Inkrafttreten des Allgemeinen Gleichbehandlungsgesetzes im August 2006 eingerichtet und nahm im Jahr 2007 ihre Arbeit auf. Sie ist für alle im Gesetz genannten Diskriminierungsgründe zuständig, unbeschadet der Zuständigkeit anderer spezialisierter Regierungsstellen. Organisatorisch ist die Stelle beim Bundesministerium für Familie, Senioren, Frauen und Jugend angesiedelt. Der Leiter der Stelle wird vom Bundesminister für Familie, Senioren, Frauen und Jugend auf Vorschlag der Bundesregierung ernannt, dies geschah erstmals im Frühjahr 2007. Im Jahr 2009 wurde eine neue Leitung ernannt und im Jahr 2014 bestätigt. Die Leitung ist unabhängig und nur dem Gesetz unterworfen. Die Amtszeit des Leiters entspricht der Legislaturperiode des Bundestags.

Die Aufgabe der Stelle ist es, Personen bei der Durchsetzung ihrer Rechte zum Schutz vor Benachteiligungen zu unterstützen, insbesondere indem sie über rechtliche Ansprüche und Möglichkeiten zum Schutz vor Benachteiligungen informiert, Beratung durch andere Stellen vermittelt und eine gütliche Beilegung zwischen den Beteiligten anstrebt. Zu ihrem Aufgabenbereich gehören außerdem die Aufklärung der Öffentlichkeit, Maßnahmen zur Verhinderung von Diskriminierung, die Durchführung wissenschaftlicher Untersuchungen und (alle vier Jahre) gemeinsam mit anderen zuständigen Beauftragten die Erstellung eines Berichts über Benachteiligungen. Die Stelle kann Empfehlungen geben und gemeinsam wissenschaftliche Untersuchungen durchführen. Die Stelle kann in Diskriminierungsfällen die Person, von der die mutmaßliche Diskriminierung ausgeht, um eine Stellungnahme ersuchen, wenn das Opfer sein Einverständnis erklärt.

Alle öffentlichen Stellen sind verpflichtet, die Arbeit der Antidiskriminierungsstelle zu unterstützen. Die Stelle soll mit NRO und anderen Vereinigungen zusammenarbeiten. Zu diesem Zweck wurde der Stelle ein Beirat beigeordnet. Die Antidiskriminierungsstelle des Bundes hat ein Budget von rund 3 Mio. Euro. Die Stelle ist öffentlich präsent, u.a. durch Konferenzen, Publikationen und in ihrem Auftrag durchgeführte Befragungen und Studien zu bestimmten Themen wie z. B. empirische Erkenntnisse über Diskriminierung, Diskriminierung aus religiösen Gründen, Mehrfachdiskriminierung, positive Maßnahmen oder die Situation der Sinti und Roma in Deutschland.

Neben der Antidiskriminierungsstelle des Bundes gibt es weitere Stellen, die für bestimmte Aspekte von Diskriminierung zuständig sind, vor allem die Beauftragten für Migration, Flüchtlinge und Integration, für Aussiedler, für nationale Minderheiten und für Behinderte.

## **7. Schlüsselprobleme**

Grundsätzlich hat Deutschland einen umfassenden Rechtsrahmen zur Bekämpfung diskriminierender Handlungen geschaffen, der sich ständig weiterentwickelt.<sup>21</sup> Es gibt jedoch einige Mängel:

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<sup>20</sup> Zuletzt geändert am 23.12.2016 (BGBl. I Nr. 66, S. 3234).

<sup>21</sup> Gesetz zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen, BTHG, BGBl. I, S. 3234, das ab 2017 stufenweise in Kraft tritt.

- a) die Ausnahme von Kündigungen aus dem Anwendungsbereich des Diskriminierungsverbots, Paragraph 2.4, AGG, die jedoch im Fallrecht kaum angewendet wird,
- b) die mögliche Nichtanwendung des AGG auf die betriebliche Altersvorsorge Paragraph 2.2. Satz 2 AGG, die jedoch von der juristischen Auslegung der jeweiligen Norm abhängt,
- c) die Ausnahme des Zugangs zu Gütern und Dienstleistungen durch Rechtsgeschäfte, bei denen ein besonderes Nähe- oder Vertrauensverhältnis der Parteien oder ihrer Angehörigen begründet wird, einschließlich der Vermietung von Wohnraum auf dem Grundstück des Vermieters, vom Diskriminierungsverbot für alle Gründe einschließlich der Rasse und ethnischen Herkunft, Paragraph 19.5 AGG, die womöglich gegen die Antirassismusrichtlinie verstößt, abhängig von ihrer inhaltlichen Auslegung,
- d) die Ausnahme bei der Vermietung von Wohnraum, wo eine unterschiedliche Behandlung zur Schaffung ausgeglichener sozialer und kultureller Verhältnisse zulässig ist, Paragraph 19.3 AGG, je nach rechtlicher Auslegung,
- e) der Wortlaut über die Rechtfertigung einer unterschiedlichen Behandlung wegen der Religion oder der Weltanschauung, je nach rechtlicher Auslegung, Paragraph 9.1 AGG,
- f) es gibt im Zivilrecht kein ausdrückliches Verbot von Viktimisierung, wie in Artikel 9 der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse (2000/43/EG) vorgegeben,
- g) die Tatsache, dass Schadensersatz nur geleistet wird, wenn der Arbeitgeber die Handlung (durch Vorsatz oder Fahrlässigkeit) zu vertreten bzw. grob fahrlässig gehandelt hat, Paragraph 15.1; 15.3; 21.2 AGG, widerspricht der einschlägigen Rechtsprechung des EuGH,
- h) im öffentlichen Recht gibt es, je nach rechtlicher Auslegung, in den Bereichen Sozialschutz und soziale Vergünstigungen, Bildung und Bereitstellung von Gütern und Dienstleistungen kein umfassendes Verbot von Belästigung und Anweisung zur Diskriminierung aufgrund der Rasse oder ethnischen Herkunft,
- i) es gibt keine allgemeine Verpflichtung zu angemessenen Vorkehrungen.

Die künftige Herausforderung liegt darin, den Rechtsrahmen konsequent auszulegen und anzuwenden, um die Ziele des Allgemeinen Gleichbehandlungsgesetzes zu verwirklichen, die wie oben dargelegt Teil grundlegender, in der deutschen Verfassungsordnung verankerter Werte, vor allem Menschenwürde, sind.

Das Fallrecht ist, in absoluten Zahlen, immer noch sehr begrenzt. Einiges deutet darauf hin, dass die geringen Fallzahlen auf informelle Hindernisse beim Rechtsschutz und bei der Beweislast zurückzuführen sind. Eine weitere Aufgabe ist die Bekämpfung weit verbreiteter Einstellungen, durch die Diskriminierung erst entsteht. Aktuelle Ereignisse, z. B. gut besuchte fremdenfeindliche Demonstrationen, haben zwar starke Reaktionen von Zivilgesellschaft, Regierung und politischen Akteuren hervorgerufen, geben aber Anlass zu der Vermutung, dass in diesem Bereich weitere Anstrengungen notwendig sind, nicht zuletzt im Zusammenhang mit der Flüchtlingskrise und den fremdenfeindlichen Reaktionen, die diese bisweilen hervorruft. Außerdem ist die Bedrohung durch religiös motivierten Terror zu bedenken, der Deutschland 2016 auf tragische Weise getroffen hat und diese Probleme noch verschärfen kann.



## INTRODUCTION

### The national legal system

The Constitution, or Basic Law (*Grundgesetz*, GG),<sup>22</sup> 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.<sup>23</sup> Fundamental rights are part of this directly effective constitutional order. They are binding on the legislature, executive, and judiciary as directly valid law.<sup>24</sup> 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*).<sup>25</sup> 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 law,<sup>26</sup> but permeate other legal spheres as well, such as criminal and private law.

There are several constitutional provisions that protect human equality. Most important is the guarantee of human dignity.<sup>27</sup> The core of this guarantee is the respect for any human being as an individual, simply by virtue of his or her humanity, irrespective of other characteristics. In accordance with this view, case law of the German Federal Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*) consistently states that each individual should be treated not only as an object of state action, but be respected as a subject and thus as an end in itself.<sup>28</sup> He or she is, in addition, protected against degrading or humiliating treatment.<sup>29</sup> 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. 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.<sup>30</sup> Other important constitutional guarantees are the guarantee of equality<sup>31</sup> and special constitutional equality rights concerning children born outside of marriage,<sup>32</sup> equality of status and office<sup>33</sup> and equality of electoral rights.<sup>34</sup>

Germany is a democratic and social federal state under the rule of law.<sup>35</sup> As it is a social state, the state has a duty to promote the welfare of its citizens. In the field of anti-

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<sup>22</sup> Basic Law (*Grundgesetz*, GG) of 23.05.1949 (BGBl. 1949, 1), last amended on 23.12.2014 (BGBl. I, 1478).

<sup>23</sup> Article 20.3 GG.

<sup>24</sup> Article 1.3 GG.

<sup>25</sup> Article 93.1 Nr. 4a GG.

<sup>26</sup> Here understood in the narrow sense, excluding criminal law.

<sup>27</sup> Article 1.1 GG: 'Human dignity is inviolable. To respect and protect it is the duty of all state authority.'

<sup>28</sup> Settled case law, see e.g. *BVerfG*, 15.02.2006 (1BvR 357/05), *Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts, BVerfGE)* 115, 118.

<sup>29</sup> *BVerfG*, 15.02.2006 (1BvR 357/05), *BVerfGE* 115, 118.

<sup>30</sup> For background cf. M. Mahlmann (2008), *Elemente einer ethischen Grundrechtstheorie*, Nomos, Baden-Baden, p. 97ff, p. 412ff. On the relationship between equality and dignity, cf. M. Mahlmann, 'Human dignity and autonomy in modern constitutional orders' in Rosenfeld, M. and Sajó, A. (eds.) (2012), *The Oxford handbook of comparative constitutional law*, Oxford, Oxford University Press.

<sup>31</sup> Article 3 GG.

<sup>32</sup> Article 6.5 GG: 'Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.'

<sup>33</sup> Article 33.1 GG: 'Every German shall have in every State (Land) the same political rights and duties.'

Article 33.2 GG: 'Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.'

Article 33.3 GG: 'Neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired in the public service shall be independent on religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.'

Article 140 GG in conjunction with Article 136.1 and 136.2, Weimar Constitution, reiterates the equality of status and office independent of religious denomination.

<sup>34</sup> Article 38.1 sentence 1, and Article 38.2 GG.

<sup>35</sup> Articles 20.1 and 20.3, Article 28.1 GG.

discrimination, the principle of the social state leads to a wide range of programmes aiming to promote the inclusion of groups which face discrimination.<sup>36</sup>

The federal character of Germany leads to different regulations in different Länder in some areas where the Länder have legislative powers, most notably in relation to education and cultural matters or certain aspects of the law regulating civil servants employed by them.

Despite reform of the Federal order of competencies, the second phase of which was completed in 2009, the most important matters in public (with the exceptions mentioned) and private law are, however, still within the competence of the Federation, either as exclusive legislative power, or concurrent legislative power.<sup>37</sup>

### **List of main legislation transposing and implementing the directives**

The directives are transposed, since 18 August 2006, by the General Act on Equal Treatment (Allgemeines Gleichbehandlungsrecht, AGG) of 14.08.2006 (BGBl. I, 1897) which was last amended on 03.04.2013 (BGBl. I, 610).<sup>38</sup> This act covers labour law, general contract law and public law.

The Act is part of a legal package which amended other existing legal regulations and also contains a law against discrimination in the army, the Law on the Equal treatment of Soldiers (*Gesetz über die Gleichbehandlung von Soldatinnen und Soldaten*, SoldGG).<sup>39</sup>

In addition, there are various legal provisions which partly reiterate the fundamental guarantee of equality for areas of public law, including the law on the civil service and other public employees.<sup>40</sup>

In addition, there are other legal regulations relevant for anti-discrimination law. In labour law, there is a general anti-discrimination clause in the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*)<sup>41</sup> and the fundamental principle of equal treatment of employees has been consistently established by case law.<sup>42</sup> In addition, as regards discrimination on the ground of sex (which is not covered by this report) and of disability, various legal instruments have been passed aiming to protect against discrimination and increase the social inclusion of women and disabled people.<sup>43</sup>

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<sup>36</sup> See below for examples.

<sup>37</sup> Articles 70-74 GG.

<sup>38</sup> The German Federal Anti-Discrimination Agency (*Antiskriminierungsstelle des Bundes, ADS*) provides an English translation of the AGG on its website: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/agg\\_in\\_englischer\\_Sprache.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/agg_in_englischer_Sprache.html). Accessed on 01.03.2017.

<sup>39</sup> Act Implementing European Directives Putting into Effect the Principle of Equal Treatment (*Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlinien*), 14.08.2006 (BGBl. I, 1897). The AGG and the SoldGG have been amended, 02.12.2006 (BGBl. I, 2742). A second amendment was made to the AGG on 12.12.2007 (BGBl. I, 2840) and to the SoldGG on 31.07.2008 (BGBl. I 2008, 1629). A third (though only technical) amendment to AGG was made on 05.02.2009 (BGBl. I 2009, 160). The most recent amendment to the AGG was introduced on 03.04.2013 (BGBl. I, 610).

<sup>40</sup> See Section 9 Federal Law on the Civil Service (*Bundesbeamtengesetz, BBG*). This codification was amended, newly arranged and published on 05.02.2009 (BGBl. I, 160), amended again on 18.11.2010 (BGBl. I, 1552), on 06.12.2011 (BGBl. I, 2515), on 28.08.2013 (BGBl. I, 3386) and most recently on 21.11.2016 (BGBl. I, 2570).

<sup>41</sup> Section 75.1 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), of 25.09.2001 (BGBl. I, 2518). This codification was last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

<sup>42</sup> Settled case law, see Federal Labour Court (*Bundesarbeitsgericht, BAG*), 12.10.2005, 10 AZR 640/04.

<sup>43</sup> Most importantly, the AGG covers disability for all employment relations and other areas beyond the scope of Directive 2000/78/EC. Section 81.2 of the Social Code IX (*Sozialgesetzbuch IX, SGB IX*) now refers to the regulation of the AGG. The SGB IX of 19.06.2001 (BGBl. I, 1046) was last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)). The Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*) of 27.04.2002 (BGBl. I, 1467, 1468) creates special duties for public authorities and some for private parties. The codification was last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)). See below for more and for details on disability.

In the area of sexual orientation, some legal regulations have been created which either directly aim to establish protection against discrimination or do so indirectly by providing options which were not previously open to people of certain sexual orientations, for example, by introducing a legally regulated form of same-sex partnership. With regard to religion, special legal regulations and case law, in addition to the non-discrimination clauses in public law and labour law, deal with the reasonable accommodation of various religious beliefs, including exceptions from general laws.<sup>44</sup>

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 must be interpreted in the light of the constitutional order (especially in the light of fundamental rights and, most importantly, of human dignity) which prohibits discrimination.<sup>45</sup> With the enactment of the AGG, these general clauses that were of only limited importance play an even more limited role in practice in this respect.

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<sup>44</sup> See below, 2.6.

<sup>45</sup> In particular, in relation to race and ethnic origin, see T. Bezzenger, 'Ethnische Diskriminierung, Gleichheit und Sittenordnung im bürgerlichen Recht', in *Archiv für die civilistische Praxis* 196 (1996), p. 395ff.

## 1 GENERAL LEGAL FRAMEWORK

### Constitutional provisions on protection against discrimination and the promotion of equality

The German Basic Law includes the following articles dealing with non-discrimination:

Article 3 GG, guarantee of equality; Article 33.3 GG, equal access to office, as the practically most important.<sup>46</sup>

The guarantee of equality<sup>47</sup> provides, first, for equality before the law,<sup>48</sup> which has been interpreted by the German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) 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.<sup>49</sup> The guarantee of equality contains, secondly, special protection against discrimination on the ground of sex,<sup>50</sup> parentage, race, language, homeland and origin, faith, or religious or political opinions.<sup>51</sup> There is a prohibition against disadvantaging somebody because of their disability, which implies the admissibility of positive action.<sup>52</sup> The same applies to sex. It is explicitly stated that the state should support the effective realisation of the principle of equality for women and men and work towards abolishing current inequalities.<sup>53</sup> Article 33.3 GG guarantees equal access to office irrespective of religion or belief.

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives.

The provisions are directly applicable.

These provisions cannot be enforced against private actors (in addition to against the state).

However, fundamental rights 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.<sup>54</sup> In addition, the doctrine of positive duties can give rise to the obligation of state authorities to protect against discrimination.

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<sup>46</sup> There other provisions relevant for non-discrimination, e.g. Article 6.5 GG (children born out of marriage) or Article 38 GG (voting rights) that are not discussed here.

<sup>47</sup> Article 3 GG.

<sup>48</sup> Article 3.1 GG: 'All humans are equal before the law.'

<sup>49</sup> Settled case law, BVerfGE 49, 148 (165); 98, 365 (385).

<sup>50</sup> Article 3.3 and Article 3.2 GG: men and women are equal.

<sup>51</sup> Article 3.3 sentence 1 GG.

<sup>52</sup> Article 3.3 sentence 2 GG.

<sup>53</sup> Article 3.2 sentence 2 GG.

<sup>54</sup> BVerfG, 15.01.1958, 1 BvR 400/51, BVerfGE 7, 198, settled case law. A possible exception to this rule is Article 1 GG.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law: Sex, parentage, race, language, homeland and origin, faith, religion, political opinion and disability are explicitly covered by the constitutional guarantee of equality as formulated in Article 3.1 GG. 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.<sup>55</sup> The guarantees in the Länder constitutions differ in their details from this list<sup>56</sup> although this is of no great significance in practice.<sup>57</sup>

The AGG covers all grounds from the Directives. Sexual orientation is substituted by the term sexual identity, without this having any discernible legal relevance in practice.

<sup>55</sup> Settled case law, see BVerfGE 49, 286; 96, 56; 115, 1. The right includes finding and cognition of the identity, BVerfGE 49, 286; 96, 56; 115, 1. The right to a name according to sexual orientation is encompassed by this right, including for homosexual transsexuals, BVerfGE 49, 286; 96, 56; 115, 1.

<sup>56</sup> State/Provision /Ground/Content concerning differences from the federal guarantee of equality: Bavaria: Constitution of the Free State of Bavaria (*Verfassung des Freistaates Bayern, BayVerf*), of 15.12.1998 (GVBl. 1998, 991), last amended on 11.11.2013 (GVBl. 642), Article 118a; Disability; promotion of equalisation; Berlin: Constitution of Berlin (*Verfassung von Berlin, VvB*), of 23.11.1995 (GVBl. 779), last amended on 22.03.2016 (GVBl. 114), 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, BbgVerf*), of 20.08.1992 (GVBl. I/92 [Nr.18], 298), last amended on 05.12.2013 (GVBl. 1/13 [Nr. 42]), Article 12 Section 2; Sexual identity, nationality, social background; prohibition of discrimination; Ibid., Article 12 Section 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, BremVerf*), of 21.10.1947 (Brem. GBl. 251), last amended on 20.12.2016 (Brem. GBl. 904), 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, VerfMV*), of 23.05.1993 (GVBl. M-V 1993, 372), last amended on 14.07.2016 (GVBl. M-V 573), 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, VerfNRW*), of 28.06.1950 (GV. NW. 1950, 127), last amended on 25.10.2016 (GV. NRW. 860), Article 13; Religion; prohibition on denying schooling for religious reasons in state schools in absence of confessional schools; Rhineland-Palatinate: Constitution for Rhineland-Palatinate (*Verfassung für Rheinland-Pfalz, VerfRP*), of 18.05.1947 (VOBl. 1947, 209), last amended on 08.05.2015 (GVBl. 35), 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, SächsVerf*), of 27.05.1992 (SächsGVBl. 243), last amended on 11.07.2013 (SächsGVBl. 502), 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, VerfST*), of 16.07.1992 (GVBl. LSA 600), last amended on 05.12.2014 (GVBl. LSA 494), 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, VerfSH*), of 13.05.2008 (GVBl. 2008, 223), last amended on 19.12.2016, (GVBl. 1008), Article 5 Section 1, 2; Ethnic minorities, especially Danes and Frisians and Sinti and Roma; 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, ThürVerf*), of 25.10.1993 (GVBl. 625), last amended on 11.10.2004 (GVBl. 745), Article 2 Section 3; Ethnicity, 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.

<sup>57</sup> See Article 31 GG: 'Federal law shall take precedence over Land law.' However, Article 142 GG 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.

The Law on the Equal Treatment of Soldiers (*Gesetz über die Gleichbehandlung der Soldatinnen und Soldaten, SoldGG*)<sup>58</sup> covers all grounds with the exception of age and disability in Article 1, taking advantage of the exception for military service in Article 3.4 Directive 2000/78. However, there are regulations on severely disabled soldiers<sup>59</sup> based on the premises of the relevant Section 1.2 and Section 18 SoldGG.

Other specialised legislation contains slightly modified lists. The main examples are as follows. Section 9 Federal Law on the Civil Service (*Bundesbeamtengesetz, BBG*)<sup>60</sup> 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, background, relationships or sexual identity.<sup>61</sup> Age (*Alter*) is not explicitly included, although it is implicitly covered by other legislation, such as Section 24 AGG.

Section 67 Federal Employee Representation Law (*Bundespersönalvertretungsgesetz, BPersVG*)<sup>62</sup> 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, sex or sexual identity.

At Land level, the legal regulations for civil servants and other public employees were amended because of a change in the legal regulation of civil servants.<sup>63</sup>

According to Section 75.1 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*),<sup>64</sup> 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. Section 27.1 Law on Representative Bodies for Executive Staff (*Sprecherausschussgesetz, SprAuG*)<sup>65</sup> 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 (*Bundespersönalvertretungsgesetz, BPersVG*) or Section 75.1 BetrVG lacks objective reason and can be regarded as unlawful arbitrary treatment. The AGG enforces this view.

Legislation regulating public and private employment includes several measures at federal and Land level prohibiting discrimination on the ground of disability.<sup>66</sup> There is some law

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<sup>58</sup> Last amended on 31.07.2008 (BGBl. I, 1629).

<sup>59</sup> See the decision by the Federal Administrative Court (*Bundesverwaltungsgericht, BVerwG*), 11.03.2008, 1 WB 8/08 which clarifies that there is no analogous application of the AGG in these cases.

<sup>60</sup> Last amended on 21.11.2016 (BGBl. I, 2570).

<sup>61</sup> Section 9 of the Federal Law on Civil Service reads as follows: '*Geschlecht, Abstammung, Rasse oder ethnische Herkunft, Behinderung, Religion oder Weltanschauung, politische Anschauungen, Herkunft, Beziehungen oder sexuelle Identität.*'

<sup>62</sup> Last amended on 19.10.2016 (BGBl. I, 2362).

<sup>63</sup> See Annex 1.

<sup>64</sup> Last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

<sup>65</sup> Last amended on 31.10.2006 (BGBl. I, 2407).

<sup>66</sup> Cf. Section 81.2 SGB 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-Württemberg: Land Law on Promoting the Equality of People with Disabilities (*Landesgesetz zur Gleichstellung von Menschen mit Behinderungen, Landes-Behindertengleichstellungsgesetz, L-BGG*), of

on the prohibition of discrimination on the grounds of sexual orientation<sup>67</sup> and other Land laws against discrimination.<sup>68</sup>

### 2.1.1 Definition of the grounds of unlawful discrimination within the directives

The AGG contains no legal definitions of the characteristics. However, the explanatory report provides some, albeit non-binding, indications, referred to in the relevant section below.<sup>69</sup>

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17.12.2014 (GBl. 2014, 819); 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, Bayerisches Behindertengleichstellungsgesetz, BayBGG*), of 09.07.2003 (GVBl. 2003, 419), last amended on 22.07.2014 (GVBl. 286); Berlin: Law on Equal Opportunities for People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung, Landesgleichberechtigungsgesetz, LGBG*), of 28.09.2006 (GVBl. 957), last amended 15.12.2010 (GVBl. 560); Brandenburg: Law on Promoting the Equality of Disabled People in the Land of Brandenburg (*Gesetz zur Gleichstellung behinderter Menschen im Lande Brandenburg, Brandenburgisches Behindertengleichstellungsgesetz, BbgBGG*), of 11.02.2013 (GVBl. Land Brandenburg I/ 13 [Nr. 05]), last amended on 11.03.2013 (GVBl. I/13 [Nr. 05]); Bremen: Bremen Law on Promoting the Equality of Disabled People (*Bremisches Gesetz zur Gleichstellung von Menschen mit Behinderung, Bremisches Behindertengleichstellungsgesetz, BremBGG*), of 18.12.2003 (Brem. GBl. 2003, 413; 2004, 18), last amended on 25.11.2014 (Brem. GBl. 555); Hamburg: Hamburg Law Promoting the Equality of Disabled People (*Hamburgisches Gesetz zur Gleichstellung behinderter Menschen, HmbGGbM*), of 21.03.2005 (HambGVBl. [Nr. 10] 2005, 75); Hessen: Hesse Law on Promoting the Equality of People with Disabilities (*Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen, Hessisches Behinderten-Gleichstellungsgesetz, HessBGG*) of 20.12.2004 (GVBl. I 2004, 482), last amended on 13.12.2012 (GVBl. I, 622); 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, Landesbehindertengleichstellungsgesetz, LVGG M-V*), of 10.07.2006 (GVBl. M-V 2006, 539), last amended on 24.10.2012 (GVBl. M-V 2009, 744); Lower Saxony: Lower Saxony Law on the Equality of People with Disabilities (*Niedersächsisches Behindertengleichstellungsgesetz, NBGG*), of 25.11.2007 (Nds. GVBl. 661), last amended on 03.04.2014 (Nds. GVBl. Nr. 7/2014 S. 90); North Rhine-Westphalia: Law of the Land of North Rhine-Westphalia on Promoting the Equality of People with Disabilities (*Gesetz des Landes Nordrhein-Westfalen zur Gleichstellung von Menschen mit Behinderung, Behindertengleichstellungsgesetz Nordrhein-Westfalen, BGG NRW*), of 16.12.2003 (GV. NRW. 766), last amended on 14.06.2016 (GV. NRW. 442); Rhineland-Palatinate: Land Law on Promoting the Equality of Disabled People (*Landesgesetz zur Gleichstellung behinderter Menschen, LGGBehM*), of 16.12.2002 (GVBl. 2002, 481); Saarland: Law Nr.1541 on Promoting the Equality of People with Disabilities in Saarland (*Gesetz Nr. 1541 zur Gleichstellung von Menschen mit Behinderungen im Saarland, Saarländisches Behindertengleichstellungsgesetz, SBGG*), Date: 26.11.2003 (Abl. 2003, 2987), last amended on 15.07.2015 (Abl. I, 632); 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, Sächsisches Integrationsgesetz, SächsIntegrG*), of 28.05.2004 (SächsGVBl. 2004/8, 196), last amended on 14.07.2005 (SächsGVBl. 2005, 167); Saxony-Anhalt: Law of Saxony-Anhalt on Promoting the Equality of People with Disabilities (*Gesetz des Landes Sachsen-Anhalt zur Gleichstellung von Menschen mit Behinderungen (Behindertengleichstellungsgesetz Sachsen-Anhalt - BGG LSA)*), of 16.12.2010 (GVBl. LSA 2001, 584), replacing the former *Behindertengleichstellungsgesetz* of 20.11.2001 (GVBl. LSAS 45) which was last amended on 22.12.2004 (GVBl. LSA 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, Landesbehindertengleichstellungsgesetz, LBGG*), of 16.12.2002 (GVBl. Schl. -H. 2002, 264), last amended on: 18.11.2008 (GVBl. 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*), of 04.05.2007 (GVBl. 2007, 69), last amended on 15.05.2012 (GVBl. 139).

<sup>67</sup> See Berlin: Law on Article 10.2 of the Constitution of Berlin (*Gesetz zu Artikel 10 Abs. 2 der Verfassung von Berlin*), 24.06.2004; Saxony-Anhalt: Law on Eliminating the Disadvantages faced by Lesbians and Homosexuals (*Gesetz zum Abbau von Benachteiligungen von Lesben und Schwulen*), 22.12.1997 (GVBl. LSA 1072), last amended on 19.03.2002 (GVBl. LSA 130).

<sup>68</sup> Section 15.2 sentence 3 of the Saarland Media Law (*Saarländisches Mediengesetz, SMG*) of 27.02.2002 (Abl. 2002, 498), last amended on 10.12.2015 (Abl. I, 913) provides for non-discriminatory radio programmes which enhance (among other things) respect for people's sexual identity; 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, SOG LSA*) of 23.09.2003 (GVBl. LSA 2003, 214), last amended on 18.12.2015 (GVBl. LSA 666, 711), provides that the discretion of the police must be non-discriminatory, listing as grounds sex, parentage, race, disability, sexual identity, language, home and origin, belief, religious or political opinions.

<sup>69</sup> Cf. *Bundestagsdrucksache 16/1780, 31*.

## - Race

The guarantee of equality in 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<sup>70</sup> which has an impact on the legal terminology used in (draft) legislation dealing with the matter.<sup>71</sup> In the explanatory report to the AGG it is explained that the term "race" does not imply the acceptance of racist theories.

Race is defined in legal doctrine as actual or alleged characteristics which are biologically inherited.<sup>72</sup> 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.<sup>73</sup> Ethnic origin is covered by the term "race".

Apart from constitutional law, there are various special laws which refer to race, for example the law on residence,<sup>74</sup> or the law on restitution for victims of persecution during the period of Nazi government.<sup>75</sup> In criminal law, there are provisions penalising incitement to racial hatred.<sup>76</sup> In these contexts race is defined along the lines of constitutional law.

## - Ethnic origin

It is stated in the explanatory report that "ethnic origin" is to be understood according to the definitions of the Committee on the Elimination of Racial Discrimination (CERD), including race, colour, parentage, national origin or ethnicity, without clarifying the exact delineation of these terms. The scope of ethnic origin is thus wider than race but overlaps in part.

Membership of indigenous minorities (i.e. the Danish minority, the Sorbian people, the Frisians in Germany and the German Sinti and Roma)<sup>77</sup> is determined in Land law with reference to subjective standards such as self-definition and other indicators like language.<sup>78</sup>

## - Religion and belief

The most important assistance for the understanding of the meaning of religion and belief

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<sup>70</sup> The German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) has taken a stand against the use of the term "race" in legal texts. S. H. Cremer (2009) "...und welcher Rasse gehören Sie an?" *Zur Problematik des Begriffs "Rasse" in der Gesetzgebung*, Policy Paper, Deutsches Institut für Menschenrechte; H. Cremer (2010) *Ein Grundgesetz ohne "Rasse" - Vorschlag für eine Änderung von Artikel 3 Grundgesetz*, Policy Paper Nr. 16, Deutsches Institut für Menschenrechte.

<sup>71</sup> The Federal German Constitutional Court uses the term "racial" (*rassisch*) only in quotation marks, cf. BVerfGE 23, 98, 105 et seq.

<sup>72</sup> Osterloh in M. Sachs, 7<sup>th</sup> ed. 2014, GG, Art.3, para. 293.

<sup>73</sup> See BVerfGE 23, 98; Federal Constitutional Court, 1 BvR 1056/95, 06.09.2000.

<sup>74</sup> E.g. Section 60.1 Residence Law (*Aufenthaltsgesetz, AufenthG*), of 25.02.2008 (BGBl. I, 162), last amended on 22.12.2016 (BGBl. I, 3155 (Nr. 65)): residence rights in the case of persecution on the grounds of race in a person's country of origin.

<sup>75</sup> E.g. Section 1.6 Property Law (*Vermögensgesetz, VermG*), of 09.02.2005 (BGBl. I, 205), last amended on 21.11.2016 (BGBl. I, 2591).

<sup>76</sup> Section 130 Penal Code (*Strafgesetzbuch, StGB*), of 13.11.1998 (BGBl. I, 3322), last amended on 04.11.2016 (BGBl. I, 2460).

<sup>77</sup> These groups come under the Council of Europe Framework Convention for the Protection of Minorities, see the German Declaration which states: "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".

<sup>78</sup> See below 3.2.8 and references.



provides the interpretation of the guarantee of freedom of religion<sup>79</sup> by the Federal 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 (*Rechtswissenschaft*, encompassing any scholarly study of the law) 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.<sup>80</sup> Often, religion and belief are taken to be any specific views in relation to the world as a whole and the origin and purpose of humankind which give sense to human life and the world.<sup>81</sup> 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 an immanent system of convictions.<sup>82</sup> 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.<sup>83</sup> It relied in this context on current trends in society, cultural tradition and the understanding of religion in general and in religious studies.<sup>84</sup> Beyond that, a teleological interpretation of the fundamental freedom of religion is regarded as being decisive.<sup>85</sup>

#### - Disability

Section 2 Social Code IX (*Sozialgesetzbuch IX, SGB IX*) and Section 3 of the Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*)<sup>86</sup> provide the most important legal definition of disability. According to these provisions, people are disabled if their physical functions, intellectual abilities or mental health have a high probability of differing from the state typical for their age for longer than six 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) and the jurisprudence further developed in C-335/11 (Ring and Skouboe Werge). According to the explanatory report to the AGG, disability is to be understood as in Section 2 SGB IX<sup>87</sup> and Section 3 BGG.<sup>88</sup> This reference was upheld by the BAG.<sup>89</sup>

The definition differs in its wording from the (non-exhaustive, guidance providing) definition of persons with disability in Art. 1 of UN Convention on the Rights of Persons with Disabilities, incorporated into EU law by the CJEU in the latter decision. It is wider, as it refers to participation in society. The reference to six months may be less strict than the word "long-term" used by the CJEU in that decision.<sup>90</sup> The reference to a state typical for a person's age excludes age-related impairments from the concept of disability.

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<sup>79</sup> Article 4.1 GG.

<sup>80</sup> The Federal German Constitutional Court held in an early decision (BVerfGE 12, 1 (4)) that religion refers only to the traditional religions established among civilised people. This jurisprudence has since been superseded.

<sup>81</sup> BVerfGE 90, 112 (115).

<sup>82</sup> BVerfGE 90, 112 (115).

<sup>83</sup> BVerfGE 83, 341 (353).

<sup>84</sup> BVerfGE 83, 341 (353).

<sup>85</sup> BVerfGE 83, 341 (353).

<sup>86</sup> Last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

<sup>87</sup> Social Code IX (*Sozialgesetzbuch IX, SGB IX*) of 19.06.2001 (BGBl. I, 1046), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)). Cf. Fn 49 above.

<sup>88</sup> Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*) of 27.04.2002 (BGBl. I, 1467, 1468), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

<sup>89</sup> Federal Labour Court (*Bundesarbeitsgericht, BAG*), 22.10.2009, 8 AZR 642/08.

<sup>90</sup> CJEU, C-335/11 (Ring and Skouboe Werge), para. 41. In ECJ C-1/05 (Chacón Navas) an illness lasting eight months was not regarded as sufficient.

Importantly, the definition adopted by the CJEU refers to potential exclusions (“may hinder the full and effective participation”) whereas the definition in Section 2 Social Code IX (*SGB IX*) refers to an actual impairment (rather than a potential one).

In a decision, the Federal Labour Court (*Bundesarbeitsgericht, BAG*) considered these issues and decided that, for the interpretation of disability in the light of EU anti-discrimination Law, a wide concept of disability must be adopted which combines the elements advantageous for a disabled person in EU anti-discrimination law and national law. Disability in the sense of anti-discrimination law exists thus not only in cases that fall under the definition of Section 2 Social Code IX (*SGB IX*). In addition, states typical at a particular age are not excluded from the outset as a possible disability factor. The Court explicitly states – in the context of HIV infection without symptoms – that a disability can be created by social reactions to a long-term illness, thereby impairing a person’s participation in society.<sup>91</sup> This interpretation of the concept of disability fully incorporated the jurisprudence of the CJEU. It goes beyond this jurisprudence, at least through the reference to inclusion in society (not only working life) and the (arguably) more lenient criteria of a six-month period of differing physical functions in comparison to the (as yet unspecified) “long-term” criterion of the CJEU.<sup>92</sup>

People are “severely disabled” (*schwerbehindert*) if their disability reduces their ability to participate in working life by at least 50%, Section 2.2 *SGB IX*. Severe disability is the precondition of the application of special disability legislation.

People with a degree of disability of less than 50% but more than 30% are treated as severely disabled if they cannot find or maintain employment due to their disability.<sup>93</sup> The degree of disability is established by the relevant administrative authorities,<sup>94</sup> applying standards defined by experts and the authorities, the details of which are contentious. A minimum impairment of 20% is necessary for a formal declaration of the degree of disability in this procedure by the authorities.<sup>95</sup> If the above-mentioned threshold of a 30% reduction in the ability to participate in working life is not reached, the individual cannot under any circumstances be classed as severely disabled.

The Land disability laws mostly follow the definition of disability contained in Section 2 *SGB IX*.<sup>96</sup>

- Age

Age is generally understood as biological age.<sup>97</sup>

- Sexual orientation

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<sup>91</sup> BAG, 19.12.2013, 6 AZR 190/12, para. 43ff.

<sup>92</sup> CJEU, C-395/15 (Daouidi) dealt with the meaning of “long-term” but did not specify any absolute time period that may be regarded as “long-term”. It rather took a circumstantial approach.

<sup>93</sup> Section 2.3 *SGB IX*.

<sup>94</sup> Section 69.1 *SGB IX*.

<sup>95</sup> Section 69. 1 Sentence 6 *SGB IX*. This has consequences for some benefits related to disability, e.g. in tax law: Section 33b Income Tax Law (*Einkommenssteuergesetz, EStG*), of 08.10.2009 (BGBl. I, 3366, 3862), last amended on 23.12.2016 (BGBl. I, 3191).

<sup>96</sup> See for the standard formulation Section 3.1 North Rhine-Westphalia Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz Nordrhein Westfalen, BGG NRW*), of 16.12.2003 (GV.NRW 766), last amended on 14.07.2016 (GV.NRW. 442); Section 4 Berlin Land Equal Opportunities Act (*Landesgleichberechtigungsgesetz Berlin, LGBG Berlin*), of 17.05.1999 (GVBl. für Berlin Nr. 42, 433), last amended on 15.12.2010 (GVBl. 560); for a slightly different definition cf. Section 2 sentence 1 Law of Saxony-Anhalt on Promoting the Equality of People with Disabilities (*Behindertengleichstellungsgesetz Sachsen-Anhalt, BGG LSA*), of 16.12.2010 (GVBl. LSA 2010, 584): A person is considered disabled if they have physical, psychological, mental or sensory impairments which are not temporary (i.e. which last longer than six months) and may prevent them in interaction with various barriers from full, effective and equal participation in the life of society.

<sup>97</sup> E.g. Hamm Higher Regional Court (*Oberlandesgericht Hamm, OLG Hamm*), 12.01.2011, 20 U 102/10, I-20.

Like the AGG, other laws refer to sexual identity (*sexuelle Identität*) rather than sexual orientation.<sup>98</sup> According to the explanatory report, sexual identity includes homosexual, bisexual, transsexual and intersexual people. In legal commentary, transsexuality is regarded as a matter of gender, not sexual identity.<sup>99</sup> The Federal Constitutional Court refers to both as aspects of the individual's autonomous personality.<sup>100</sup> This encompasses homosexuality and transsexuality, without excluding any other imaginable orientation.<sup>101</sup>

### 2.1.2 Multiple discrimination

In Germany, prohibition of multiple discrimination is included in the law.

Section 4 AGG provides that any unequal treatment on the basis of multiple prohibited grounds must be justified for each of these grounds. It has not been clarified how the norm applies to cases of intersectionality. Section 27.5 AGG states that, in cases of multiple discrimination, the Federal Anti-Discrimination Agency (*Antidiskriminierungs-stelle des Bundes, ADS*) and the competent agents of the Federal government and the German Bundestag are obliged to cooperate. The rules in place (within their general limits) would allow such cases to be dealt with.

So far, case law on multiple discrimination is very limited.<sup>102</sup> Although a number of cases have concerned several grounds,<sup>103</sup> the courts regularly do not categorise (in legal terms) these as cases of "multiple discrimination" but instead focus on one ground. Thus, there is no recent case law clarifying the legal concept. In addition, there is as yet no case law on amounts of damages in cases of multiple discrimination.

### 2.1.3 Assumed and associated discrimination

#### a) Discrimination by assumption

In Germany, the national law does not explicitly prohibit discrimination based on perception or assumption of what a person is, with the exception of the field of employment.

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<sup>98</sup> See Article 10.2 Constitution of Berlin (Verfassung von Berlin, VvB).

<sup>99</sup> Cf. Mahlmann, in: B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, Baden-Baden, Nomos, § 3 para. 63 with further references to corresponding jurisprudence from the European Court of Justice (ECJ).

<sup>100</sup> See Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), 06.12.2005, 1 BvL 3/03, para. 48.

<sup>101</sup> Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), 06.12.2005, 1 BvL 3/03, para. 48 ff. On transsexuals, see Footnote 55.

<sup>102</sup> Two expert reports, commissioned by the Federal Anti-Discrimination Agency, were published in early 2011. They concern the conceptual framing and legal handling of "multidimensional discrimination", as well as an empirical study on this phenomenon. Due to the method applied by the latter (a focus on qualitative analysis), a generalisation of the results would appear to be difficult. However, it was found that a very high percentage of the individuals selected by the researchers due to their experience of social injustice based on one ground also suffered from a similar experience on another ground (181 out of 290). This was particularly true of the ground of sex (as the second ground), cf.: S. Baer, *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse*: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Mehrdimensionale\\_Diskriminierung\\_jur\\_Analyse.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Mehrdimensionale_Diskriminierung_jur_Analyse.html) as well as S. Dern, L. Inowlocki and D. Oberlies, *Mehrdimensionale Diskriminierung – Eine empirische Untersuchung anhand von autobiographisch-narrativen Interviews*, (both published on 11.01.2011) cf.: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Mehrdimensionale\\_Diskriminierung\\_empirische\\_untersuchung.html?nn=4192910](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Mehrdimensionale_Diskriminierung_empirische_untersuchung.html?nn=4192910). An online survey also produced the result that in most cases reported by victims, discrimination was experienced as "multidimensional" rather than "one-dimensional", cf. above, H. Rottleuthner and M. Mahlmann (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Nomos Verlag.

<sup>103</sup> For example, Cologne Labour Court (*Arbeitsgericht Köln, AG Köln*), 06.03.2008 19 Ca 7222/07; Düsseldorf Administrative Court (*Verwaltungsgericht Düsseldorf, VG Düsseldorf*), 05.06.2007, 2 K 26225/06; Frankfurt Administrative Court (*Verwaltungsgericht Frankfurt, VG Frankfurt*), 09.12.2009, 9 L 3454/09; Hamm Land Labour Court (*Landesarbeitsgericht Hamm, LAG Hamm*), 04.02.2014, 7 Sa 1026/13. For an overview cf. Baer (Fn. 81), p. 53 ff.

There is no explicit general regulation of this matter in the AGG. The definition of discrimination, Section 3 AGG (see below 2.2) is, however, generally understood in legal doctrine to cover assumed characteristics. This is necessarily the case for race, as different human races in the scientific sense do not exist. As for discrimination in employment, Section 7.1 AGG contains an explicit regulation that the prohibition of discrimination extends to assumed characteristics.

b) Discrimination by association

In Germany, national law does not explicitly prohibit discrimination based on association with persons with particular characteristics.

The regulations of the AGG are interpreted in legal doctrine as potentially covering such cases, although there is no reported case law in this respect.<sup>104</sup>

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

a) Prohibition and definition of direct discrimination

In Germany, direct discrimination is prohibited in national law. It is defined.

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

Direct discrimination shall be taken to occur where a person is treated less favourably than another is, has been or would be treated in a comparable situation on the basis of any of the prohibited grounds.<sup>105</sup>

The guarantee of equality establishes the principle of equal treatment as a fundamental right at the constitutional level.<sup>106</sup> However, this provision contains no explicit legal definition of direct discrimination. The definitions in use have been developed by the Federal Constitutional Court.

At the constitutional level, most doctrinal developments have been initiated by cases involving discrimination on the ground of sex.<sup>107</sup> 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 direct discrimination (although this term is not necessarily used), the unequal treatment must be based on a particular characteristic.

The German Federal Constitutional Court has emphasised in some early decisions the need for intent on the part of the discriminator.<sup>108</sup> This precondition has been weakened in a more recent decision. Discrimination is held to have taken place 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*).<sup>109</sup> Consequently, no decisive causal link between

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<sup>104</sup> W. Däubler, in: W. Däubler/M. Bertzbach (eds.), *Allgemeines Gleichbehandlungsgesetz, Handkommentar* (3rd ed., 2013), § 1 para. 97; on the background in European law, M. Mahlmann, in: M. Mahlmann and B. Rudolf (eds.) (2007), *Gleichbehandlungsrecht*, Baden-Baden, Nomos § 3 para. 83, 104.

<sup>105</sup> Section 3.1 sentence 1 AGG: "Eine unmittelbare Benachteiligung liegt vor, wenn eine Person wegen eines in § 1 genannten Grundes eine weniger günstige Behandlung erfährt, als eine andere Person in einer vergleichbaren Situation erfährt, erfahren hat oder erfahren würde." A "person" is a natural person.

<sup>106</sup> Article 3 GG.

<sup>107</sup> Article 3.2 and 3.3 GG.

<sup>108</sup> BVerfGE 75, 40 (70).

<sup>109</sup> BVerfGE 89, 276 (289).

the characteristic and the discrimination is needed. It suffices that the characteristic is part of the (negative) criteria that lead to the discriminatory behaviour.<sup>110</sup>

The Federal Labour Court regarded the objective qualification of a job candidate as a condition for possible discrimination,<sup>111</sup> but has abandoned this jurisprudence: Any applicant, irrespective of objective suitability can be the victim of discrimination, according to this interpretation of the prohibition of discrimination.<sup>112</sup> The Federal Labour court underlined that filing suit for discrimination may form abuse of rights, ruling out a violation of the prohibition of discrimination.<sup>113</sup>

Section 81.2 SGB IX prohibits discrimination on the ground of disability in work relations for severely disabled people and people of equivalent status,<sup>114</sup> referring to the AGG, including its regime of justifications.<sup>115</sup>

Section 7.2 sentence 2 BGG 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 people in society is in consequence directly or indirectly impaired.<sup>116</sup>

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

Section 11 AGG states that discriminatory job vacancy announcements are prohibited. Such an advertisement, e.g. expressing a preference for applicants of a certain age,<sup>117</sup> may constitute direct discrimination.<sup>118</sup> With regard 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 interpretation in relation to such cases.

#### b) Justification of direct discrimination

Section 8.1 AGG provides that 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. (see below, 4.1)

Section 9 AGG contains a regulation of the justification on the ground of religion and belief. A difference in 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 practise a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a

<sup>110</sup> Cf. Federal Labour Court, 19.05.2016, 8 AZR 470/14, para 53.

<sup>111</sup> BAG, 19.08.2010, 8 AZR 370/09.

<sup>112</sup> Cf. BAG, 19.05.2016, 8 AZR 470/14, para 24ff.

<sup>113</sup> Cf. BAG, 19.05.2016, 8 AZR 470/14. This is in line with CJEU, C-423/15, (*Kratzer*), 28. July 2016.

<sup>114</sup> The Federal Labour Court ruled that prior to the AGG and the amendment of Section 81.2 Social Code IX coming into force, the personal scope of the non-discrimination rule in the old version of Section 81.2 Social Code IX was already to be interpreted as covering all types of disability as understood in EU Law (direct/indirect discrimination), cf. Federal Labour Court (*Bundesarbeitsgericht, BAG*), 04.04.2007, 9 AZR 823/06.

<sup>115</sup> The Federal Labour Court interpreted this provision before the enactment of the AGG with explicit reference to the definitions of Directive 2000/78/EC. According to the Court, direct discrimination shall be deemed to occur where a 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, pp. 870, 872.

<sup>116</sup> This definition therefore only covers discrimination against disabled people. There is no definition of what constitutes compulsory reasons in the law.

<sup>117</sup> Cf. for example: Schleswig-Holstein Land Labour Court (*Landesarbeitsgericht Schleswig-Holstein, LAG Schleswig-Holstein*), 09.12.2008, 5 Sa 286/08.

<sup>118</sup> See W. Däubler, in: Däubler/Bertzsch (eds.), AGG, § 3 para. 16a.

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 (Section 9.1). Section 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 practise a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation. (see below, 4.2)

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

The means of achieving that aim must be appropriate and necessary. Such differences in 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 people with caring responsibilities, in order to promote their vocational integration or ensure their protection (Section 10 No. 1);
- the setting of minimum conditions of age, professional experience or seniority of service for access to employment or to certain advantages linked to employment (Section 10 No. 2);
- the setting 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 (Section 10. No. 3);
- the setting for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the setting under such 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 (Section 10 No. 4);
- an agreement which provides for the termination of an employment relationship without dismissal at the time when the employee is entitled to apply for a pension on the ground of age, notwithstanding the regulations in Section 41 Social Code VI (*Sozialgesetzbuch VI, SGB VI*)<sup>119</sup> (Section 10 No 5);
- differentiations of benefits in compensation plans in the sense of the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*),<sup>120</sup> if the parties have created a settlement graduated according to age and staff membership in a firm, in which labour market opportunities, which are essentially dependent on age, are openly considered, or which exclude from the benefits of the compensation plan employees who are economically secure, as they are entitled to pensions, possibly following receipt of unemployment benefit (Section 10 No 6.).

There are further justifications for general civil law. According to Section 20.1 AGG, differences in treatment on the grounds of religion, disability, age, sexual identity or sex (the latter is not covered in this report) are not prohibited if there is an objective reason for the treatment. The following are listed as examples.

- the avoidance of dangers, the prevention of damage or other comparable aims (Section 20.1 No. 1);
- the protection of privacy or personal security (Section 20.1 No. 2);

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<sup>119</sup> Social Code VI (*Sozialgesetzbuch VI, SGB VI*) of 19.02.2002 (BGBl. I, 754, 1404, 1384), last amended on 23.12.2016 (BGBl. I, 3234 (Nr. 66)).

<sup>120</sup> Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), of 25.09.2001 (BGBl. I, 258), last amended on 23.12.2016 (BGBl. I, 3234 (Nr. 66)).

- the granting of special advantages when there is no specific interest in enforcing equal treatment (Section 20.1 No. 3);<sup>121</sup>
- in case of differences in treatment on the ground of religion, if the treatment is justified in the light of freedom of religion or the right to self-determination of religious communities or their institutions, irrespective of their legal form, or of organisations, the aim of which is to practise a religion together, in accordance with their respective ethos (Section 20.1 No 4).

Section 20.2 sentence 2 AGG provides that a difference in treatment on the ground of religion, disability, age or sexual identity is only admissible for private insurance, if it is based on acknowledged principles of calculations adequate to the risks, especially on actuarial evaluations based on statistical data.

Section 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 residents, balanced settlement structures and balanced economic, social and cultural relations. Given that there is no explicit exception or possibility of justification of such unequal treatment under the Racial Equality Directive (2000/43/EC), the reconcilability of the clause with the European law depends on the question whether the interpretation of the clause is limited to very specific cases, e.g. of preventing ghettoization.<sup>122</sup>

Section 24 AGG provides for the extension of the regulations of the AGG to civil servants, including justifications.

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

With regard to the constitutional guarantee and the justification of unequal treatment, the Federal 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 Article 3 GG) is unconstitutional unless it is a necessary consequence of attempts to resolve problems which by their very nature affect men or women only.<sup>123</sup> Whether any direct discrimination on the grounds listed in Article 3.3 GG can be justified or not is the subject of debate. Some argue for this interpretation, others regard Article 3.3 GG as a strict prohibition of any discrimination.<sup>124</sup>

The general doctrine of justification of unequal treatment is of relevance in this context as well, given the open-textured nature of Article 3 GG, which extends its scope of application to such characteristics as age or sexual identity. Article 3.1 GG has been interpreted in the older case law of the Court as the prohibition of arbitrary treatment within the limits of material justice.<sup>125</sup> More recent decisions have increased the demands for unequal treatment to be justified beyond this position. The Federal Constitutional Court has ruled that, as the principle of equality before the law intends to prevent unjustified unequal treatment, 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 GG and there is therefore a greater likelihood that

<sup>121</sup> This case is intended to cover cases of special advantages to one group, e.g. bonuses for students which would not be extended to everybody.

<sup>122</sup> Arguing for permissibility on the ground of a teleological reduction of the regulation of the Racial Equality Directive (2000/43/EC) as the prevention of ghettoization is not against the telos of the directive, Armbrüster in B. Rudolph, M. Mahlmann (2007), *Gleichbehandlungsrecht*, § 7 para. 109 et seq.; for the impermissibility of exclusive quotas but the permissibility of supporting quotas implying maximum representation of certain minorities, B. Ambrosius, AGG § 19 para. 40 et seq., in: W. Däubler/M. Bertzbach (3rd ed., 2013), *Allgemeines Gleichbehandlungsrecht, Handkommentar*.

<sup>123</sup> BVerfGE 57, 335 (342); 85, 191 (207).

<sup>124</sup> Cf. Osterloh, in Sachs 7<sup>th</sup> ed. 2014, GG, Article 3 para. 239ff, 254 (justification possible).

<sup>125</sup> BVerfGE 1, 14 (52); 25, 101 (105).

unequal treatment based on them will lead to discrimination against a minority. The strict constraint is, however, not limited to discrimination against individuals. It also exists where unequal treatment of subject matters of the law leads to the unequal treatment of groups of people.

The strictness of the constraint depends on the degree to which the people affected are able to change the characteristics which 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 people or subject matters can disadvantageously affect the enjoyment of basic liberties.<sup>126</sup> 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.

### 2.2.1 Situation testing

#### a) Legal framework

In Germany, the law is silent on situation testing.

There is no explicit regulation of situation testing in German law. Its use depends therefore on the law of evidence in the respective field.<sup>127</sup>

As far as the shift of the burden of proof is regulated, Section 22 AGG, situational testing could be used as evidence which makes the assumption of discrimination plausible.<sup>128</sup>

#### b) Practice

In Germany, situation testing is not used much in practice.<sup>129</sup>

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

#### a) Prohibition and definition of indirect discrimination

In Germany, indirect discrimination is prohibited in national law. It is defined.

Section 3.2 AGG provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put people with one of the characteristics within the scope of the AGG at a particular disadvantage compared with other people unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>130</sup>

<sup>126</sup> BVerfGE 88, 87 (96).

<sup>127</sup> E.g. in civil proceedings an expert opinion (Section 404 Code of Civil Procedure (*Zivilprozessordnung*, ZPO), of 05.12.2005 (BGBl. I., 3202; 2006 I, 431; 2007 I, 1781), last amended on 21.11.2016 (BGBl. I, 2591), could refer to the results of situation testing. There is, however no reported case law on the matter. According to Section 284, sentence 2 ZPO, evidence beyond the legally prescribed type and form can be used if the parties agree. For a rare case on the matter cf. Oldenburg Local Court (*Amtsgericht Oldenburg*), 23.07.2008, E2 C 2126/07.

<sup>128</sup> Cf. the explanatory report, Bundestagsdrucksache 16/1780 p. 47.

<sup>129</sup> This is true both for NGOs and individuals. Cf. for a rare example Kiel Land Labour Court (Landesarbeitsgericht Kiel, LAG Kiel), 09 April 2014, 3 Sa 401/13. For an expert study involving situation testing in the housing sector cf.: A. Müller "Expertise 'Diskriminierung auf dem Wohnungsmarkt'. Strategien zum Nachweis rassistischer Benachteiligungen" (2015): [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Wohnungsmarkt\\_20150615.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Wohnungsmarkt_20150615.html).

<sup>130</sup> Section 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.'



The criterion must affect a group of people protected by the AGG significantly more than others.<sup>131</sup> This can be determined by statistical comparison,<sup>132</sup> although recourse to statistics is not mandatory.<sup>133</sup> Instead it is sufficient if the criterion is typically likely to have these consequences.<sup>134</sup>

The case law on predecessors of this norm gives some further indications of its possible interpretation.<sup>135</sup> Courts have ruled that discrimination on the ground of sex is not only assumed to have taken place if one sex is always disadvantaged with respect to working conditions but also if there are significant differences (*wesentliche Unterschiede*) between the number of men and women among privileged and disadvantaged employees.<sup>136</sup> According to this ruling, discrimination may 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 Section 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 subject of debate. A ratio of one woman to 10 men enjoying better working conditions has been regarded as a significant difference.<sup>137</sup> In another decision, a ratio of about 80% women to 20% men was deemed sufficient to establish a significant difference.<sup>138</sup>

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.<sup>139</sup> This case law is based on ECJ case law.<sup>140</sup>

The former prohibition of discrimination based on disability, Section 81.2 Social Code IX (*SGB IX*), which now refers to the AGG, has previously been interpreted by the Federal Labour Court in this manner, explicitly referring to Article 2.2 b) of Directive 2000/78/EC.<sup>141</sup>

Other federal courts also apply this interpretation of indirect discrimination along the lines of CJEU case law and the Directives, although important details, such as references to hypothetical comparators, are not explicitly mentioned.<sup>142</sup>

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<sup>131</sup> Federal Labour Court (*Bundesarbeitsgericht, BAG*), 18.08.2009, 1 ABR 47/08; Saarland Land Labour Court (*Landesarbeitsgericht Saarland, LAG*), 11.02.2009, 1 TaBV 73/08.

<sup>132</sup> BAG, 24.09.2008, 10 AZR 639/07.

<sup>133</sup> BAG, 18.08.2009, 1 ABR 47/08.

<sup>134</sup> BAG, 18.08. 2009, 1 ABR 47/08; thus, a job announcement limiting the list of applicants to those 'in their first year in post' constitutes an indirect discrimination on the ground of age.

<sup>135</sup> 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 legislation, cf. former Sections 611a and 612.3 BGB, 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. Although indirect discrimination was not defined in Section 611a BGB 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 was explicitly stated in Article 2.1. As is shown in other examples from the case law, referred to in the text, indirect discrimination is not a new concept in German law.

<sup>136</sup> See BAG, *Neue Juristische Wochenschrift* 1992, 1125; BAG, *Neue Juristische Wochenschrift* 1993, 3091, 3093.

<sup>137</sup> BAG, *Neue Juristische Wochenschrift* 1993, 3091, 3094.

<sup>138</sup> BAG, *Neue Juristische Wochenschrift* 1992, 1125, 1126f.

<sup>139</sup> BAG, *Neue Juristische Wochenschrift* 1993, 3091, 3094.

<sup>140</sup> ECJ, ECR Cs. 170/84, 1986 I-1607 (Bilka).

<sup>141</sup> BAG, *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 BAG, *Der Betrieb* 2004, 1106, thus extending the standard conception to discrimination on the ground of disability.

<sup>142</sup> See Federal Administrative Court (*Bundesverwaltungsgericht, BVerwG*), 23.06.2005, 2 C 21/04.

Section 7.2 sentence 2 Equal Opportunities for Disabled People Act (*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 people 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.<sup>143</sup>

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

In the same decision, the Court explicitly recognised neutral provisions with discriminatory effects as being 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.<sup>144</sup> The Court referred in this context to the respective case law of the ECJ. Again, although this ruling directly referred to discrimination based on sex, it applies equally to other grounds. This case law has been upheld in more recent decisions.<sup>145</sup>

#### b) Justification test for indirect discrimination

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<sup>143</sup> See Section 3.3 of the Baden-Württemberg Law on the Equality of the Disabled (*Landes-Behindertengleichstellungsgesetz Baden-Württemberg, BGG Baden-Württemberg*) of 17.12.2014 (GBl. 2014, 819), last amended on 17.12.2014 (GBl. 2014, 819); Article 5 of the Bavarian Law on the Equal Opportunities for Disabled People (*Bayerisches Behindertengleichstellungsgesetz, BayBGG*) of 09.07.2003 (GVBl. 2003, 419), last amended on 22.07.2014 (GVBl. 286); Section 3.2 of the Brandenburg Law on the Equal Opportunities for Disabled People (*Brandenburgisches Behindertengleichstellungsgesetz, Bbg BGG*) of 11.02.2013 (GVBl. Bbg. I/13 [Nr. 05]); Section 3 of the Bremen Law on the Equal Opportunities for Disabled People (*Bremisches Behindertengleichstellungsgesetz, BremBGG*) of 18.12.2013 (BREM.GBl. 413), last amended on 25.11.2014 (Brem.GBl. 555); Section 6.2 Hamburg Law on the Equal Opportunities for Disabled People (*Hamburgisches Gesetz zur Gleichstellung behinderter Menschen, HmbGGbM*) of 21.03.2005 (HmGVBl. 2005, 75); Section 4 of the Hesse Law on the Equal Opportunities for Disabled People (*Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen, HessBGG*) of 20.12.2004 (GVBl. I 2004, 482); Section 5 of the Law on the Equal Opportunities for Disabled People Mecklenburg-West Pomerania (*Landesbehindertengleichstellungsgesetz Mecklenburg Vorpommern, LBGG M-V*) of 10.07.2006 (GVOBl. M-V 2006, 539), last amended on 24.10.2012 (GVOBl. M-V 474); Section 4.2 of the Lower Saxony Law on the Equal Opportunities for Disabled People (*Niedersächsisches Behindertengleichstellungsgesetz, NBGG*) of 25.11.2007 (Nds. GVBl. 2007, 661); Section 3.2. North Rhine-Westphalia Law on the Equal Opportunities for the Disabled People (*Behindertengleichstellungsgesetz Nordrhein-Westfalen, BGG NRW*) of 16.12.2003 (GV. NRW 766), last amended on 14.07.2016 (GV. NRW. 442); Section 2.2 of the Rheinland-Palatinate Law on the Equal Opportunities for Disabled People (*Landesgesetz zur Gleichstellung behinderter Menschen Rheinland-Pfalz, BehGleichG RP*) of 16.12.2002 (GVBl. 2002, 481); Section 3.2 of the Saarland Law on the Equal Opportunities for Disabled People (*Saarländisches Behindertengleichstellungsgesetz, SBGG*) of 26.11.2003 (Amtsbl. 2003, 2987), last amended on 15.07.2015 (Amtsbl. I, 632); Section 4.3 of the Saxony Integration Law (*Sächsisches Integrationsgesetz, SächsIntegrG*) of 28.05.2004 (SächsGVBl. 2004 [Nr. 8], 196); Section 2.2 of the Schleswig-Holstein Law on the Equal Opportunities for Disabled People (*Landesbehindertengleichstellungsgesetz Schleswig-Holstein, LBGG S-H*) of 16.12.2002 (GVOBl. 2002, 264), last amended on 18.11.2008 (GVOBl. 582); 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, ThürGiG*) of 16.12.2005 (GVBl. 2005, 383). Section 3 of the Berlin Law on the Equal Opportunities for Disabled People (*Berliner Behindertengleichstellungsgesetz, LBG Berlin*) of 17.05.1999 (GVBl. für Berlin [Nr. 42], 433), last amended on 15.12.2010 (GVBl. 560) 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 4 of the Saxony-Anhalt Law on Promoting the Equality of Disabled People (*Behindertengleichstellungsgesetz Sachsen-Anhalt, BGG LSA*) of 16.12.2010 (GVBl. LSA 2010, 584) includes cases where the development of people with disabilities is limited due to a lack of positive accommodation of their needs.

<sup>144</sup> BVerfGE 97, 35 (43).

<sup>145</sup> Cf. BVerfGE 121, 241 (254ff).

In legal science it is widely held that CJEU case law forms a suitable model to answer the question of justification for indirect discrimination in constitutional law.<sup>146</sup>

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.<sup>147</sup>

In a more recent decision, the Court stated that the strict test of proportionality developed for cases of direct discrimination also applies to cases where the unequal treatment of facts indirectly leads to disadvantage for certain people. The Federal Constitutional Court determines in each case whether there are reasons of sufficient weight to justify the unequal treatment.<sup>148</sup>

In its case law, the Federal Labour Court (Bundesarbeitsgericht, BAG), affirmed that indirect discrimination by a "neutral criterion" may be justified by any legitimate aim as long as the principle of proportionality is not violated.<sup>149</sup>

The objective reason for the discrimination must 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 must be suitable for its purpose and necessary to achieve it. The reason must not be disproportionate as to the principle of equal treatment, for example non-discriminatory requirements set out in employment policies.<sup>150</sup>

Beyond these clarifications, there are no clear contours of the reasons accepted to justify indirect discrimination.

The AGG definition is compatible with the Directives. In addition, the concept of indirect discrimination has in most cases been defined in line with the definition and interpretations of the respective European law and especially the case law of the CJEU on this matter. The definition in Section 3.2 AGG continues to inform the understanding of indirect discrimination for all courts.

As far as objective reasons and justifications excluding indirect and direct discrimination are concerned, there is a great deal of variety in the case law (cf. 12.2. and previous Country reports for the European network of legal experts in the non-discrimination field by this author). Detailed argument would be needed for the various spheres concerned that are regulated by the law, in order to assess convincingly whether or not they are in conformity with European standards.<sup>151</sup>

### c) Comparison in relation to age discrimination

In relation to age discrimination, national law does not specify how a comparison is to be made.

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<sup>146</sup> Cf. Osterloh, in: Sachs (ed.), GG (2014), Article 3 para. 255f.

<sup>147</sup> BVerfG 2 BvR 1476/01, 19.11.2003, [www.bverfg.de](http://www.bverfg.de).

<sup>148</sup> BVerfG 1 BvR 1748/99 20.04.2004, [www.bverfg.de](http://www.bverfg.de).

<sup>149</sup> BAG, 18.08.2009, 1 ABR 47/08 referring to ECJ, 05.03.2009, C-388/07 (Age Concern England).

<sup>150</sup> Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 16<sup>th</sup> ed. 2016, § 3 AGG, para. 9ff for an overview, the balance of interests reasoning: para. 13.

<sup>151</sup> To take one example, where case law from the ECJ exists: one Chamber of the Federal German Constitutional Court held that the unequal treatment of same-sex couples in relation to certain (social) benefits is justified despite ECJ, 01.04.2008, C-267/06 (Tadao Maruko), because in heterosexual couples one partner is assumed to be in a greater need of financial support due to the requirements of child rearing than the partner in a same-sex partnership, where these requirements typically do not exist and the assumed positive effects of such unequal treatment on the rate of procreation of a society. For critical comments, see M. Mahlmann, *EuZW* 2008, 218f. A (senate) decision by the Federal Constitutional Court did not follow this line of argument but affirmed the right of same-sex couples living in registered partnerships to the same benefits as married spouses, BVerfG, 07.07.2009, 1 BvR 1164/07. For the practically important matter of the justification of unequal treatment on the ground of religion or belief, see below 4.2.

### 2.3.1 Statistical evidence

#### a) Legal framework

In Germany, there are national rules permitting data collection. Germany has 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 GG. The Federal Constitutional Court ruled<sup>152</sup> that everybody enjoys the right to informational self-determination (*informationelle Selbstbestimmung*). 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 according to this jurisprudence, 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 areas 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 (*Bundesdatenschutzgesetz, BDSG*)<sup>153</sup> stipulates as a general principle that a public authority is allowed to collect data, if this is necessary for carrying out its tasks.<sup>154</sup> 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 which 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: firstly, if these actions serve the aim of contractual relations; secondly, 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 thirdly, if the data are publicly accessible, if the other party does not have a legitimate interest in these actions not being taken.<sup>155</sup>

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.<sup>156</sup>

The collection of data for purposes relating to non-discrimination policies must 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.

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

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<sup>152</sup> See BVerfGE 65, 1 (154ff).

<sup>153</sup> Federal Law on the Protection of Data (*Bundesdatenschutzgesetz, BDSG*) of 14.01.2003 (BGBl. I, 66), last amended on 25.02.2015 (BGBl. I, 162).

<sup>154</sup> Section 13.1 BDSG.

<sup>155</sup> Section 28.1 BDSG.

<sup>156</sup> Section 4d.5 in conjunction with Section 3.9 Federal Law on the Protection of Data (*Bundesdatenschutzgesetz, BDSG*). The report can be directed to the Ombudsman for Data Protection.

Section 131 Social Code IX (SGB 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 noted that, given historic experience, German authorities are explicitly reluctant to gather data for any purpose on certain characteristics which formed the basis of discrimination in the Nazi period.

In Germany, statistical evidence is permitted by national law in order to establish indirect discrimination. In the AGG the admissibility of statistical evidence is not explicitly regulated but is presupposed for indirect discrimination.<sup>157</sup> Article 286 ZPO<sup>158</sup> provides for example for such a possibility.

The statistical data collected on the basis of Section 131 Social Code IX (SGB IX) about severely disabled persons provides background information on the situation of this group of persons and the law that includes positive action matters. In other areas, there is no relevant use of such data for positive action.

#### b) Practice

In Germany, statistical evidence in order to establish indirect discrimination is used in practice.

Courts routinely use statistical evidence to establish indirect discrimination. The Federal Constitutional Court has used statistical evidence to establish whether or not indirect discrimination exists.<sup>159</sup> The data in the specific case (concerning sex) were derived from statistics provided by the defendant, the City of Hamburg.

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 must be treated equally. It depends on the specific context which criteria are used to establish whether groups are essentially equal or not. There is no settled case law with regard to a specific quantitative measure for establishing a disproportionate application of a regulation to one group in comparison to another group.

As the examples discussed indicated before,<sup>160</sup> 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 which regard any difference which persists for a period of time as sufficient to establish indirect discrimination. If the ratio is small, the justification of this discrimination becomes easier for the employers. Others propose a threshold of about 75 %.<sup>161</sup>

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

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<sup>157</sup> Cf. the explanatory report Bundestagsdrucksache 16/1780, p. 47.

<sup>158</sup> Code of Civil Procedure (*Zivilprozessordnung*, ZPO) of 30.01.1879, last amended on 21.11.2016 (BGBl. I, 2591).

<sup>159</sup> See BVerfGE 97, 35 (44).

<sup>160</sup> See above 2.3 a).

<sup>161</sup> Cf. on the debate Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 16<sup>th</sup> ed., 2016, § 3 AGG, para. 7, on the discussion about the significance and relevance of quotas see para. 10.

of applicants for employment, although 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 Section 611a Civil Code (*Bürgerliches Gesetzbuch, BGB*)<sup>162</sup> (repealed by the AGG) not only forbids a refusal to employ someone on the grounds of a particular characteristic (in this case sex), but that it suffices if the characteristic is one of a "bundle of motives" for not choosing this applicant.<sup>163</sup> 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. The Federal Labour Court regarded the objective qualification of a job candidate as a condition for possible discrimination,<sup>164</sup> but has abandoned this jurisprudence: Any applicant, irrespective of objective suitability can be the victim of discrimination, according to this interpretation of the prohibition of discrimination.<sup>165</sup>

Section 71.1 Social Code IX (SGB 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, it does not mean that discrimination has occurred in an individual case.

However, there are voices in the literature which 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.<sup>166</sup> There is not yet any settled case law on these matters.

There are no discernible 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.

## **2.4 Harassment (Article 2(3))**

### **a) Prohibition and definition of harassment**

In Germany, harassment is prohibited in national law. It is defined.

Section 3.3 AGG defines harassment as discrimination when unwanted conduct related to any of the grounds covered by the AGG intend or cause the dignity of a person to be violated and an intimidating, hostile, degrading, humiliating or offensive environment to be created. According to German jurisprudence on Section 3.3 AGG, such an "environment" is generally not created by one-off but only by continuous behaviour,<sup>167</sup> of certain severity, beyond mere onerousness.<sup>168</sup> The personal and material scope of the prohibition of harassment is not different to other forms of discrimination under the AGG, explained below, 3.

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 a violation of the

<sup>162</sup> Civil Code (*Bürgerliches Gesetzbuch, BGB*), of 02.01.2002 (BGBl. I, 42, 2909; 2003 I, 738), last amended on 24.05.2016 (BGBl. I, 1190).

<sup>163</sup> BVerfGE 89, 276 (189), see above.

<sup>164</sup> BAG, 19.08.2010, 8 AZR 370/09.

<sup>165</sup> Cf. BAG, 19.05.2016, 8 AZR 470/14, para 24ff.

<sup>166</sup> See Großmann, *Gemeinschaftskommentar, Sozialgesetzbuch IX*, § 81, para. 240.

<sup>167</sup> BAG, 24.04.2008, 8 AZR 347/07: unjustified dismissal as such not creating a hostile environment; Düsseldorf Land Labour Court (*Landesarbeitsgericht Düsseldorf, LAG Düsseldorf*), 18.06.2008, 7 Sa 383/08: graffiti in restroom not enough by itself to create a hostile environment. Berlin-Brandenburg Land Labour Court (*Landesarbeitsgericht Berlin-Brandenburg, LAG Berlin-Brandenburg*), 18.06.2010, 6 Sa 271/10: no harassment if considerable time period and no inherent connection between different incidents.

<sup>168</sup> Schleswig-Holstein Land Labour Court (*Landesarbeitsgericht Schleswig-Holstein, LAG Schleswig-Holstein*), 23.12.2009, 6 Sa 158/09: no ethnically discriminating harassment by an employer's repeated demands to take a German language course.

right to personality, which is protected by tort law.<sup>169</sup> Such an action can give rise to compensation for material and non-material damage. In criminal law e.g. the provisions against criminal insult can also cover cases of harassment, with the relevant sanctions.<sup>170</sup>

In Germany, harassment does explicitly constitute a form of discrimination, Article 3.3. AGG.

#### b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Germany the employer and the employee are both liable.

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

The AGG establishes organisational duties for the employer. According to Section 12.1 AGG, the employer is under a duty to provide for appropriate measures of protection against and prevention of discrimination. Section 12.2 AGG provides that the employer must educate employees on the principles of non-discrimination. Section 12.3 AGG establishes the duty of the employer to act against discrimination by his or her employees through appropriate measures, including dismissal. Section 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– although discussed – does not form part of the AGG. The employer is under a duty to make the AGG known in the organisation, Section 12.5 AGG.

According to Section 15.1 AGG, employers are liable for material damages caused by violations of the prohibition of discrimination in case of fault. For non-material damages there is strict liability.<sup>171</sup> If the discrimination occurs while applying collective agreements, intent or gross negligence is necessary, Section 15.3 AGG. Equivalent claims can be based on Section 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 acting on behalf of others apply to the extension of liability.<sup>172</sup> There are no special rules for discrimination.<sup>173</sup> A service provider can therefore, for example, be liable for the action of their representative. Beyond the listed specific duties, there is no general responsibility for discrimination by third parties.<sup>174</sup>

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.

The AGG does not contain any particular provision regarding the liability of legal persons. Instead, the general rule of Section 31 Civil Code (*Bürgerliches Gesetzbuch, BGB*) is

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<sup>169</sup> Section 823.1 BGB of 02.01.2002 (BGBl. I, 42, 2909; 2003 I, 738), last amended on 24.05.2016 (BGBl. I, 1190). In legal theory, it has been argued that protection against harassment through tort law is much wider than protection would be through a specific prohibition.

<sup>170</sup> Section 185 StGB.

<sup>171</sup> BAG, 22.01.2009, 8 AzR 906/07.

<sup>172</sup> Most importantly, Section 31, 278 and 831 BGB, see below 2.5.

<sup>173</sup> 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 BAG, 05.02.2004, Az. 8 AZR 112/03.

<sup>174</sup> See Federal Labour Court (*Bundesarbeitsgericht, BAG*), 23.01.2014, Az. 8 AZR 118/13. In terms of the relationship to candidates, the court ruled that third parties subcontracted by the potential employer to recruit employees, cannot be held liable given that the AGG only provides for compensation obligations on the part of the potential employer. As it was not necessary to rule on this issue in the present case, the court left open the question of whether a third party's duty of compensation may arise from any other legal source.

applicable, according to which legal persons are liable for damage caused by executive employees.<sup>175</sup>

## **2.5 Instructions to discriminate (Article 2(4))**

### **a) Prohibition of instructions to discriminate**

In Germany, instructions to discriminate are prohibited in national law. Instructions are defined: An instruction to discriminate against people on any of the grounds covered by the AGG shall be deemed to be discrimination, Section 3.5 AGG. This is especially the case, if someone instigates someone else to engage in a behaviour which disadvantages an employee due to one of the covered grounds, Section 3.5 sentence 2 AGG.

In addition, such cases may be covered by general legal provisions.<sup>176</sup> Responsibility for agents in contractual relations and in tort law is relevant in this respect.<sup>177</sup> Another example from criminal law is incitement to discrimination that amounts to a criminal offence, e.g. criminal insult.<sup>178</sup>

In Germany, instructions do explicitly constitute a form of discrimination.

### **b) Scope of liability for instructions to discriminate**

In Germany, the instructor and the discriminator can be liable, if there is no justification of the discrimination.

The general rules on responsibility of agents apply to the extension of liability.<sup>179</sup> There are no special rules or case law for discrimination.<sup>180</sup>

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

### **a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment**

In Germany, the duty to provide reasonable accommodation is included in the law. It is defined not in a general way but in particular provisions referred to below.

The AGG contains no additional regulation on reasonable accommodation of a general scope, as prescribed in Article 5 Directive 2000/78/EC for employment. It is argued by Courts, including the Federal Labour Court that a duty of reasonable accommodation is to be understood as a contractual duty stemming from Section 241.2 BGB.<sup>181</sup> From this point of view, it is a contractual duty of the employer to take proper care of the legitimate needs

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<sup>175</sup> Arnold, *MünchKommBZG* zum Bürgerlichen Gesetzbuch; BGB, 7th ed. (2015), BGB, § 31, para. 11, 20ff, 30ff.

<sup>176</sup> Prior to the enactment of the AGG, a first instance labour court regarded 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 at the next instance, see Arbeitsgericht Wuppertal, 3 Ca 4927/03, 10.12.2003.

<sup>177</sup> Section 31, 278, 831 BGB.

<sup>178</sup> Section 26, 185 StGB.

<sup>179</sup> Most importantly, Section 31, 278 and 831 BGB, see above 2.5.

<sup>180</sup> 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 BAG, 05.02.2004, Az 8 AZR 112/03.

<sup>181</sup> BAG, 19.12.2013, 6 AZR 190/12 para. 53.



of their employees. For people with disabilities, this means that the duty exists to reasonably accommodate their needs.

Nevertheless, the law on disability, constitutionally buttressed by the disability clause of the Basic Law<sup>182</sup> and the obligations created by the Convention on the Rights of Persons with Disabilities, signed and ratified by Germany (cf. annex II) and Land constitutions, foresees reasonable accommodation in various contexts, including the following.

The social security system has the general aim of integrating disabled people into society through individual assistance and accommodation of their needs<sup>183</sup> and establishes claims to material means of integration.<sup>184</sup> The German welfare agencies provide support for participation in working life.<sup>185</sup> This encompasses support for obtaining employment, including vocational training, special medical and psychological support for participation in working life, housing near the place of work, transport or the creation of housing adequate for the disabled people, to name some examples.<sup>186</sup>

Section 81.4 Social Code IX (SGB IX) imposes various duties on public and private employers in providing reasonable accommodation for severely disabled people.<sup>187</sup>

For example, severely disabled people 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 accommodation measures. 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.<sup>188</sup> The employers are under a duty to promote part-time work.<sup>189</sup> Under certain circumstances, the severely disabled person can have a claim to part-time work.<sup>190</sup> They also have a claim to additional paid holidays.<sup>191</sup>

According to Section 106, Sentence 3 Industrial Code (*Gewerbeordnung*), an employer must pay due regard to disability in their directives guiding the enterprise.

According to the Equal Opportunities for Disabled People Act, organisations and social partners should conclude agreements (*Zielvereinbarungen*) which specify what kind of measures for reasonable accommodation are to be provided in certain areas of life, e.g.

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<sup>182</sup> Article 3.3 sentence 2 GG.

<sup>183</sup> Section 10 Social Code I (*Sozialgesetzbuch I, SGB I*) of 11.12.1975 (BGBl. I, 3015), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

<sup>184</sup> Section 4ff Social Code IX (*Sozialgesetzbuch IX, SGB IX*) of 19.06.2001 (BGBl. I, 1046), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)); Section 53ff Social Code XII (*Sozialgesetzbuch XII, SGB XII*) of 27.12.2003 (BGBl. I, 3022), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)). Special regulations for blind people: Section 72 Social Code XII (*Sozialgesetzbuch XII, SGB XII*).

<sup>185</sup> Section 97ff Social Code III (*Sozialgesetzbuch III, SGB III*) of 24.03.1997 (BGBl. I, 594), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)), Section 104 SGB IX.

<sup>186</sup> See e.g. Section 33 SGB IX.

<sup>187</sup> On the definition of this, see above 2.1.1.

<sup>188</sup> Section 81.4.3 SGB IX.

<sup>189</sup> Section 81.5 SGB IX.

<sup>190</sup> Section 81.5 sentence 3 SGB IX.

<sup>191</sup> Section 125 SGB IX.

for accessibility to financial institutions. These agreements determine the relevant measures in general terms. This regulation is not limited to severely disabled people.<sup>192</sup>

Public and private employers should conclude integration agreements with the representatives of disabled employees for enterprises and authorities with regard to working conditions and other issues of integration of severely disabled people.<sup>193</sup> There are special regulations in pension law, including a lower minimum age for severely disabled people to collect a state pension.<sup>194</sup>

Given that there is no general regulation of reasonable accommodation that covers all areas within the material scope of the Directive, including, among others, job applicants, the law as it stands seems not to be in conformity with EU law.

#### b) Practice

A measure of accommodation is regarded as unreasonable for the employer in disability law if the financial burden is disproportionate, despite support from the Federal Labour Agency and the integration agencies, using funds from the equalisation levy.<sup>195</sup> There is only limited case law clarifying precise standards.<sup>196</sup>

#### c) Definition of disability and non-discrimination protection

There is no difference between the definition of disability as such for the purposes of claiming a reasonable accommodation and for claiming protection from discrimination in general in the areas of the law covered. The degree of disability is relevant for the application of the special rules for severely disabled persons whereas the definition of disability is the same for both spheres of law.

#### d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Germany, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field.

There are various areas where such rules exist. With regard 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.<sup>197</sup>

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<sup>192</sup> Section 5 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*). This may concern a variety of accessibility issues – from buses to buildings.

<sup>193</sup> Section 83 SGB IX.

<sup>194</sup> Section 37 SGB VI of 18.12.1989 (BGBl. I, 2261; 1990 I, 1337), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

<sup>195</sup> Section 77.5, 102.3 SGB IX.

<sup>196</sup> Cf. Baden-Württemberg Land Labour Court (*Landesarbeitsgericht Baden-Württemberg, LAG Baden-Württemberg*), 22.06.2005, Az: 2 Sa 11/05 with further references. The duty of accommodation in 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 true. It has been regarded as unreasonable to demand that an employer introduce 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-Palatinate Land Labour Court (*Landesarbeitsgericht Rheinland-Pfalz, LAG Rheinland-Pfalz*), 04.03.2005, Az: 12 Sa 566/04. On the duty to create a procedural precondition for measures of accommodation in dealing with the Works Council, see BAG, 03.12.2002, Az: 9 AZR 481/01.

<sup>197</sup> Section 4.3 SGB 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 place a child in a special school for people with disabilities against the will of the parents constituted a breach of Article 3.3.2 GG, 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.<sup>198</sup> Higher education in universities should take account of the needs of people with disabilities.<sup>199</sup>

There are various provisions stipulating that reasonable accommodation should be made to allow disabled people to communicate with public authorities and in court. Severely disabled people experiencing 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),<sup>200</sup> and other aspects of mobility, to name just a few examples.<sup>201</sup>

There are particular regulations for disabled people in civil law relating to their special needs.<sup>202</sup>

A special regulation of general contract law allows for valid contracts with people with intellectual disabilities.<sup>203</sup>

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

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Germany, failure to meet the duty of reasonable accommodation does count as discrimination:

The Federal Constitutional Court found that disabled people are not only discriminated against if there is unequal treatment, but also when a disadvantage results from the lack of appropriate measures to accommodate the needs of the disabled person.<sup>204</sup> This principle was developed in the context of integrated schooling but applies as a constitutional principle to other spheres of life as well. The Federal Labour Court has in this sense clarified that it is only if an employer meets their duty of reasonable accommodation derived from Section 241.2 BGB that a justification of direct discrimination on the ground of disability (Section 8 AGG) is possible.<sup>205</sup> Meeting the duties to reasonable

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<sup>198</sup> See BVerfG 96, 288.

<sup>199</sup> Section 2.4 sentence 2 University Framework Law (*Hochschulrahmengesetz, HRG*), of 19.01.1999, BGBl. I, 18, which is expected to be abrogated in the near future, and corresponding regulations at the Land level (subject to reform). Last amended on 12.04.2007 (BGBl. I, 506).

<sup>200</sup> Section 145-147 SGB IX.

<sup>201</sup> See Section 7-11 BGG and the corresponding regulations in Land laws on disability, on a special regulation on mobility, e.g. Sect. 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, LGBG Berlin*); on communication with public authorities and in court see also e.g. Section 17.2 SGB I; Section 57 SGB IX; Section 19.1 sentence 2 SGB X; Section 186, 191a Courts Constitution Act (*Gerichtsverfassungsgesetz, GVG*) of 09.05.1975 (BGBl. I, 1077), last amended on 22.12.2016 (BGBl. I, 3150); Section 483 Code of Civil Procedure (*Zivilprozessordnung, ZPO*) last amended on 21.11.2016 (BGBl. I, 2591); Section 66, 259.2 Code of Criminal Procedure (*Strafprozessordnung, StPO*) of 07.04.1987 (BGBl. I, 1074, 1319), last amended on 23.12.2016 (BGBl. I, 3346); Section 22ff Law on Authorisation (*Beurkundungsgesetz, BeurkG*) of 18.08.1969 (BGBl. I, 1513), last amended on 23.11.2015 (BGBl. I, 2090) on notarial instruments; Section 2233.2 BGB.

<sup>202</sup> Section 305.2 Nr. 2 BGB establishes, for example, the duty to pay due regard to the needs of disabled people when general terms and conditions are included in a contract; on other matters see Section 138.6 SGB IX.

<sup>203</sup> See Section 105a BGB.

<sup>204</sup> BVerfG 96, 288. This judgment is not limited to severely disabled people.

<sup>205</sup> BAG, 19.12.2013, 6 AZR 190/12 para. 50ff.

accommodation is a precondition for possibility of the justification of discrimination. A failure to accommodate reasonably the needs of human beings with disabilities can thus lead to discrimination. The failure to meet the duty of reasonable accommodation duties could give rise to a right to compensation, e.g. under Section 15 AGG.

There is no such provision for the shift of the burden of proof in the relevant codifications, apart from the general regulations providing for the shift of the burden of proof.<sup>206</sup>

f) Duties to provide reasonable accommodation in respect of other grounds

In Germany, there is a duty to provide reasonable accommodation in respect of other grounds, such as religion and age, in the public and the private sector.

Concretely, as far as religion is concerned, public authorities are under a duty to take the special needs of religious communities and the individuals who form these communities into account because of the fundamental right to freedom of religion.<sup>207</sup>

Employers must pay due consideration to the fundamental right to freedom of religion.<sup>208</sup> The same principle holds for belief.

Under German law on social security, there are stipulations providing for special means to accommodate the needs of older people. These include help in the household, adaptation of housing to the needs of older people, support for inclusion in social and cultural life, etc.<sup>209</sup>

g) Accessibility of services, buildings and infrastructure

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<sup>206</sup> There is specific case law easing the burden to provide evidence for a possible breach of the duty to provide reasonable accommodation of a disabled person, cf. Hessisches LAG, 21.03.2013 – Az 5 Sa 842/11 para 49; BAG, 10.05.2005 – 9 AZR 230/04 para 42.

<sup>207</sup> See e.g. BVerfG 1 BvR 1783/99, 15.1.2002: if a non-German butcher who is a practising Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to provide his customers, in accordance with their religious belief, the opportunity to consume the meat of animals which were ritually slaughtered, the constitutionality of this activity must be examined in accordance with Article 2.1 in conjunction with Articles 4.1 and 4.2 GG. Section 4a.1 in conjunction with Section 4a.2, Nr. 2 of the Animal Protection Act (*Tierschutzgesetz, TierSchG*) of 18.05.2006 (BGBl. I, 1206, 1313), last amended on 18.07.2016 (BGBl. I, 1666) provides for the possibility that an exceptional permission for ritual slaughter may be granted. See also BAG, 24.02.2011, 2 AZR 636/09, where the court ruled that, even in cases of dismissals due to breach of the legitimate loyalty expectations of a church institution (employer), the continuity of employment could in individual cases be proved reasonable and therefore the dismissals would be ineffective, after balancing the competing interests of the self-perception of the Church on one hand and the employee's right to respect for their private and family life on the other. Section 241.2 BGB can play a role in this respect, without there being any clear patterns of application of this norm. A complaint by a school girl requested dispensation from swimming lessons in a public school because of prescriptions stemming from her Muslim faith to show her body forms to men. Although the school allows for the use of so-called burkinis, this option was not regarded as sufficient by the complainant. The complaint was struck down by the Federal German Constitutional Court. The Court argued, that the complainant did not substantiate the claim that the use of the burkini was not sufficient to abide by religious rules in this respect.

<sup>208</sup> Cases include religious dress codes, e.g. Mala (Land Labour Court Düsseldorf (*Landesarbeitsgericht Düsseldorf, LAG Düsseldorf*), 22.03.1984, 14 Sa 1905/83), Sikh turban (Labour Court Hamburg (*Arbeitsgericht Hamburg, AG Hamburg*), 03.01.1996, 19 Ca 141/95) or the head-scarf (BAG, 10.10.2002, 2 AZR 472/01; Labour Court Dortmund (*Arbeitsgericht Dortmund, AG Dortmund*), 16.10.2003, 6 Ca 5736/02). In previous case law, it has been held constitutional to prohibit a teacher in a state school from wearing a headscarf (BVerfG, 2 BvR 1436/02; BVerwG, 2 C 45/03, 24.6.2004). The German Federal Constitutional Court has held now that a general ban on headscarves for teachers at state schools is not compatible with the Constitution, BVerfG, 1 BvR 471/10, BVerfG, 1 BvR 1181/10, 27.01.2015. On the legitimate ban of a headscarf for a nurse working in a hospital run by the Protestant Church, see: BAG, Az.: 5 AZR 611/12, 24.09.2014 and the reconsideration of the LAG Hamm, Az.: Sa 1724/14, 08.05.2015 (see case law section). Other cases concern breaks for prayers (Land Labour Court (*Landesarbeitsgericht*) Hamm, 18.01.2002, 5 Sa 1782/01: balancing of interests in the case of break for prayers, no obligation if disruption of process of production).

<sup>209</sup> Section 70 SGB XII provides for help to maintain a household; for further social security benefits for older people see Section 71 SGB XII.

In Germany, national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

According to the Equal Opportunities for Disabled People Act, the principle of accessibility (lack of barriers, *Barrierefreiheit*) is the leading principle for the organisation of public services, including the stipulation that new federal buildings and major alterations to existing federal buildings should be accessible to persons with disabilities. The same principle of accessibility holds for other buildings, public streets and squares and public transport.<sup>210</sup>

The Länder have passed laws on building standards which relate to accessibility of buildings at Land level for the persons with disabilities, older people and people with small children.<sup>211</sup>

According to Section 554a BGB, a disabled person has the right to demand consent to changes in rented property which are necessary for his or her adequate use. The landlord can refuse consent if their interest in the unchanged status of the property carries more weight than the interest of the disabled person.<sup>212</sup> The AGG incorporates in Section 19.1 a prohibition of discrimination on the ground of disability in its regulation of general civil law which covers in principle services etc. if governed by private law. It contains no clause that a failure to comply with other laws on accessibility constitutes discrimination.

In Germany, national law contains a general duty to provide accessibility by anticipation for people with disabilities.

As mentioned above, the leading principle in this field is accessibility (lack of barriers, *Barrierefreiheit*). According to the definition in Section 4 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*), buildings, transportation, technical implements, acoustic and visual sources of information and means of communication, as well as other aspects of life (*gestaltete Lebensbereiche*) are accessible (*barrierefrei*)<sup>213</sup> when disabled people have access to them and can make use of them ordinarily, without particular difficulty and generally unassisted (i.e. independently of third parties).

With regard to higher education, Article 2.4 sentence 2 University Framework Law (*Hochschulrahmengesetz, HRG*)<sup>214</sup> states that disabled students should preferably have access to university services without needing the assistance of others.

#### h) Accessibility of public documents

According to Section 10 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*), individuals with visual impairments (blind or partially sighted) may request from the public authorities at no extra cost any documents needed in an accessible form, therefore in Braille as well. Consequently, in court proceedings, Section 191a of the Courts Constitution Act (*Gerichtsverfassungsgesetz, GVG*) states that a blind or visually impaired person may demand at no charge that the court documents intended for them may also be made available in a form accessible to

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<sup>210</sup> Section 8 in conjunction with Section 4 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*). Similar provisions exist at the Land level.

<sup>211</sup> See e.g. Section 51 Berlin Regulation on Construction (*Bauordnung Berlin, BauOBln*), of 29.09.2005 (GVBl. 495), last amended on 17.06.2016, GVBl. 361). On minimum standards in homes: Regulation on Home Building (*Heimmindestbauverordnung, HeimMindBauV*) of 03.05.1983 (BGBl. I, 550), last amended on 25.11.2003 (BGBl. I, 2346).

<sup>212</sup> Case law has underlined that the claim of the disabled tenant does not suppose extreme sacrifices on their side, see Regional Court Hamburg (*Landgericht Hamburg, LG Hamburg*), 29.04.2004, Az: 307 S 159/03.

<sup>213</sup> The Federal Government has also emphasised in its National e-Government Strategy that electronic communication between citizens and the administration should be user-friendly and accessible.

<sup>214</sup> Due to a general reform in the federal system in Germany, the University Framework Law (*Hochschulrahmengesetz, HRG*) is expected to be abrogated in the near future, as mentioned above.

them to the extent that this is necessary in order to safeguard their rights in the proceedings.

As far as sign languages are concerned, Section 6.1 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*) recognises German sign language as an official language of the German state. Furthermore, Section 6.2 of the same law states explicitly that speech-accompanying gestures are recognised as a form of communication of the German language.<sup>215</sup> Individuals with hearing or speech impairments have the right to use German sign language and speech-accompanying gestures in all administrative procedures to communicate and, in the absence of these, other communication aids.<sup>216</sup> In administrative and judicial proceedings, people with hearing and language disabilities are entitled to a sign language interpreter or other communication assistance, including technical aids.

According to Section 186.1 of the Courts Constitution Act (*Gerichtsverfassungsgesetz, GVG*), for example: "Communication with a hearing-impaired or speech-impaired person during the hearing shall, at his choice, take place orally, in writing or with the assistance of a communication facilitator to be called in by the court. The court shall furnish suitable technical aids for oral and written communication. The hearing or speech-impaired person shall be advised of his right to choose." A similar principle applies during ongoing investigations conducted by the prosecutors in charge. According to Section 187.1 of the GVG, the court shall call in an interpreter for an accused or convicted person who is hearing or speech-impaired insofar as this is necessary for the exercise of his rights under the law of criminal procedure.<sup>217</sup>

In addition, the Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales, BMAS*)<sup>218</sup> gives people with hearing or speech impairments the opportunity to obtain information on various topics of the federal government by enabling them to use the public administration customer services phone number, 115.<sup>219</sup>

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<sup>215</sup> Section 6.2 BGG.

<sup>216</sup> Section 6.3 BGG. In addition, public authorities shall use so called "simple language" (*leichte Sprache*) to provide access to easy to read documents, Sec. 11 BGG.

<sup>217</sup> See also Section 68.b, 259.2, 406.2 Code of Criminal Procedure (*Strafprozessordnung, StPO*).

<sup>218</sup> [www.bmas.de](http://www.bmas.de).

<sup>219</sup> By dialing 115 citizens (but also businesses and public administration) have a direct connection to authorities in Germany, regardless of the government level concerned. The Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales, BMAS*) has developed a programme in cooperation with the German Association of the Hearing Impaired (*Deutscher Gehörlosen-Bund*) so that users with hearing and speech impairments could use the service as well. A computer with a camera and internet access and the new free-to-obtain Softphone are required. Users can then communicate directly in sign language with employees appointed by the Ministry. See also information available online: [www.115.de](http://www.115.de).

### **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)**

In Germany, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

The AGG is not restricted to German nationals or residents. It applies to everyone 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 main legal pillars of anti-discrimination law thus are applicable to migrants and refugees as well.

The regulations on the special protection of severely disabled people apply to people who are legally resident or employed in Germany.<sup>220</sup> Other special legislation applies to German citizens and other qualified countries, especially EU countries only.<sup>221</sup>

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

###### **a) Protection against discrimination**

In Germany, the personal scope of anti-discrimination law covers natural and (certain) legal persons for the purpose of protection against discrimination.

In terms of protection, Section 7, in conjunction with Sections 3, 6.1 AGG, protects employees, thus natural persons. The prohibition of discrimination against disabled people in employment, now referring to the AGG, applies only to natural persons.<sup>222</sup> In other areas of the law, depending on the circumstances, natural and legal persons can be protected: Section 19.1 AGG applies to natural persons in contract law, Art. 3 GG to legal persons so, e.g. a religious community.

The constitutional guarantee of equality protects natural persons. Legal persons are within the scope of the norm to the extent allowed by the nature of that right, which is relevant for religious organisations.<sup>223</sup> It is directly applicable to actions by public authorities and indirectly to actions by private actors through the interpretation of private law. Other prohibitions in public law apply to natural persons only, due to the nature of the matter concerned.<sup>224</sup>

###### **b) Liability for discrimination**

In Germany, the personal scope of anti-discrimination law covers natural and (certain) legal persons for the purpose of liability for discrimination.

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<sup>220</sup> Section 2.2 sentence 2 SGB IX.

<sup>221</sup> For example, Section 7 Federal Civil Service Law (*Bundesbeamtengesetz, BBG*), German nationality (or citizenship of another EU-member or EEA-contracting state or a state with which Germany or the EU has concluded an agreement on the recognition of respective professional qualifications) is a prerequisite for employment as a civil servant.

<sup>222</sup> For example, Section 81.2 SGB IX.

<sup>223</sup> Article 3 in conjunction with Article 19.3 GG.

<sup>224</sup> For example, the anti-discrimination clauses in the laws on the civil service or the Federal Employee Representation Law (*Bundespersönalvertretungsgesetz, BPersVG*) of 15.03.1974 (BGBl. I, 693), last amended on 19.10.2016 (BGBl. I, 2362).

Under the AGG, both natural and legal persons can be held liable for violations of the prohibition of discrimination, Articles 7, 19 AGG. Under the prohibition of discrimination against disabled persons in employment, now referring to the AGG natural and legal persons may be liable.<sup>225</sup> If law other than the AGG applies, for example contract or tort law, depending on the circumstances, natural and legal persons can be liable. In public law, legal persons are liable as well, e.g. under Section 24 AGG.

### **3.1.3 Private and public sector including public bodies (Article 3 (1))**

#### **a) Protection against discrimination**

In Germany, the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination.

The differentiated system of rules of non-discrimination applies to both the private and the public sector, albeit depending on the particular kind of rules. For example, the equality guarantee in the constitution applies directly to actions of public bodies (e.g. any legislative or administrative act from the provision of social services to police action, the public education system etc.), protecting thus individuals in a legal relation governed by public law and through indirect horizontal effect to private parties. The AGG applies to private parties, Sections 2, 3, 6.1, 7.1, 19.1 AGG (including employment and general contract law on the provision of goods and services, including private education or housing) and, by extension, Section 24 AGG applies to public employment, including the judiciary and conscientious objectors.

#### **b) Liability for discrimination**

In Germany, the personal scope of anti-discrimination law covers private and public sector including public bodies for the purpose of liability for discrimination.

As for protection against discrimination, there is a differentiated set of rules for the liability both in the private and public sector. For example, the equality guarantee in the constitution applies directly to actions of public bodies (e.g. any legislative or administrative act from the provision of social services to police action, the public education system etc.) and through indirect horizontal effect to private parties which can thus both be held liable under this provision. The AGG applies to private parties, Sections 2, 3, 6.2, 7.1, 19.1 (including employment and general contract law on the provision of goods and services, including private education or housing) and, by extension, Section 24 AGG applies to public employment, including the judiciary and conscientious objectors, making public employers liable for breaches of the prohibition of discrimination.

## **3.2 Material scope**

### **3.2.1 Employment, self-employment and occupation**

In Germany, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds.

The AGG applies to all sectors of employment (including self-employment) for all grounds (race, ethnic origin, sex, religion or belief, disability, age or sexual identity). Military service is covered by the SoldGG. The AGG applies to the civil service taking into consideration its specificities, Section 24 AGG.

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<sup>225</sup> Cf. Section 81.2 SGB IX.



In addition, public employment (civil service and other employees) is covered by the guarantee of equality,<sup>226</sup> the guarantee of equal access,<sup>227</sup> civil service laws (which exclusively concern civil servants),<sup>228</sup> prohibitions of discrimination in the law on the representation of public employees<sup>229</sup> and – with regard to disability – a special regulation prohibiting discrimination which applies to private employers as well.<sup>230</sup> Equal access to any kind of (self-)employment is guaranteed by freedom of profession, Article 12 GG. For the public sector, there are additional duties e.g. the early registration of vacancies to facilitate the employment of disabled people.<sup>231</sup> The prohibition of discrimination in the Works Constitution Act (*Betriebsverfassungsgesetz*, *BetrVG*) applies only to certain enterprises, in particular excluding under certain conditions enterprises based on a particular religious, philosophical or political ethos (*Tendenzbetriebe*).<sup>232</sup> The general principle of equal treatment of employees demanding equal treatment of employees in equal circumstances (developed in the case law before and independently of the AGG) applies in all matters of labour law, including collective agreements, although contentiously not to recruitment.<sup>233</sup>

### **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))**

In Germany, national legislation prohibits discrimination in the following areas: 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 for the five grounds in both private and public sectors as described in the directives.

Section 2.1.1 AGG closely follows the regulation of the Directives in this respect, covering all these areas. Section 11 AGG contains a prohibition of discriminatory job advertisements. Section 24 AGG provides for an application of the regulations of the AGG which takes account of the specificities of the civil service. In addition, Section 9 Federal Civil Service Law (*Bundesbeamtengesetz*, *BBG*) repeats the prohibition of discrimination in access to the civil service. This prohibition is relevant for other areas of civil service law as well, Section 22.1 sentence 1 BBG. This prohibition of discrimination does not cover discrimination on the ground of age. This ground, however, is covered for civil service law by Section 24 AGG.

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

In Germany, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals, for all five grounds and for both private and public employment.

The AGG covers employment and working conditions, including pay and dismissals, in Section 2.1.2. For dismissals, the AGG contains a special regulation in Section 2.4 which provides that, for dismissals, only the existing general and particular regulations for

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<sup>226</sup> Article 3 GG.

<sup>227</sup> Article 33.2 and 33.3 GG.

<sup>228</sup> On sexual orientation, see Article 1; Law on Article 10.2 of the Constitution of Berlin (*Gesetz zu Artikel 10 Absatz 2 der Verfassung von Berlin*). For the changing legal basis in this area cf. Annex 1.

<sup>229</sup> See Section 67.1 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*, *BPersVG*) and the respective Land-level regulations.

<sup>230</sup> Section 81.2 SGB IX, now referring to the AGG.

<sup>231</sup> Section 82 SGB IX.

<sup>232</sup> Works councils are formed in all enterprises with more than five employees; on the exclusion of enterprises based on an ethos, see Section 118 Works Constitution Act (*Betriebsverfassungsgesetz*, *BetrVG*).

<sup>233</sup> See R. Richardi (ed.) (2014), *Betriebsverfassungsgesetz*, 14th ed. § 75 para. 8.

dismissal are to be applied, most importantly the Law on Protection against Dismissal (*Kündigungsschutzgesetz, KSchG*).<sup>234</sup> As there are no prohibitions of discrimination in these norms, it seems unlikely to be possible to interpret these norms, due to their wording, in conformity with the Directives. Therefore, this exception is not in accordance with European Law.<sup>235</sup> However, the Federal Labour Court 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.<sup>236</sup> It held that such an interpretation of German law on protection against dismissal is in conformity with the Directives. This line of argument has been confirmed in a recent decision holding that the AGG applies only to those rules on dismissal which are not covered by Section 2.4 AGG because special rules of dismissal are not applicable, e.g. in a probation period.<sup>237</sup>

### 3.2.3.1 Occupational pensions constituting part of pay

According to Section 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, although some prohibitions have been established through case law.

This regulation can be regarded as a deficit in transposing the Directives, given the consistent CJEU case law regarding occupational pensions as part of pay.<sup>238</sup> The only way 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 (as in the case of Section 2.4 AGG) stating that only the Law on Occupational Pensions is applicable, as formulated in relevant case law.<sup>239</sup> The same reasoning applies to occupational pension schemes in the public domain.

### 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))

In Germany, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

Section 2.1.3 AGG follows the regulation of the Directives closely. There is no explicit reference to vocational training outside employment relationships. Section 19 (a) Social Code IV (SGB IV)<sup>240</sup> contains a prohibition on all grounds for benefits concerning access to all forms and levels of vocational guidance, vocational training, advanced vocational training and vocational retraining including practical work experience. In addition, Section 36.2 Social Code III (SGB III)<sup>241</sup> provides that the employment agency (*Agentur für Arbeit*) may only consider limitations imposed by employers for job and training applicants on the

<sup>234</sup> Law on Protection against Dismissal (*Kündigungsschutzgesetz, KSchG*) of 25.08.1969 (BGBl. I, 1317). Last amended on 20.04.2013 (BGBl. I, 868).

<sup>235</sup> Accordingly, this regulation, which was created at the very end of the legislative process as part of political bargaining, has been widely criticised in jurisprudence, cf. Düwell, *jurisPR-ArbR* 28/2006 para. 7; Thüsing/Bauer/Schunder (Thüsing) NZA 2006, 777; Däubler, Däubler/Bertzbach, AGG § 2, para. 259ff.

<sup>236</sup> BAG, 06.11.2008, 2 AZR 523/07; BAG, 05.11.2009, 2 AZR 676/08. On the concept of social choice (*Sozialauswahl*) cf. below Fn. 336.

<sup>237</sup> BAG, 19.12.2013, 6 AZR 190/12 para. 22.

<sup>238</sup> There was a preliminary reference to the ECJ by the Federal Labour Court (*Bundesarbeitsgericht, BAG*) with regard to the question of age discrimination in a case in which a surviving dependent's pension is not paid if the surviving spouse is 15 years younger than the employee (BAG, 27.06.2006, 3 AZR 352/05). However, the ECJ did not answer this question, since it ruled that, due to the nature and time of the specific case, EU Law was not applicable, ECJ, 23.09.2008, C-427-06.

<sup>239</sup> Cf. e.g. BAG, 06.11.2008, 2 AZR 523/07. The BAG decided that, despite Section 2.2.2 AGG, the AGG applies to occupational pensions insofar as the Law on Occupational Pensions (*Betriebsrentengesetz, BetrAVG*, of 19.12.1974 (BGBl. I, 3610), last amended on 21.12.2015 (BGBl. I, 2553)) does not contain a special regulation (BAG, 11.12.2007, 3 AZR 249/06).

<sup>240</sup> SGB IV of 23.12.1976 (BGBl. I, 3845), last amended on 11.11.2016 (BGBl. I, 2500).

<sup>241</sup> SGB III of 24.03.1997 (BGBl. I, 594), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

grounds of age (among other grounds like health or nationality), if they are indispensable for the kind of work in question. A consideration of race or ethnic origin, religion or belief, disability or sexual identity is possible, according to this norm, if this is permitted on the basis of the AGG. In addition, the constitutional guarantee of equality is applicable in public law and thus extends to social law.

### **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))**

In Germany, national legislation prohibits discrimination in the following areas: membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

Section 2.1.4 AGG follows the regulation of the Directives. Section 18 provides for the application of the regulation on labour law in the AGG in this area, including a right to membership of these organisations, Section 18.2 AGG. Section 24 AGG extends the provisions to public employment.

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, for the areas covered by 3.2.6-3.2.8 the AGG is fully applicable for discrimination on the grounds of race and ethnic origin (Section 19.1 and 19.2 AGG). For other grounds, this is only the case for qualified contracts (Section 19.1 AGG).

There are no explicit rules on harassment and instruction to discriminate in public law in this area, as the rules of the AGG are not made applicable. Prohibitions of harassment and of instruction to discriminate may, however be derived from the existing norms by judicial interpretation.

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

In Germany, national legislation prohibits discrimination in the following areas: social protection, including social security and healthcare as formulated in the Racial Equality Directive.

According to Section 2.1.5 AGG, the AGG applies – for all grounds covered – in these areas. According to Section 2.2 sentence 1 AGG, Section 33c Social Code I (SGB I)<sup>242</sup> and Section 19a Social Code IV (SGB IV) are applicable. Given the scope of the Social Code, this regulation is applicable both to social protection and to social advantages. Section 33c Social Code I (SGB I) prohibits discrimination on the grounds of race, ethnic origin and disability in relation to claiming social rights.

This provision of Section 33c Social Code I (SGB I) 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 and or participation by disabled people. The norm intends to implement Directive 2000/43/EC and adds the ground of disability. Art. 19 (a) Social Code IV (SGB IV) concerns vocational training, including vocational training in the framework of social protection. It covers all grounds of the Directives.

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<sup>242</sup> SGB I of 11.12.1975 (BGBl. I, 3015), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

### 3.2.6.1 Article 3.3 exception (Directive 2000/78)

In Germany, national law does not rely on the exception in Article 3.3 of the Employment Equality Directive in relation to religion or belief, age, disability and sexual orientation.

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

In Germany, national legislation prohibits discrimination in the following areas: social advantages as formulated in the Racial Equality Directive.

Section 2.1.6 AGG covers social advantages.<sup>243</sup>

In Germany, the lack of definition of social advantages does not raise problems.

Social advantages are understood in a wide sense. Social welfare benefits (*Sozialhilfe*) are taken to be social advantages as well.<sup>244</sup> According to Section 2.2 sentence 1 AGG, Section 33c Social Code I (SGB I)<sup>245</sup> and Section 19a Social Code IV (SGB IV) are applicable. Given the scope of the Social Code, this regulation is applicable both to social protection and to social advantages. Section 33c Social Code I (SGB I) prohibits discrimination on the grounds of race, ethnic origin and disability in relation to claiming social rights.

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 and or participation by disabled people. The norm intends to implement Directive 2000/43/EC and adds the ground of disability. Section 19a Social Code IV (SGB IV) concerns vocational training and covers all grounds of the Directives. The constitutional guarantee of equality is also applicable.

The exception in Article 3 (3) Directive 2000/78 does not lead to an absence of any protection against discrimination given that Germany does not rely on it.<sup>246</sup> There are no explicit rules on harassment and instruction to discriminate in public law in this area, as the rules of the AGG are not made applicable. Prohibitions of harassment and of instruction to discriminate may however, depending on judicial interpretation, be derived 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 held,<sup>247</sup> for example, that it is lawful in relation to employment benefits 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.<sup>248</sup> Such jurisdiction is contrary to the regulation contained in the AGG.<sup>249</sup> The ECJ has clarified that it is a violation of the principle of non-discrimination, Articles 1 and 2 Directive 2000/78/EC,

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<sup>243</sup> Cf. Eichenhofer, Däubler/Bertzbach, AGG, § 2 para. 66.

<sup>244</sup> Cf. Eichenhofer, Däubler/Bertzbach, AGG, § 2 para. 78.

<sup>245</sup> SGB I of 11.12.1975 (BGBl. I, 3015), last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

<sup>246</sup> However, there is some case law on the question of 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*, BSG), 29.01.2004, B 4 RA 29/03 (left open); for narrow interpretation (only monetary payments) Hesse Social Security Court (*Hessisches Landessozialgericht*), 10.06.2005, 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*), 29.01.2004, B 4 RA 29/03 R; concurrent Hesse Social Security Court (*Hessisches Sozialgericht*) 29.07.2004 L 12 RJ 12/04 compared to Düsseldorf Social Security Court (*Sozialgericht Düsseldorf*, SG Düsseldorf), 23.10.2003, S 27 RA 99/02; cf. ECJ, 01.04.2008, C-267/06, Tadao Maruko.

<sup>247</sup> BVerwG 2 C 43.04, 26.01.2006, NJW 2006, 1828.

<sup>248</sup> Article 6 GG.

<sup>249</sup> Mahlmann, in Däubler/Bertzbach, AGG, § 24 para. 50.

if a surviving life partner, in contrast to a surviving spouse, has no right to receive a survivor's pension, if life partners and spouses are in a comparable position according to national law.<sup>250</sup>

Accordingly, the Federal Constitutional Court has held that both same-sex couples living in a life partnership and married spouses must be treated equally with regard to social benefits, overruling contradicting case law on this matter.<sup>251</sup> The German courts have followed this line of argument, as the decisions of the Federal Constitutional Court are binding.<sup>252</sup> Section 46.4 SGB VI extends the entitlement to state pensions to registered partners.

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

In Germany, national legislation prohibits discrimination in the following areas: education as formulated in the Racial Equality Directive.

Section 2.1.7 AGG covers education in relation to all grounds. It is clear that this norm applies to any form of education provided on the basis of a private contract, Section 19 AGG. There is no explicit extension by the AGG to education ruled by public law as in Section 24 AGG for civil servants. For state education (schools, universities, universities of applied sciences etc.), the majority of education in Germany, the constitutional equality guarantee which prohibits discrimination by its general equal treatment clause, Article 3.1 GG, and its specific prohibitions of discrimination, Article 3.3 GG is thus central.<sup>253</sup>

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.<sup>254</sup> Private schools, possibly with a religious or philosophical ethos, have a right to equal treatment as regards state support.<sup>255</sup> There is an explicit prohibition in the Basic Law of discrimination based on income by private schools which function as a substitute for state schools.<sup>256</sup> Beyond this prohibition, the organisation responsible for the school has the right to select pupils freely, e.g. by faith, as long as pupils in the area are able to attend an alternative state school. There are rules on reasonable accommodation for disabled children. All these rules on equal treatment in schools apply irrespective of nationality and thus to non-nationals, including migrants and refugees as well.

There are special regulations for indigenous minorities in Germany,<sup>257</sup> which provide special protection of cultural identity, including the use of language in schools.

#### a) Pupils with disabilities

In Germany, the general approach to education for pupils with disabilities does not raise problems under discrimination law.

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<sup>250</sup> ECJ, 01.04.2008, C-267/06, Tadao Maruko.

<sup>251</sup> BVerfG, 07.07.2009, 1 BvR 1164/07.

<sup>252</sup> See, for example, Saxony Administrative Appeals Court (*Sächsisches Obergerverwaltungsgericht, OVG Sachsen*), 04.03.2011, 2A665/10; Stuttgart Administrative Court (*Verwaltungsgericht Stuttgart, VG Stuttgart*), 30.03.2011, 8K 211; Munich Social Security Court (*Sozialgericht München, SG München*), 22.07.2011. S 57 AL 816/08.

<sup>253</sup> Cf. B. Rudolf in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 6 para. 154.

<sup>254</sup> See e.g. Article 7 North Rhine-Westphalia Constitution (*Landesverfassung Nordrhein-Westfalen, VerfNW*, of 28.06.1950, GV. NW. 1950, 127/GS. NW. 3, last amended on 05.11.2016, GV. NRW. 860), Section 1.1 North Rhine-Westphalia School Law (*Schulgesetz Nordrhein-Westfalen, NRW – SchulG* of 15.02.2005, GV. NRW., 102, last amended on 06.12.2016 (GV. NRW. 1052): no discrimination on basis of economic status, origin or sex.

<sup>255</sup> BVerfGE 75, 40.

<sup>256</sup> Article 7.4 sentence 3 GG.

<sup>257</sup> See Footnotes 57, 58 above and Footnotes 325, 326 below.

This does not mean that there are not particular legal issues to be solved. As already mentioned before, with regard to education, there are several dimensions to the question of integrated education for children with disabilities, which varies among the *Länder* because of the federal structure of Germany. The general aim is not to separate disabled children from their social background (e.g. friends) and to educate them with children without disabilities through integrated schooling.<sup>258</sup>

In the leading case concerning integrated schooling, the German Federal Constitutional Court held that the decision to place a child in a special school for people with disabilities against the will of the parents constituted a breach of Article 3.3 sentence 2 GG, 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.<sup>259</sup> Higher education in universities should take account of the needs of people with disabilities.<sup>260</sup>

#### b) Trends and patterns regarding Roma pupils

In Germany, there are no specific patterns existing in education regarding Roma pupils such as segregation. Segregation in the sense of (often legally) enshrined patterns of exclusion of certain social groups – in contrast to individual and structural issues of discrimination – is not a feature of the German school system. Given the statements on the issue of segregation 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.<sup>261</sup>

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<sup>258</sup> Section 4.3 SGB IX. The school laws of the *Länder* contain detailed regulations on the matter.

<sup>259</sup> See BVerfG 96, 288.

<sup>260</sup> Section 2.4 sentence 2 University Framework Law (*Hochschulrahmengesetz, HRG*), of 19.01.1999, BGBl. I, 18, which is expected to be abrogated in the near future, and corresponding regulations at the Land level (subject to reform). Last amended on 12.04.2007 (BGBl. I, 506).

<sup>261</sup> The German Federal Anti-Discrimination Agency uses the term “segregation” widely in the sense of separation into different social groups, cf. *Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages* (2013), p. 14 et passim. In this sense, it concludes that segregation exists in the educational system. Differing educational opportunities for people from a migrant background are in any case well documented, cf. A. Klose in B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, Baden-Baden, Nomos, § 10 for further details. There are some independent investigations on this matter, reporting that a high percentage of Sinti and Roma children do not attend school and are over-represented in remedial schools. However, in the absence of reliable statistical data, these reports have to draw on 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 (in the narrower sense), 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. S. D. Strau (ed.) (2011) *Studie zur aktuellen Bildungssituation deutscher Sinti und Roma: Dokumentation und Forschungsbericht*: Federal Anti-Discrimination Agency (2014), *Zwischen Gleichgültigkeit und Ablehnung - Bevölkerungseinstellungen gegenüber Sinti und Roma* (Between indifference and rejection - Population attitudes towards Sinti and Roma, available at: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Bevoelkerungseinstellungen\\_gegenueber\\_Sinti\\_und\\_Roma\\_20140829.html?jsessionid=5E9577EF246F7504031322D4400DA9A2.2\\_cid322?nn=4193516](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Bevoelkerungseinstellungen_gegenueber_Sinti_und_Roma_20140829.html?jsessionid=5E9577EF246F7504031322D4400DA9A2.2_cid322?nn=4193516)).

There has been very little case law on the matter in recent years (cf. the previous reports by this rapporteur to the European network of legal experts in the non-discrimination field). There are patterns of divisions, especially because of areas with high percentages of pupils from immigrant backgrounds which can lead to school classes which mirror this population structure.

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

In Germany, national legislation prohibits discrimination in the following areas: access to and supply of goods and services as formulated in the Racial Equality Directive.

Section 19 AGG contains 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, although contained in the drafts, was removed from the provision because of last-minute political decisions arguing that the inclusion of belief might broaden the prohibition too much. The provision thus goes in principle beyond what is demanded by Directive 2000/43/EC.

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 constitutional guarantee of equality, with the scope outlined above, applies.

There are no explicit rules on harassment and instruction to discriminate in public law in this area, as the rules of the AGG are not made applicable. Prohibitions of harassment and of instruction to discriminate may, however, depending on judicial interpretation, be derived from the existing norms. If 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 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 sectors where specific market conditions apply. For example, insurance premiums must not be calculated on the basis of nationality or ethnic origin.<sup>262</sup>

The Passenger Transport Act (*Personenbeförderungsgesetz, PBefG*)<sup>263</sup> requires that a company must be reliable in order to receive a licence and establishes the duty to provide services to anyone who abides by the transport regulations.<sup>264</sup> Telecommunications and postal service regulations require companies with a dominant market position to offer their services to everyone on the same conditions.<sup>265</sup> The Licensing Law (*Gaststättengesetz*)<sup>266</sup> makes authorisation for the establishment of a restaurant dependent on the provision of rooms which reasonably accommodate the needs of disabled people.<sup>267</sup> The licence itself

<sup>262</sup> Section 81e Insurance Supervision Law (*Versicherungsaufsichtsgesetz, VAG*) of 17.12.1992 (BGBl. 1993 I, 2). The codification was last amended on 26.07.2016 (BGBl. I, 1824).

<sup>263</sup> Passenger Transport Act (*Personenbeförderungsgesetz, PBefG*) of 08.08.1990 (BGBl. I, 1690), last amended on 29.08.2016 (BGBl. I, 2082).

<sup>264</sup> Section 22 Passenger Transport Act (*Personenbeförderungsgesetz PBefG*, of 08.08.1990 (BGBl. I, 1690)). Last amended on 29.08.2016 (BGBl. I, 2082). Disabled people are consequently included.

<sup>265</sup> Section 2 Regulation on the Protection of Telecommunications Customers (*Telekommunikations-Kundenschutzverordnung, TKV*, of 11.12.1997, (BGBl. I, 2910)), last amended on 18.02.2007 (BGBl. I, 106); Section 2 Regulation on the Postal Service (*Postdienstleistungsverordnung, PDLV*, of 21.08.2001 (BGBl. I, 2178)), last amended on 31.10.2006 (BGBl. I, 2407). Furthermore, Section 1.3 Nr. 4 Regulation on Universal Postal Services (*Postdienstleistungsverordnung, PDLV*) excludes from delivery postal items with racist statements written on their envelopes.

<sup>266</sup> Licensing Law (*Gaststättengesetz, GastG*) of 20.11.1998 (BGBl. I, 3418), last amended on 31.08.2015 (BGBl. I, 1474).

<sup>267</sup> Section 4.1 Nr. 2a Licensing Law (*Gaststättengesetz, GastG*). This provision is applicable in some of the Länder, e.g. Nordrhein-Westfalen or Bayern. Others have enacted their own Licensing Laws. Bremen's act contains a regulation on barrier free access, Sec. 3.3 Licensing Act Bremen (*Bremer Gaststättengesetz*) of 24.02.09, (Brem. GBl., 45), last amended on 02.08.2016 (Brem. GBl., 434,474). Regional building laws contain such norms, too. Some Länder have in addition made denial of access to or discriminatory treatment in restaurants etc. a misdemeanour, cf. Sec. 12.1 Nr. 15 Licensing Act Bremen (*Bremer Gaststättengesetz*), (ethnic origin, disability, sexual identity, gender identity, religion, belief); similarly Sec.

can be denied in cases of discriminatory behaviour.<sup>268</sup> There is some case law in this area.<sup>269</sup>

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. However, despite some literature on the matter, the case law in this respect is limited.<sup>270</sup>

Insofar as financial services are provided on the basis of private contract, the general rules of the AGG apply. Section 19.1 Nr. 2 AGG extends the prohibition of discrimination to private insurance. The grounds covered are race and ethnic origin, sex, religion, disability, age and sexual identity.

Discrimination on the ground of race or ethnic origin cannot be justified. With regard to unequal treatment on the ground of religion, disability, age or sexual orientation, Section 20.2.2 AGG provides that a difference in treatment on the ground of religion, disability, age or sexual identity is only admissible, if it is based on acknowledged principles of calculations adequate to the risks, especially on actuarial evaluations of risks based on statistical surveys.

### 3.2.9.1 Distinction between goods and services available publicly or privately

In Germany, national law distinguishes 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).

The prohibition of discrimination on the ground of race and ethnic origin extends to all legal transactions available to the public (Section 19.2 AGG). The interpretation of the term "available to the public" is contentious in legal doctrine and not ultimately settled in case law.

Most convincing is an interpretation, in line with EU law on this matter,<sup>271</sup> 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.<sup>272</sup>

The prohibition on the other grounds extends to all legal transactions which are typically concluded in a multitude of cases under comparable conditions without regard to the person, so-called bulk business (*Massengeschäfte*), or to legal transactions where the characteristics of the person have only subordinate importance (Section 19.1 Nr. 1 AGG).

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11.1 Nr. 14 Licensing Law Niedersachsen (Niedersächsisches Gaststättengesetz), of 10.11.2011 (Nds. GVBl. Nr. 27/2011, 415), last amended on 15.12.2015 (Nds. GVBl. Nr. 23/2015, 412) (ethnic origin, religion for "discotheques").

<sup>268</sup> Cf. A. Klose in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 6 para. 177ff.

<sup>269</sup> Cf. Schleswig-Holstein Administrative Court (*Verwaltungsgericht Schleswig-Holstein, VG Schleswig-Holstein*) 27.09.2000, 12 B 81/00: no denial of licence for restaurant on basis of political belief (Neo-Nazi) if no crime committed; for further case law, see A. Klose in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 6 para. 177ff.

<sup>270</sup> Examples from case law are rare and not of recent date: The practice by 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*), 28.05.1999, 14 U 238/98; Land Court Karlsruhe (*Landgericht Karlsruhe*), 11.08.2000, 2 O 243/00: Violation of Section 826 BGB through the exclusion of a gay singing club by an association of such clubs; the termination of a contract with the executive because of ethnic origin is an offence against good morals and consequently null and void, Land Court Frankfurt (*Landgericht Frankfurt, LG Frankfurt*), 07.03.2001, 3-13 O 78/00. Extraordinary termination of contract, Section 626 BGB void if severe disability has not been duly considered, Land Labour Court Brandenburg (*Landesarbeitsgericht Brandenburg, LAG Brandenburg*), 19.02.2003, 7 Sa 385/02.

<sup>271</sup> Cf. M. Mahlmann, in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 3 para. 89.

<sup>272</sup> Cf. Armbrüster, in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 7 para. 75ff; explanatory report, Bundestagsdrucksache 16/1780 p. 32.



The principle of non-discrimination is not supposed to apply in principle (although exceptions are supposed to be possible), if a landlord does not let more than 50 dwellings, as in this case a *Massengeschäft* is not assumed to exist (Section 19.5 sentence 3 AGG). Furthermore, the prohibition of discrimination extends to private insurance (Section 19.1 Nr. 2 AGG).

The prohibition of discrimination does not apply to legal relations of a personal nature or if there is a special relationship of trust between the parties concerned or their relatives (Section 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) aspect of European law. However, as Directive 2000/43/EC (unlike Article 3.1 Directive 2004/113/EC) contains no explicit exception in this respect it is questionable whether the exception in the AGG is in accordance with the legal regime of EU law pertaining to race and ethnic origin, bearing in mind that any intrusion into 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.<sup>273</sup> The regulation of the AGG is thus contrary to EU law.

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

In Germany, national legislation prohibits discrimination in the following areas: housing<sup>274</sup> as formulated in the Racial Equality Directive. As stated above these rules are applicable to non-nationals, including migrants and refugees.

Although the AGG applies to housing, unequal treatment is nevertheless permissible on all grounds if it serves to create and maintain stable social relations regarding inhabitants, and balanced patterns of settlement and economic, social and cultural relations (Section 19.3 AGG). According to the explanatory report, this clause is not to be interpreted as justifying the under-representation of any racial or ethnic minority.<sup>275</sup> This question has practical importance for various groups of residents from migrant backgrounds, given the residential structures in some cities where people from such backgrounds find housing predominantly in some areas, but not others. It is of less relevance for Roma, as comparable housing patterns in their case do not exist. Some measures will be justifiable as positive action insofar as they increase the presence of some minorities. In other cases possible indirect discrimination on grounds of race and ethnic origin because of the application of certain socio-economic parameters might be justified by the objective reason of creating a socially balanced structure of inhabitants, if these measures are proportionate. 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 on the question of whether the interpretation of the clause is limited to this framework.<sup>276</sup>

As mentioned above, the prohibition of discrimination in contract law does not apply to legal relations of a personal nature or if there is a special relationship of trust between the parties concerned or their relatives (Section 19.5 sentence 1 AGG).

In the case of housing this is supposed to be the case if the parties or their relatives live at the same premises (Section 19.5 sentence 2 AGG). This raises the same issues as

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<sup>273</sup> For the reconcilability of Sections 19.5.1 and 19.5.2 AGG with Directive 2000/43/EC, cf. e.g. Armbrüster in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 7 para. 84ff.

<sup>274</sup> Cf. background information: A. Müller, Expertise "Diskriminierung auf dem Wohnungsmarkt". Strategien zum Nachweis rassistischer Benachteiligungen (2015), (Fn. 104).

<sup>275</sup> Bundestagsdrucksache 16/1780 p. 42.

<sup>276</sup> Arguing for permissibility on the ground of a teleological reduction of the regulation of the Directive 2000/43/EC as the prevention of ghettoization is not against the purpose of the Directive, see Armbrüster in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 7 para. 109ff; for the impermissibility of exclusive quotas but the permissibility of supporting quotas implying maximum representation of certain minorities, see Ambrosius in Däubler/Bertzbach, *AGG* § 19 para. 40 et seq.

discussed under 3.2.9, 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). There is no case law clarifying these issues.

As already mentioned before, the principle of non-discrimination is not supposed to apply in principle (although exceptions are supposed to be possible), if a landlord does not let more than 50 dwellings, as in this case a *Massengeschäft* is not assumed to exist (Section 19.5 sentence 3 AGG).

There is a special clause enabling registered partners (*Lebenspartner*) to succeed in rental contracts after their partner's demise.<sup>277</sup>

If a public body provides housing, it is bound by the guarantee of equality. Support for people with disabilities is granted for finding, modifying, equipping and preserving housing adequate for their special needs (Section 55.2 Nr. 5 Social Code IX (SGB IX)). As mentioned above (2.7 a), people with disabilities may be granted social security benefits to help them live independently in sheltered accommodation (Section 55.2 Nr. 6 Social Code IX (SGB IX)).

Further provisions provide for special means to accommodate the needs of older people, including adaptation of housing to their needs (Sections 70 and 71.2 Nr. 2 Social Code XII (SGB XII)).

#### 3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Germany, there are no patterns of housing segregation and discrimination against the Roma, though individual discrimination may occur. There is no case law on this matter, either.

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<sup>277</sup> Section 563.1.2 BGB, mirroring the same right of married couples, Section 563.1 BGB.

## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

In Germany, national legislation provides for an exception for genuine and determining occupational requirements.

Section 8 AGG contains a provision on genuine and determining occupational requirements which closely follows the Directives.

### **4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)**

In Germany, national law provides for an exception for employers with an ethos based on religion or belief.

#### **General framework**

In German law an elaborate system of justifications exists for religious communities – an area of considerable social, cultural and political importance, as the Christian Churches and their dependent organisations are among the biggest employers in Germany.<sup>278</sup> The question of the conformity of the exception in discrimination law cannot be answered without a view on this legal framework. The legal basis for it is 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 Constitutional Court and means that, to a certain degree, religious faiths can play a role in public life, subject to strict equal treatment of all

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<sup>278</sup> Religious communities are understood as associations of at least two people based on a consensus of faith aiming at least partly to manifest this faith.

religions.<sup>279</sup> Article 140 GG incorporates several articles of the Weimar Constitution,<sup>280</sup> 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 GG, 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 abolished any "state church". This entails the separation of the secular and religious spheres and creates a basis for the autonomy of churches and other religious communities.

Article 137.3 of the Weimar Constitution forms the legal basis for this autonomy from the state. A number of landmark decisions by the Federal Constitutional Court have elaborated the nature of this autonomy.<sup>281</sup> The religious community is autonomous in organisation and administration. This is not only limited to the internal organisation of churches but extends to all institutions related to the religious community, regardless of their legal form. The only precondition is a substantial relationship with the religious mission of the religious community. Whether such a relationship exists is not to be determined by state institutions, but most importantly by the courts. It is solely up to the religious community 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 religious mission of the Christian faith. Acts concerning the internal workings of a church are not acts by public authorities

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<sup>279</sup> The head scarf issue is at its core not conceptualised by the Federal 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, BVerfG*), 2 BvR 1436/02 para. 32 et passim. Even the yardstick for the guarantee of equality of Article 33.3 GG is the compatibility of a regulation with freedom of religion, BVerfG, 2 BvR 1436/02, para. 39. However, the Court emphasises that any prohibition of religious symbols must respect the strictly interpreted equality of religions, BVerfG, 2 BvR 1436/02, para. 43, 71. The Federal Administrative Court confirmed this principle of equal treatment in its second head scarf decision, Federal Administrative Court (*Bundesverwaltungsgericht, BVerwG*), 2 C 45/03, 24.6.2004 para. 35. On the general legal framework cf. Kunig and Mager in Mahlmann/Rottleuthner (eds.) (2006), *Ein neuer Kampf der Religionen?*, p. 161ff; p. 185ff. The neutrality of the state as a fundamental principle is also reinforced by the Hesse Civil Service Law (*Hessisches Beamtengesetz, HBG*, latest version of 05.02.2016 (GVBl. 30), entry into force 06.06.2013 (GVBl. 2013, 218), Section 45 (entry into force on 01.03.2014) prohibits the act of wearing symbols that violate the neutrality of the state. (In the earlier version of the Hesse Civil Service Law of 11.01.1989 (GVBl. I, 26), the neutrality of the state was discussed in Section 68.) In this context, the Hesse Land Government prohibited the wearing of the burqa in the public services. The case arose when a public employee announced they would return to work wearing a burqa after a period of leave. The decision was considered unsurprising given the established legal framework in Hesse. There is a broad consensus that the burqa does not constitute suitable dress in the public services, not least because of functional necessities, e.g. in the context of contact with those seeking the public services provided.

The Federal German Constitutional Court ruled that a general ban of such a religious symbol was not reconcilable with the fundamental right to freedom of religion, Art. 4, and the equality guarantee of the Basic Law, Art. 3. Cf. German Federal Constitutional Court – 1 BvR 471/10, 27 January 2015. Cf. Matthias Mahlmann, Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Head Scarf Decision, 16 German Law Journal 2015, 887. The Federal German Constitutional Court confirmed this jurisprudence in a decision on the permissibility of wearing an Islamic headscarf by a kindergarten teacher employed by a public authority, cf. Federal German Constitutional Court, 1 BvR 354/11, 18 October 2016 and below 12. A complaint by a school girl requested dispensation from swimming lessons in a public school because of prescriptions stemming from her Muslim faith to show her body forms to men. Although the school allows for the use of so-called burkinis, this option was not regarded as sufficient by the complainant. The complaint was struck down by the Federal German Constitutional Court. The Court argued, that the complainant did not substantiate the claim that the use of the burkini was not sufficient to abide by religious rules in this respect. A lower Court held that the prohibition to wear a head scarf for a legal trainee in the public justice system is not legal in light of freedom of religion, Augsburg Administrative Court (Verwaltungsgericht Augsburg, VG Augsburg), 30 June 2016, Au 2 K 15.457.

<sup>280</sup> The Constitution of the German Reich (*Die Verfassung des Deutschen Reichs*) of 11.08.1919, usually known as the Weimar Constitution (*Weimarer Verfassung*).

<sup>281</sup> BVerfGE 46, 73 (Application of the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) 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). Cf. Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), 20 October 2014, 2 BvR 661/12 (see case law 12.2 below).

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 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) is not applicable to hospitals as employers if their operation is part of the religious mission of a religious community.<sup>282</sup> The Works Constitution Act contains a general provision in this respect which exempts from its scope all organisations which are of a directly or predominantly religious nature, among others.<sup>283</sup> Another provision in the law directly exempts religious communities.<sup>284</sup>

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

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.<sup>285</sup> If, however, exercise their private autonomy, they are in principle regulated by general labour law.<sup>286</sup>

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.

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.<sup>287</sup>

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

### **The regulation by the General Act on Equal Treatment (AGG)**

Section 9 AGG contains an exception for religion mirroring this general legal framework. A difference in treatment on the grounds of the religion or belief of the employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practise a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, with regard to the ethos of the religious community or

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<sup>282</sup> S. Federal Labour Court (*Bundesarbeitsgericht*), 24.09.2014, 5 AZR 611/12.

<sup>283</sup> Section 118.1 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*). This provision applies if the character of the organisations justifies the exemption.

<sup>284</sup> Section 118.2 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*).

<sup>285</sup> BVerfGE 70, 138, 164.

<sup>286</sup> BVerfGE 70, 138, 164.

<sup>287</sup> BVerfGE 70, 138, 168.

organisation in question and by reason of their right to self-determination or by the nature of the particular activity (Section 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 practise a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation (Section 9.2 AGG).

This general legal regime is, in principle, in accordance with the regime of exceptions in Article 4.2 and (also relevant) Article 4.1<sup>288</sup> of Directive 2000/78. However, there are problems with regard to the details of the regulations. The AGG regulation is problematic in this respect. Section 9.1 AGG refers to the self-understanding or ethos (*Selbstverständnis*) or the nature of the particular activity, whereas the Directive combines *both*. The requirement must be justified through a test of proportionality implied in Article 4.2 Directive 2000/78/EC with regard to *both* the self-understanding *and* the kind of work concerned.<sup>289</sup>

A regulation like Section 9.1 AGG which does not appear necessarily to differentiate between kinds of work therefore does not seem to be in accordance with European Law. It should be noted that the Federal Constitutional Court accepted as constitutional that it is up to religious communities to determine to which kind of work their specific requirements apply, including the possibility that all requirements apply fully to all kinds of work.<sup>290</sup> Section 9.1 AGG refers only to justified (*gerechtfertigt*) not to legitimate and justified requirements, like the Directive, although this might not lead to any difference in judicial interpretation. A preliminary reference of the Federal Labour Court to the CJEU may lead to a clarification of these questions which are of great practical importance.<sup>291</sup>

As in German labour law, people who hold a religious office (e.g. priests) are regularly not regarded as employees and so the AGG does not apply to them. Although professional requirements in this core area of the activities of the religious community will be justifiable under Articles 4.1 and 4.2 Directive 2000/78/EC, the Directive does not contain an exception in this respect.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

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<sup>288</sup> On the complicated and unclear structure of the regime of exceptions on the grounds of religion and belief in Directive 2000/78/EC, cf. M. Mahlmann in B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 3, para. 110ff. Differentiation based on religious motives, e.g. with regard to sexual orientation, must be justified according to Article 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.

<sup>289</sup> BAG, 25.4.2013, 2 AZR 579/12 para. 46 has left it open whether Article 9 AGG is in breach of EU law or not.

<sup>290</sup> Cf. BVerfGE 70, 138, 162ff. It is a matter of debate, whether this regime is in accordance with Directive 2000/78/EC and other regulations of EU Law on the status of religious communities, including the (non-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 Treaty on the functioning of the European Union as amended by the Treaty of Lisbon, cf. for further details Mahlmann, in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 3 para. 110ff. One case, Labour Court Hamburg (*Arbeitsgericht Hamburg, AG Hamburg*), 04.12.2007, 20 Ca 105/07, has modified this approach, differentiating as to the kind of work concerned, concluding that under EU law it is not a justified requirement that for work which 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, LAG Hamburg*) on 29.10.2008, 3 Sa 15/08. The reversal was confirmed by the BAG, 19.08.2010, 8 AZR 466/09.

<sup>291</sup> Federal Labour Court (Bundesarbeitsgericht), 17 March 2016 – 8 AZR 501/14 (A), cf. below 12 (case law section). The case concerns an employer (defendant) who is affiliated with the Protestant Church in Germany and bound by the internal regulations of the Protestant Church in Germany on employment. The defendant had specified a protestant confession as a hiring criterion for a job vacancy for a limited-term contract. An applicant without religious affiliation, who had not been invited for a job interview regarding the advertised vacancy, consequently claimed financial compensation based on a violation of the principle of non-discrimination.

In Germany, there is 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.

For example, courts have ruled that there are special reasons for terminating employment contracts if special duties and obligations of loyalty are violated, e.g. by an employee leaving a Christian church.<sup>292</sup> Another pertinent issue is employees' homosexuality, which is, if openly manifested, interpreted by some religious organisations as a breach of such duties of loyalty. There is contesting case law on this matter. There is no recent case law clarifying these questions, not the least because the mayor Christian Churches have liberalised their internal rules and practice in this respect.<sup>293</sup> Given what has been said above, a practice that does not differentiate between spheres of work, raises issues of proper implementation.

- Religious institutions affecting employment in state funded entities

In Germany, religious institutions are permitted to 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.

According to Article 7.3 sentence 2 GG, religious instruction in state schools is, with the exception of non-denominational schools, organised in harmony with the principles of religious communities. This creates no directional authority 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 regarding Chairs in Theology in state universities. Apart from this, 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) for the appointment of chairs of subjects other than theology (philosophy, history, pedagogy). In practice, these chairs are not necessarily limited to Catholic applicants, as a Protestant applicant has been appointed to one of these chairs with the consent of the Catholic Church.<sup>294</sup> The Catholic Church enjoys a veto in relation to the appointment but not the exercise of the professorship (e.g. the actual teaching content), which has no "missio canonica". In 1980, the Constitutional Court of Bavaria 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 achieve the educational goals (*Bildungsziele*) in state schools laid down in Section 131 and 135 of the Bavarian Constitution (among others the reverence for God, respect for religious convictions and human dignity, as well as an education according to the principles of the Christian faith).

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<sup>292</sup> Cf. e.g. Rhineland-Palatinate Land Labour Court (*Landesarbeitsgericht Rheinland-Pfalz, LAG Rheinland-Pfalz*), 02.07.2008, 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 (parties settled at next instance, BAG, 21.12.2010, 2 AZR 516/09); BAG, 25.4.2013, 2 AZR 579/12 confirming that leaving a Church forms a sufficient reason for the dismissal of an educational social worker, employed for social work without religious content with children in a state-financed institution run by a Catholic charity.

<sup>293</sup> On this matter, with reference to some case law, see Wedde in: Däubler/Bertzbach, AGG § 9 para. 58. Cf. Land Labour Court Baden-Württemberg, 24 June 1993, 11 Sa 39/93, NZA 1994, 416 (homosexuality not sufficient reason for refusal to admit applicant for education as carer for disabled persons); Labour Court Stuttgart, 28 April 2010, 14 Ca 1585/09, NJOZ 2011, 1309 (registered partnership justified reason not to employ applicant as head of catholic Kindergarten).

<sup>294</sup> Cf. Tagesspiegel, 15.05.2012.

The Court held that, in order to be able to educate according to the principles of the Christian faith, it is necessary to provide corresponding course options at university level for future teachers.<sup>295</sup>

However, the question of the legitimacy of these chairs continues to be highly contentious. While proponents mainly follow the reasoning of the Bavarian Constitutional Court, arguing that as long as there is a need for teachers able to teach in accordance with the principles of the Christian faith these agreements are legitimate,<sup>296</sup> opponents criticise breaches of the constitutional principles of neutrality and separation of church and state, the constitutional guarantee of equal access to public employment irrespective of religious faith and the constitutional freedom of sciences, as well as of Directive 2000/78/EC and of the AGG.<sup>297</sup>

In a relevant case, the actions of several applicants for an appointment to a professorship of philosophy for which the Catholic Church exercises a veto right, were dismissed on the basis of procedural issues. The Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgeschichtshof*) stated, in addition, that given the non-discriminatory practice of the university not considering the religion of the applicants, no unequal treatment had been substantiated by the applicant.<sup>298</sup> In 2012 Catholic bishops announced they would waive their right to give their consent to the appointment of candidates.

The Protestant church has concluded agreements with Bavaria that the Land must take into account the needs of theology students when appointing chairs of church law at two of its universities.<sup>299</sup>

#### **4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)**

In Germany, national legislation provides for an exception for the armed forces in relation to age and disability discrimination (Article 3(4), Directive 2000/78).

The Soldiers General Act on Equal Treatment (*Soldatinnen- und Soldaten-Gleichbehandlungsgesetz, SoldGG*) covers all grounds with the exception of age and disability, taking advantage of the exception for military service in Article 3.4 Directive 2000/78.

However, Section 18.1 SoldGG provides for a prohibition of discrimination for severely disabled soldiers provided that physical function, intellectual ability or mental health is not a genuine and determining occupational requirement for the military service. Section 18.2 SoldGG provides for compensation for a violation of this prohibition. It is unclear whether drafted persons or volunteers are covered by this prohibition.<sup>300</sup>

In addition, in the Soldiers Act (*Soldatengesetz, SG*),<sup>301</sup> there is a legal prohibition of discrimination against soldiers on the grounds of sexual identity, parentage, race, faith,

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<sup>295</sup> Constitutional Court of Bavaria (Bayerischer Verfassungsgerichtshof, BayVerfGH), BayVerfGHE 33, p. 65 et seq.

<sup>296</sup> E.g. von Campenhausen, in Mangoldt/Klein/Starck, GG (6th ed. 2010), Article 136 WRV, para. 25 et seq. for philosophy and pedagogy but not history; Ehlers, in Sachs, 7<sup>th</sup> ed. 2014, GG, Article 140, 136, para. 3, both with further references to the extensive discussion.

<sup>297</sup> Jeand'Heur/Korioth (2000), *Grundzüge des Staatskirchenrechts*, para. 338ff; Morlok, in Dreier, GG, Article 140/136 WRV para. 18; Czermak (2008), *Religions- und Weltanschauungsrecht* (para. 406 both with further references.

<sup>298</sup> Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgeschichtshof, BayVerwGH*), 30.4.2009, 7 CE 09.661, 7 CE 09.662.

<sup>299</sup> Law on the concordat with the Holy See and the contracts with the Evangelical Churches (*Gesetz zu dem Konkordate mit dem Heiligen Stuhle und den Verträgen mit den Evangelischen Kirchen*), 15.01.1925, GVBl. 22.01.1925, p. 53.

<sup>300</sup> It should be noted that the compulsory military service is suspended since 2011.

<sup>301</sup> Soldiers Act (*Gesetz über die Rechtsstellung der Soldaten, SG*) of 30.05.2005 (BGBl. I, 1482), last amended



belief, religious or political opinion or ethnic origin, amongst others.<sup>302</sup> It should be noted, that the constitutional equality clause, Art. 3.3. Basic Law, applies as well.

According to social law, the legal status of severely disabled soldiers is, with regard to certain legal provisions, the same as for other severely disabled people. The provisions for severely disabled people are applied insofar as they are compatible with the special requirements of military service.<sup>303</sup>

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

In Germany, national law includes exceptions relating to difference of treatment based on nationality.

In German law, as in other legal systems, there is a differentiated system for the treatment of non-German nationals. On the most fundamental level, the status of non-nationals is protected by fundamental rights in the German constitution which are human rights and therefore applicable to every human being in their relations with the German state authorities. Most important here is the guarantee of human dignity.<sup>304</sup> Only German nationals are entitled to a number of other fundamental rights, although special laws may grant the same rights to non-German citizens as well.<sup>305</sup>

Citizens of EU Member States are treated in the same way as Germans in most respects, due to EU law. Within this framework, German law differentiates between Germans and non-Germans in various legal spheres, such as residence rights, work permits and some social security rights.<sup>306</sup>

Some professions are open only to German nationals and specified groups of non-Germans, such as EU citizens and stateless people.<sup>307</sup> Nationality discrimination, including the example cited, can however be judged unlawful, if it is not justifiable under the general guarantee of equality.

In Germany, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

There are prohibitions of discrimination which list nationality as a proscribed ground, e.g. Section 75.1 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*). In other spheres

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on 19.10.2016 (BGBl. I, 2362).

<sup>302</sup> Section 3.1 Soldiers Act (*Soldatengesetz, SG*): '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 amended on 19.10.2016 (BGBl. I, 2362). There is very limited case law on the matter. For some examples cf. Klose, in: Däubler/Bertzach, § 24 para 91ff.

<sup>303</sup> Section 128.4 SGB IX.

<sup>304</sup> Article 1 GG.

<sup>305</sup> As, for example, in the case of freedom of assembly, see Section 1 Law on Assembly (*Versammlungsgesetz, VersammIG*, of 15.11.1978 (BGBl. I, 1789)). Last amended on 08.12.2008 (BGBl. I, 2366).

<sup>306</sup> Some examples: The federal scheme to support educational costs through grants is not only open to German nationals, but also to non-Germans of various legal statuses, as well as individuals entitled to asylum, refugees, long-term legal residents and people with exceptional leave to remain, see Section 8.1 Nr. 2 – Nr. 7; 8.2 Federal Law on Promotion of Education (*Bundesausbildungsförderungsgesetz, BaföG*, of 07.12.2010 (BGBl. I, 1952; 2012 I, 197), last amended on 22.12.2015 (BGBl. I, 2557)). See also Section 63.1 and 63.2 SGB III.

<sup>307</sup> See Section 2.1 Nr. 1 Law on Pharmacies (*Apothekengesetz, ApoG*, of 15.10.1980 (BGBl. I, 1993)), last amended on 18.04.2016 (BGBl. I, 886). A similar regulation also existed until recently for medical professions, Former Section 3.1 Nr. 1 Federal Medical Regulation (*Bundesärzteordnung, BÄO*, of 16.04.1987 (BGBl. I, 1218), last amended on 18.04.2016 (BGBl. I, 886)) admission to medical practice only for German citizens, according to Article 116 GG, citizens of EU Member States, contractual parties to the Treaty on the European Economic Area, other contractual partners in this respect or stateless people.

of law, unequal treatment on the basis of nationality can be considered a breach of the general provisions of private law.

b) Relationship between nationality and 'race or ethnic origin'

Under the AGG, discrimination on the ground of nationality is generally regarded as possible indirect discrimination on the basis of race or ethnic origin and, as such, is prohibited.

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

a) Benefits for married employees

In Germany, it would under conditions constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married.

Due to the principle of freedom of collective bargaining,<sup>308</sup> contracting partners are free to include provisions based on marriage in collective agreements.

However, there must be a connection to professional tasks or working conditions.<sup>309</sup> Marriage in this context can only refer to family status, not to its reproductive function.

The family status of registered life partnerships (*eingetragene Lebenspartnerschaft*) is not covered by the law on the remuneration of civil servants.<sup>310</sup> The case law in the past was rather restrictive. Because of the ECJ Tadao Maruko decision, differential treatment of spouses and life partners within the scope of Directive 2000/78/EC must be considered as violating EU law.<sup>311</sup> Accordingly, the Federal Constitutional Court has clarified, as mentioned above, that same-sex life partners and spouses must be treated equally.<sup>312</sup> Meanwhile, the Federal Labour Court and other courts have adapted their jurisprudence to follow this interpretation.

b) Benefits for employees with opposite-sex partners

In Germany, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners.

Such limitation could form discrimination, though there is no case law on that matter.

#### **4.6 Health and safety (Article 7(2) Directive 2000/78)**

In Germany, there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78).

a) Exceptions in relation to disability and health/safety

Section 20 AGG describes permissible differences in treatment on grounds of disability when they are based on objective grounds. Specifically, such differences in treatment in relation to disability and health and safety are considered permissible under the provision when they serve the avoidance of threats, the prevention of damage or another purpose of a comparable nature (Section 20.1 Nr. 1) or when they satisfy the requirement of protection of personal safety (Section 20.1 Nr. 2).

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<sup>308</sup> Article 9.3 GG.

<sup>309</sup> BAG, 29.04.2004, Az: 6 AZR 101/03.

<sup>310</sup> Section 40 Civil Servants Remuneration Act (*Bundesbesoldungsgesetz, BBesG*, of 19.06.2009 (BGBl. I, 1434)). Last amended on 21.11.2016 (BGBl. I, 2570).

<sup>311</sup> ECJ, 01.04.2008, C-267/06, Tadao Maruko (for case law on this matter cf. above, 2.3.c); 3.2.7).

<sup>312</sup> BVerfG, 07.07.2009, 1 BvR 1164/07.

Exceptions in employment would have to be in accordance with Section 8 AGG on genuine and determining occupational requirements.

For disability, the duty of reasonable accommodation must be considered in this respect.

#### **4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

In Germany, national law provides an exception for direct discrimination on age.

Section 10 AGG contains a detailed provision to justify direct discrimination on the ground of age.

##### **a) Justification of direct discrimination on the ground of age**

In Germany, it is possible, generally, and in specified circumstances, to justify direct discrimination on the ground of age.

Section 10 AGG implies a test of proportionality which is at the core of the Mangold-jurisprudence.<sup>313</sup>

The regulations in Section 10 Nr. 1-4 AGG follow the regulations of the Directives. Section 10 Nos. 5 and 6 AGG cover additional (exemplary) grounds.<sup>314</sup> Section 10 Nr. 6 seems to be justifiable in the light of Article 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.<sup>315</sup> For Section 10 No. 5 on retirement ages, see below 4.7.4. Before the ECJ Age Concern decision,<sup>316</sup> and later clarifications by the CJEU on aims of social policy as a precondition for the application of Article 6 of the Directive,<sup>317</sup> objective reasons were taken not to be limited to those contained in legislation or which are in the public interest. Entrepreneurial interests were regarded as being legitimate as well.<sup>318</sup> It has to be seen how this jurisprudence is adapted given the CJEU case law. The various questions raised by this jurisprudence have not been clarified as of yet by the courts.

According to the equality guarantee, any different treatment on the ground of age as a personal unchangeable characteristic through legislation or other acts of the public authorities falls in principle under a strict scrutiny of proportionality. This matches the Mangold test,<sup>319</sup> which is a test of proportionality, like other existing case law.

##### **b) Permitted differences of treatment based on age**

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<sup>313</sup> ECJ, 22.11.2005, C-144/04 (Mangold).

<sup>314</sup> The provisions name as examples:

- an agreement that provides for the termination of an employment relationship without dismissal at the time when the employee is entitled to apply for pension on the ground of age, notwithstanding the regulations in Section 41 SGB VI (Section 10 Nr. 5 AGG).
- differentiations between the social benefits within the meaning of the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), where the parties have created a regulation governing compensation based on age or length of service whereby the employee's chances on the labour market (which are decisively dependent on his or her age) have recognisably been taken into consideration by means of emphasising age relatively strongly, or employees who are economically secure are excluded from social benefits because they may be eligible to draw an old-age pension after drawing unemployment benefit (Section 10 Nr. 6 AGG).

<sup>315</sup> The issue is contentious in legal theory, for discussion cf. Brors in: Däubler/Bertzbach, *AGG*, § 10 para. 129ff; Voggenreiter in: B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 8 para. 46 (both: admissible).

<sup>316</sup> ECJ, 05.03.2009, C-388/07, (Age Concern England).

<sup>317</sup> Cf. e.g. ECJ, 13.09.2011, C-447/09 (Prigge).

<sup>318</sup> BAG, 22.01.2009, 8 AzR 906/07.

<sup>319</sup> ECJ, 22.11.2005, C-144/04 (Mangold).

In Germany, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

As explained, this possibility exists (Section 10 AGG), implementing the framework of Directive 2000/78/EC (Article 6) and its judicial interpretation.

- c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Germany, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6 (2).

The regulation in Section 10.4 AGG provides for this possibility.

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

In Germany, there are special conditions set by law for older and younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

There are various measures which aim to integrate older and younger workers.<sup>320</sup> There are provisions protecting people with caring responsibilities, e.g. parents, and, in addition, Section 10 Nr. 1 AGG provides for the possibility for the preferential treatment of these people.

#### **4.7.3 Minimum and maximum age requirements**

In Germany, there are exceptions permitting minimum and 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.<sup>321</sup>

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<sup>320</sup> The provisions under scrutiny in the Mangold case (see FN 300) 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*, *TzBfG*) of 21.12.2000 (BGBl. I, 1966), last amended 20.12.2011 (BGBl. I, 2854).

<sup>321</sup> Examples include: Federal President: minimum: 40 years, no maximum entry age, Article 54.1 GG. Judges, maximum: - varying Land laws exist, in Bayern e.g. 45 years (Section 23 Civil Service Law Bayern (*Beamtengesetz Bayern*, *BayBG*), last amended on 13.12.2016 (GVBl. 354)). Federal Judges, minimum: 35 (Section 125.2 Court Constitution Act (*Gerichtsverfassungsgesetz*, *GVG*), last amended on 22.12.2016 (BGBl. I, 3150)). Federal Constitutional Judges, minimum 40: (Section 3.1 Federal Constitutional Court Law (*Bundesverfassungsgerichtsgesetz*, *BverfGG*, of 11.08.1993 (BGBl. I, 147)), last amended on 31.08.2015 (BGBl. I, 1474)). Federal civil servants: age requirement can be waived for official purposes, application for service training (*Vorbereitungsdienst*) in criminal investigation department, maximum: 33 years (Section 5.2 Regulation on Service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung*, *KrimLV*) of 18.09.2009 (BGBl. I, 3042)). It is notable that the former general maximum age requirement of 32 years for applications for public service training (*Beamtenausbildung*), former Section 14.2 Regulation on Careers in Public Service (*Bundeslaufbahnverordnung*, *BLV*, of 12.02.2009 (BGBl. I, 284)), was abrogated in 2009, last amended on 19.10.2016 (BGBl. I, 2362). Promotion to a higher service level (*Aufstieg in eine höhere Laufbahn*) for public employees, maximum: 57 years (Section 36.2 Regulation on Careers in Public Service (*Bundeslaufbahnverordnung*, *BLV*)). Federal Criminal Police Officers: maximum 52 years (Section 10 Regulation on Service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung*, *KrimLV*). Executive police service (*Polizeivollzug*), maximum: 62 years (Section 5.1 Federal Executive Police Service Law (*Bundespolizeibeamtenengesetz*, *BpolBG*, of 03.06.1976 (BGBl. I, 1357)), last amended on 19.10.2016 (BGBl. I, 2362). Universal compulsory military service (*Wehrpflicht*), minimum: 17 (Section 3.2 Law on Universal Compulsory Military Service (*Wehrpflichtgesetz*, *WpflG*) of 15.08.2011 (BGBl. I, 1730), last amended on 03.05.2013 (BGBl. I, 1084)), maximum: between 22 and 31 years (Section 5.1 Law on Universal Compulsory Military Service (*Wehrpflichtgesetz*, *WpflG*). Military Service, common maximum: 62 years, maximum corresponding to the military rank: 40 to 65 years (Section 45 Soldier's Law (*Soldatengesetz*, *SG*), last amended on 19.10.2016 (BGBl. I, 2362)). Aircraft personnel, maximum: 60 years (Section 41.1

For example, Section 5 of the Federal Police Career Structures Regulation (*Bundespolizei-Laufbahnverordnung, BpolLV*)<sup>322</sup> contains specific provisions for enforcement officers. The concrete physical demands of police officers require the establishment of separate conditions of access to the police force than those for civil servants in general. The minimum age for commencing training for the Federal police service is 16 and the maximum age is 28 (up to 28<sup>th</sup> birthday). Individuals eligible for training for the intermediate or higher police service in the Federal police must be under the age of 34. This maximum age limit can be adjusted up to a maximum of three years per child or per person being cared for after considering factors such as statutory maternity leave, childcare and the care of close relatives. However, in such cases the applicants should be under the age of 36 (middle grade of civil service) or 42 (higher intermediate and higher civil service).<sup>323</sup>

Exempted from this regulation are holders of certificates of inclusion and acceptance, in accordance with Section 9 Military Pensions Act (*Soldatenversorgungsgesetz, SVG*),<sup>324</sup> as well as participants in inclusion measures under Section 7. 2 of the Military Pensions Act (SVG). The Federal Police Board has the authority to make an exception in specific cases.

#### 4.7.4 Retirement

##### a) State pension age

In Germany, there is no state pension age, at which individuals must begin to collect their state pensions.

If an individual wishes to work longer, the pension can be deferred. An individual can collect a pension and still work.

The labour law part of the so-called "Flexi-Pension" (*Flexi-Rente*) has been implemented as a result of the Pension-Performance Improvement Act (*RV-Leistungsverbesserungsgesetz*).<sup>325</sup> The legal regulation in Section 41.3 Social Code VI (SGB VI) enables employers and employees to defer the termination date of employment and the beginning of state

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sentence 2 Service Regulations on the Operation of Aircraft (*Betriebsordnung für Luftfahrtgerät, LuftBO*), of 04.03.1970 (BGBl. I, 262)), last amended on 31.08.2015 (BGBl. I, 1474). Midwives, maximum: 70 years (Section 29 Law on Midwives (*Hebammengesetz, HebG*), of 04.06.1985 (BGBl. I, 902)), last amended on 23.12.2016 (BGBl. I, 3191 (Nr. 65)). The minimum requirement of 17 years (former Section 7) was abrogated in 2008 (cf. amending law, 30.9.2008 BGBl. I 2008, 1910). The former Section 9 Law on Chimney Sweeps (*Schornsteinfegergesetz, SchfG*), of 10.08.1998 (BGBl. I, 2071), last amended on 03.04.2009 (BGBl. I, 700) which set the maximum age for chimney sweeps to 65 years ceased to be in effect on 01.01.2013 and was replaced by the *Schornsteinfeger-Handwerksgesetz, SchfHWG* of 26.11.2008 (BGBl. I, 2242), last amended on 31.08.2015 (BGBl. I, 1474) where in Section 12.1.3 the maximum age is increased to 67 years. Educational funding (*Ausbildungsförderung*), maximum: 29 years (34 years for master's degree programmes) (Section 10.3 Law on Federal Educational Support (*Bundesausbildungsförderungsgesetz, BaföG*), last amended on 22.12.2015 (BGBl. I, 2557)). Federal Ombudsman on Data Protection: minimum 35 years (Section 22.1 Federal Law on Data Protection (*Bundesdatenschutzgesetz, BDSG*), last amended on 25.2.2015 (BGBl. I, 162)). Notaries, maximum entry age: 60 (Section 6.1), maximum age: 70 years (Section 48a Federal Notary Act (*Bundesnotarordnung, BNotO*), last amended on 23.11.2015 (BGBl. I, 2090)). Bailiffs, varying Land laws, e.g. North-Rhine Westphalia, maximum: 40 – entry age for 20-month training period, minimum: 23 (Section 2.1 Nr. 3 Ordinance on Bailiffs North-Rhine Westphalia (*Verordnung über die Ausbildung und Prüfung für die Laufbahn des Gerichtsvollzieherdienstes des Landes Nordrhein-Westfalen, NRWGerVollzDAPO*), last amended on 02.06.2015 (GV. NRW. 484)). Prosecutors, varying Land laws, e.g. in Bavaria maximum: 45 with the possibility of exceptions (Section 23 Civil Service Law Bavaria (*Beamtengesetz Bayern, BayBG*), last amended on 13.12.2016 (GVBl. 354)).

<sup>322</sup> Federal Police Career Structures Regulation (*Bundespolizeilaufbahnverordnung, BpolLV*) of 12.02.2009 (BGBl. I, 284), last amended on 15.10.2014 (BGBl. I, 1626).

<sup>323</sup> Such a provision seems to be in line with the case law of the CJEU on this matter, cf. e.g. CJEU, C-229/08 (*Wolf*), 12. January 2010; CJEU, C-416/13 (*Vital Pérez*), 13. November 2014; CJEU, C-258/15 (*Salaberria Sorondo*), 15. November 2016.

<sup>324</sup> Military Pensions Act (*Soldatenversorgungsgesetz, SVG*) of 16.09.2009 (BGBl. I, 3054), last amended on 19.10.2016 (BGBl. I, 2362).

<sup>325</sup> Pension-Performance Improvement Act (*RV-Leistungsverbesserungsgesetz*) adopted on 23.06.2014, BGBl. I 2014, 787.

pension by mutual agreement. During such an employment relationship it is possible to defer state pension for several times. If a state pension is deferred after reaching state pension age, the subsequent pension increases per deferred month.<sup>326</sup>

After a reform in 2008, the normal state pension age for both women and men is 67 (instead of 65).<sup>327</sup> However, the new threshold applies fully only to those who were born in 1964 or later. The state pension age for age cohorts from 1947 to 1963 will be raised 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.

There is no restriction on individuals working while receiving a normal state pension after the age of 67. However, there is a limit on how much money may be earned if an individual is receiving a pension before this age.<sup>328</sup>

#### b) Occupational pension schemes

In Germany, there is a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.<sup>329</sup> If an individual wishes to work longer, payments from such occupational pension scheme can be deferred. An individual can collect a pension and still work.

Usually such payments start at the same time as state pensions.<sup>330</sup> It was ruled to be constitutional to regulate occupational pension schemes according to the state pension regulation. Furthermore, the Federal Labour Court ruled that if an employer promises an employee a total pension provision (*Gesamtversorgung*) it is regularly to be assumed that the employee can only claim the occupational pension if he receives, at the same time, a pension from the state pension system.<sup>331</sup>

#### c) State imposed mandatory retirement ages

In Germany, there is no state-imposed mandatory retirement age.

There is no general state-imposed mandatory retirement age, but there are various special regulations for particular professions.<sup>332</sup>

#### d) Retirement ages imposed by employers

In Germany, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and collective bargaining.

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, with exceptions for fixed term contracts for employees above the age of 52.<sup>333</sup>

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<sup>326</sup> Section 77.3 sentence 3, Nr. 3 SGB VI.

<sup>327</sup> Section 35 SGB VI.

<sup>328</sup> Section 34.2 SGB VI.

<sup>329</sup> The legal entitlement of employees to an occupational pension by converting an amount of their salary is compatible with the Constitution, BAG 12.06.2007, Az.: 3 AZR 14/06.

<sup>330</sup> See Sections 2 and 6 Law on Work Pensions (*Betriebsrentengesetz, BetrAVG*), last amended on 21.12.2015 (BGBl. I, 2553) and on the correlation between state pension and occupational pension the decision of the BAG, 15.05.2012, Az.: 3 AZR 11/10).

<sup>331</sup> BAG, 13.01.2015, Az.: 3 AZR 894/12. See for the prohibition of discriminatory age limits for entering a company's occupational pension scheme, BAG, 18.03.2014, 3 AZR 69/12.

<sup>332</sup> See above 4.7.3.

<sup>333</sup> See Section 14.1 Law on Part-time Work and Fixed Term Contracts (*Teilzeit- und Befristungsgesetz, TzBfG*) last amended on 20.12.2011 (BGBl. I, 2854). No such objective reason is needed if the employee is older than 52 (Section 14.3 Law on Part-time Work and Fixed Term Contracts (*Teilzeit- und Befristungsgesetz, TzBfG*)), though there are some qualifications.

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.<sup>334</sup>

e) Employment rights applicable to all workers irrespective of age

The laws on protection against dismissal apply in principle to all ages, though exceptions exist, see above 4.7.1 a). The right to a state pension does not constitute a reason for dismissal by the employer.<sup>335</sup> 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.<sup>336</sup> However, the entitlement to state pension, and therefore the age of an employee, can count as a consideration within social choice (*Sozialauswahl*) facilitating privileged dismissal.

The interest of the employer in maintaining an age balance among employees was also held to be reasonable.<sup>337</sup> The regulation in this respect can be interpreted in accordance with EU law as a concretisation of the general clause of Article 6 Directive 2000/78/EC, as long as there is no schematic preferential treatment of age groups.<sup>338</sup> On the regulations of the AGG, see 4.7.2.

f) Compliance of national law with CJEU case law

In Germany, national legislation is in line with the CJEU case law on age regarding compulsory retirement.

As mentioned above, there is a plethora of regulations on age limits. In recent years there have been major adoptions of such regulations on age limits, not least in the laws regulating public service which are now in line with the jurisprudence of the CJEU, although details and concrete age limits may be open for debate. (c.f. e.g. above 4.7.3) The courts follow the standards set out by the CJEU as well.

#### 4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Germany, national law permits age or seniority to be taken into account in selecting workers for redundancy.

The laws on protection against dismissal apply in principle to all ages, though exceptions exist. The right to a state pension does not constitute a reason for dismissal by the employer.<sup>339</sup> 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.<sup>340</sup> However, the entitlement to state

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<sup>334</sup> 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-Glöße, *Erfurter Kommentar zum Arbeitsrecht*, 16<sup>th</sup> ed. (2016), § 14 TzBfG para. 56ff; BAG, 20.10.1993, Az.: 7 AZR 135/93; BAG, 01.12.1993, 7 AZR 428/93; BAG, 19.11.2003, 7 AZR 296/03; before that age, special requirements can justify early retirement.

<sup>335</sup> Section 41 SGB VI.

<sup>336</sup> See Section 1.3 sentence 1 Law on Protection against Dismissal (*Kündigungsschutzgesetz, KschG*, of 25.08.1969 (BGBl. I, 1317), last amended on 20.04.2013 (BGBl. I, 868)). In case of dismissal due to urgent entrepreneurial reasons, the dismissal is, among other reasons, not justified if the employer does not take or does not take sufficient account of the age of the individual concerned.

<sup>337</sup> BAG, 23.11.2000, Az.: 2 AZR 533/99: employee working in a kindergarten.

<sup>338</sup> Cf. Brors, Däubler/Bertzbach, *AGG* (2013), § 10 para. 100.

<sup>339</sup> Section 41 SGB VI.

<sup>340</sup> See Section 1.3 sentence 1 Law on Protection against Dismissal (*Kündigungsschutzgesetz, KschG*, of 25.08.1969 (BGBl. I, 1317), last amended on 20.04.2013 (BGBl. I, 868)). In case of dismissal due to urgent entrepreneurial reasons, the dismissal is, among other reasons, not justified if the employer does not take or does not take sufficient account of the age of the individual concerned.

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 to pension, age might have a similar effect within selection procedures for redundancy, although there is conflicting case law.<sup>341</sup>

The interest of the employer in maintaining an age balance among employees was also held to be reasonable in this context.<sup>342</sup> The regulation in this respect can be interpreted in accordance with EU law as a concretisation of the general clause of Article 6 Directive 2000/78/EC, as long as there is no schematic preferential treatment of age groups.<sup>343</sup>

b) Age taken into account for redundancy compensation

In Germany, national law provides compensation for redundancy.

Age can play a role in redundancy compensation plans which are contractual agreements between unions and employers.

**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)**

In Germany, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality 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**

In Germany, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

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<sup>341</sup> See Land Labour Court, Lower Saxony (*Landesarbeitsgericht Niedersachsen, LAG Niedersachsen*), 28.05.2004, Az.: 10 Sa 2180/03, arguing that a guideline according to which employees over the age of 55 can be more easily dismissed is not in violation of 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, LAG Düsseldorf*) 21.01.2004, Az.: 12 Sa 1188/03: proximity to pension age is no reason for choosing older employees for dismissal. This holds true even for small businesses, Federal Labour Court (BAG) 23.07.2015, Az.: 6 AZR 457/14, see case law section.

<sup>342</sup> BAG, 23.11.2000, Az.: 2 AZR 533/99: employee working in a kindergarten.

<sup>343</sup> Cf. Brors, Däubler/Bertzach, AGG (2013), § 10 para. 100.



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

### a) Scope for positive action measures

In Germany, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is permitted in national law.

Section 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, must be reconcilable with the constitutional guarantee of equality.<sup>344</sup> Explicit regulations make permissible positive action promoting the equality of men and women and disabled people.<sup>345</sup> 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).<sup>346</sup> This has not been authoritatively clarified by the Federal Constitutional Court. Positive action in the form of preferential employment is legally regulated in accordance with the relevant CJEU case law,<sup>347</sup> which permits such treatment in principle, as long as the schemes allow for individual cases to be assessed.<sup>348</sup>

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.

### b) Main positive action measures in place on national level

There are various special regulations on positive action.

## Broad policy measures

There are provisions on positive action, including institutional arrangements, for indigenous minorities, the promotion of their language, the protection of their territory, etc., preferential rules for political representation and so on,<sup>349</sup> constitutionally buttressed by

<sup>344</sup> Article 3, 33.2 and 33.3 GG.

<sup>345</sup> Article 3.2 sentence 2, Article 3.3 sentence 2 GG. On Land constitutions see Footnote 36. The disability law provides for the explicit admissibility of positive action, see Section 7.1 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*).

<sup>346</sup> See: Osterloh in: Sachs, 7<sup>th</sup> ed. (2014), GG, Article 3 para. 241 et seq., 254.

<sup>347</sup> See ECJ, ECR 1995, I-3069, Kalanke, ECJ, ECR I-6363, *Marschall*, ECJ, ECR 2000, I-5539 *Abrahamsson*, cf. Mahlmann, in B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 3 para. 70.

<sup>348</sup> Compare for such legislation e.g. Section 9, sentence 3 Federal Civil Service Law (*Bundesbeamtengesetz, BBG*).

<sup>349</sup> See on the regulations of the Land constitutions, above Footnote 36; 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, Sorben [Wenden]- Gesetz, SWG*) 7.7.1994, GVBl. 1994, 294; Brandenburg / Saxony: State Agreement on the Establishment of a 'Foundation for the Sorbian People' (*Gesetz zum Staatsvertrag über die Errichtung der "Stiftung für das sorbische Volk", SorbVoStiftStVG*), of 09.12.1998, Sächs. GVBl. 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, SächsSorbG*), of 31.03.1999, Sächs. GVBl. 1999, 161; Schleswig-Holstein: Law on the Promotion of Frisian in the Public Sphere (*Gesetz zur Förderung des Friesischen im öffentlichen Raum, FriesischG*), of 13.12.2004, GVBl. 2004, 481; Schleswig-Holstein: Schleswig-Holstein School Law (*Schleswig-Holsteinisches Schulgesetz, Schleswig-Holstein SchulG*), GVBl. 1990, 451, last amended on 16.12.2015 (GVBl. 500); Law on the Legal Status and Financing of Parliamentary Groups in the Schleswig-Holstein Parliament (*Gesetz zur Rechtsstellung und Finanzierung der Fraktionen im Schleswig-Holsteinischen Landtag, FraktionsG*), of 18.12.1994, GVBl. 1995, 4, last amended on 26.5.1999, GVBl. 134; Electoral Law for the Schleswig-Holstein Parliament (*Wahlgesetz für den Landtag Schleswig-Holstein, Schleswig-Holstein LWahlG*), of 07.10.1991, GVBl. 1991, 442, last amended on 14.12.2016 (GVBl. 999).

basic policy clauses of the Länder constitutions.<sup>350</sup> There are many initiatives for the integration of migrants that offer support in various sphere of life tailored to the needs of migrants with the aim to foster equal standing in society – from after school tuition to sport.<sup>351</sup>

Section 71.1, in conjunction with Section 73 Social Code IX (SGB IX) establishes the duty of any employer with more than 20 employees to employ at least 5% severely disabled people. 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 above, it does not mean that discrimination has occurred in a specific case.<sup>352</sup>

### **Preferential treatment narrowly tailored**

Work Councils and the staff councils of public authorities have the competence to promote the integration of disabled people, older and foreign workers and to initiate measures against racism and xenophobia.<sup>353</sup>

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,<sup>354</sup> and also gives financial assistance to the employer for costs such as training and education, equipment and costs relating to integration.<sup>355</sup> A disabled person can claim preferential treatment regarding promotion and training. The employer is under a duty to check if qualified people with disabilities are available for posts which are vacant.<sup>356</sup> They are 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.<sup>357</sup> Furthermore there is a duty to conclude integration agreements,<sup>358</sup> which are concrete, binding legal provisions. There exists a right to such agreements, but the law does not offer a mechanism to resolve conflicts in cases where no agreement is reached.<sup>359</sup> There is an obligation to create a representative body for severely disabled people if there are at least five severely disabled workers.<sup>360</sup> Severe disability must be taken into account within social choice (*Sozialauswahl*) in case of dismissals (*betriebsbedingte Kündigungen*).<sup>361</sup> There is a special procedure involving the public authorities in the case of an ordinary dismissal of a disabled person.<sup>362</sup> The employer is under an obligation to cooperate with

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<sup>350</sup> See Footnote 36. Brandenburg: 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*, SWG (GVBl 1994, 294)): Section 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*).

<sup>351</sup> Cf. Federal Office for Migration and Refugees, <http://www.bamf.de/EN/Willkommen/Integrationsprojekte/integrationsprojekte-node.html>.

<sup>352</sup> The general employment quota applies to all employers with an average of 20 employees or more, Section 71, 73 SGB IX. There are modifications for smaller companies. If the quota is not met, penalties/payments up to EUR 290 for every disabled person who should have been employed are possible, SGB IX, Section 77. In 2008 846,166 severely disabled people were employed in this framework according to the Federal Employment Agency (*Bundesagentur für Arbeit*), in 2013 987,000. In 2005 the equalisation levy paid amounted to € 490 million, in 2014 it amounted to € 543 million.

<sup>353</sup> Section 80.1 Nr. 4 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*): integration of severely disabled people, Nr. 6: integration of older employees, Nr. 7: integration of foreign workers, initiating measures against racism and xenophobia, and see Section 68 Nrs. 4, 5, 6 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz, BPersVG*).

<sup>354</sup> Section 33 SGB IX.

<sup>355</sup> Section 34 SGB IX.

<sup>356</sup> Section 81.1 SGB IX.

<sup>357</sup> Section 81.5 sentence 3 SGB IX.

<sup>358</sup> Section 83 SGB IX.

<sup>359</sup> On all this see above 2.6.

<sup>360</sup> Section 94 SGB IX.

<sup>361</sup> Section 1.3 Law on Protection against Dismissal (*Kündigungsschutzgesetz, KSchG*).

<sup>362</sup> Section 85ff SGB IX. There is a period of three months between dismissal and conclusion of employment

the representative body for people with disabilities and the integration authority to avoid dismissal.<sup>363</sup>

There are quotas for disabled persons as mentioned above, 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 disintegrational effects of such measures. The Sinti and Roma community pursues a decisively integrational policy which focuses on non-discrimination, not positive action. In consequence, there are no quotas for Sinti and Roma or other "hard" positive action measures. There are, however, some state policies by the Federation and the Länder which might be mentioned in the context of positive action, fostering the acknowledgement of the Sinti and Roma culture and history.<sup>364</sup>

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(comparable with a period of notice) (Section 89.1 SGB IX); an extraordinary dismissal is nevertheless admissible.

<sup>363</sup> Section 84 SGB IX.

<sup>364</sup> See the recent publications of the German Federal Agency for Civic Education (*Bundeszentrale für politische Bildung*): O. von Mengersen (ed.), *Sinti und Roma. Eine deutsche Minderheit zwischen Diskriminierung und Emanzipation* (2015) and W. Benz, *Sinti und Roma: Die unerwünschte Minderheit. Über das Vorurteil Antiziganismus* (2015).

## 6 REMEDIES AND ENFORCEMENT

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

#### a) Available procedures for enforcing the principle of equal treatment

In Germany, the following procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation):

According to Section 13 AGG, employees have the right to complain to the competent body within the enterprise. In the case of harassment, they have the right to withhold their services insofar as this is necessary for their protection (Section 14 AGG).

There are no special procedures for discrimination claims, only the general procedures. Matters of employment are dealt with by labour courts, general contract law in civil courts and public law matters (including social law, public education and public employment) by administrative review in public matters. All these procedures lead finally to binding court decisions. There is the possibility of alternative dispute resolution. There is increasing interest in Germany in mediation procedures which will certainly encompass the matters covered by discrimination law.

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.

#### b) Barriers and other deterrents faced by litigants seeking redress

The litigants in discrimination cases face the problems any litigants face. In some procedures a lawyer must be instructed (e.g. higher instance civil procedures).

However, there is a well-developed system of legal aid in Germany and no problems related to infrastructure issues (location of courts etc.).

There is no explicit time limit for a complaint, according to Section 13 AGG.

According to Sections 15.4 and 21.5 AGG, there is a time limit of two months for claiming material or non-material damages in labour or civil law. The time limit begins in the case of Section 15.4. AGG with receipt of the rejection of a job application or promotion, in other cases the knowledge of the disadvantageous behaviour.<sup>365</sup>

A claim can be brought after employment has ended, within the limits of general law, especially the statute of limitations.<sup>366</sup>

The empirical research in this area indicates more informal, but important problems of access to justice, among them the fear endangering an employment relationship through

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<sup>365</sup> Given, among others, the ECJ jurisprudence on the matter of effective pursuit of claims, there is an argument that the rule must be interpreted in such a manner that the earliest beginning of the time limit is the receipt of the refusal. Otherwise the rule is contrary to European Law, cf. Deinert, in Däubler/Bertzsch, AGG (2013), § 15 para. 109 the shortness of which should anyway be a matter of concern. On this matter cf. the preliminary reference by Hamburg Land Labour Court (*Landesarbeitsgericht Hamburg, LAG Hamburg*), 03.06.2009, 5 Sa 3/09, ECJ, 08.07.2010, C-246/09 (Bulicke). The ECJ ruled that the principle of equivalence does not require Member States to extend their most favourable procedural rules to actions for safeguarding rights deriving from EU Law.

<sup>366</sup> A dismissal protection case must be brought within three weeks, Section 4 Law on Protection against Dismissal (*Kündigungsschutzgesetz, KSchG*); partly specific regulations for disabled people, Section 4 sentence 4 KSchG in conjunction with Section 85 SGB IX.

litigation and problems of proof, e.g. as to the causality of ground protected for a disadvantageous decision.<sup>367</sup>

c) Number of discrimination cases brought to justice

In Germany, there are few statistics available on the number of cases related to discrimination brought to justice.

The statistics on the number of cases related to discrimination brought to justice are indeed few. The most extensive empirical study conducted up to now in Germany between summer 2006 and December 2009 showed that 147 courts (and 1,385 judges) reported 1,113 cases related to discrimination. Nearly 90% of the cases fell under the jurisdiction of the labour courts. However, it was extrapolated that only an estimated 0.2 % of all incoming cases at German labour courts relate to the AGG.<sup>368</sup> This is a rather small number.

d) Registration of discrimination cases by national courts

In Germany, discrimination cases are not registered as such by national courts.

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

a) Engaging on behalf of victims of discrimination (representing them)

In Germany, associations/organisations/trade unions are not entitled to act on behalf of victims of discrimination.

Section 23 AGG provides for legal support through anti-discrimination associations (*Antidiskriminierungsverbände*) but does not include legal representation in court proceedings.

b) Engaging in support of victims of discrimination

In Germany, associations/organisations/trade unions are entitled to act in support of victims of discrimination.

Section 23.2 AGG provides for legal support through anti-discrimination associations (*Antidiskriminierungsverbände*) but does not include legal representation.

Anti-discrimination associations are defined as associations of people which, in accordance with their charter, promote the interests of people or groups of people discriminated against on the grounds covered by the AGG on a non-commercial basis (Section 23.1 AGG). They must have at least 75 members or be an association of seven associations with the same purpose. Legal personality of these associations is not a precondition. They must operate permanently and not only on an ad hoc basis to support one claim.<sup>369</sup>

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<sup>367</sup> Cf. H. Rottleuthner and M. Mahlmann (2011), *Diskriminierung in Deutschland*, including interviews with advocates dealing with discrimination cases.

<sup>368</sup> In the empirical study by the author and Prof Dr Hubert Rottleuthner mentioned above, commissioned by the EU and the German government, data were collected in this respect. Cf. for the executive summary (in German): [http://ec.europa.eu/ewsi/UDRW/images/items/doc1\\_16487\\_986472583.pdf](http://ec.europa.eu/ewsi/UDRW/images/items/doc1_16487_986472583.pdf). H. Rottleuthner and M. Mahlmann (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Nomos Verlag. Age played a prominent role, for details H. Rottleuthner and M. Mahlmann (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Nomos Verlag.

<sup>369</sup> These preconditions are not explicitly prescribed by the Directives. The non-profit orientation may be justified by the intent not to foster inflationary claims, and the minimum requirement of size and stability by considerations of protection of claimants.

There is no centralised procedure for acceptance as an anti-discrimination association; a legitimate interest seems to be presumed if the membership requirement is met. The status has to be verified by the court in a specific case.<sup>370</sup> No relevant case law on the type of proof has yet been reported.

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. The associations are therefore limited to counselling during court proceedings (Section 23.2 AGG). In this case, Section 90.2 ZPO regulates that the actions of the counsel are taken as actions of the party, if the latter does not contradict them.<sup>371</sup> These rules apply to other court proceedings as well.

Anti-discrimination associations may support claimants in court proceedings even if representations through advocates are mandatory. They are then able to act in support of the claimant in addition to an advocate.<sup>372</sup>

Associations are allowed to conduct other legal matters for the claimant (Section 23.3 AGG), most importantly to give legal advice.

Although the AGG does not contain an explicit regulation, it is generally held that anti-discrimination associations always need the consent of the victim when acting in support of the latter.<sup>373</sup> In cases where obtaining formal authorisation is problematic, the general rules of German civil law apply. In Germany, exists no special duty for associations to act in support of victims of discrimination.

Section 23.2 AGG does not contain any explicit limitation on certain types of proceedings. However, according to the explanatory report, associations may not engage in criminal proceedings.<sup>374</sup>

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

#### c) Actio popularis

In Germany, national law allows associations to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*) in the field of disability.

In disability law, associations have legal standing as representative action is possible in this field. This concerns the duties of public bodies to provide an accessible environment, as specified in various legal regulations and anti-discrimination law relating to people with disabilities.<sup>375</sup>

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<sup>370</sup> Cf. the explanatory report to the AGG, Bundestagsdrucksache 16/1780, 48.

<sup>371</sup> These actions encompass both factual declarations as to the matter of the case and procedural actions (recognition of a claim etc.).

<sup>372</sup> Advocates are mandatory in various instances, in civil law e.g. for all cases pending before the Higher Regional Courts (*Landgericht*), Section 78.1 sentence 1 Law on Civil Proceedings (*Zivilprozessordnung*, ZPO).

<sup>373</sup> Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 16th ed. 2016, § 23 AGG, para. 1.

<sup>374</sup> Cf. Bundestagsdrucksache 16/1780, 26, 48.

<sup>375</sup> See Section 13 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz*, BGG): right to action against violation of law. The codification was last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)). If an individual is concerned as well, the right only exists if the case has general importance; Section 63 SGB IX Right of Action by Organisations (*Klagerecht der Verbände*): organisation has legal standing in place of disabled person with their consent.

In addition, there are general regulations concerning standard form contracts (*Allgemeine Geschäftsbedingungen*). A violation of the AGG can give rise to an action by associations, which must be included in the register for this purpose.<sup>376</sup> Similar possibilities exist with regard to consumer protection.<sup>377</sup> Such instruments could be used for cases involving discrimination, e.g. in standard form contracts.

#### d) Class action

In Germany, national law does not allow associations / organisations / trade unions to act in the interest of more than one individual victim (**class action**) for claims arising from the same event.

There is no class action in German law – a suit cannot be filed with one or several named claimants on behalf of a putative group.

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

In Germany, national law provides a shift of the burden of proof from the complainant to the respondent.

Section 22 AGG regulates the burden of proof. According to this norm, the complainant must prove facts of circumstantial evidence which 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 providing protection against discrimination has occurred.

There is some debate about how such clause should be interpreted. There is general agreement that a number of elements must be distinguished: the unequal treatment, the causality of the characteristic and the possible given objective reasons or justification for the unequal treatment. It is mostly argued by courts and doctrine that the plaintiff has to fully prove the unequal treatment. The plaintiff must prove, in contrast, the preponderant probability of the causality of the characteristic for the unequal treatment. If this is achieved, the defendant must fully prove the existence of objective or justifying reasons for the treatment.<sup>378</sup>

In public law proceedings inquisitorial principles are to be applied. Because of Section 24 AGG, Section 22 AGG is applicable to lawsuits arising under civil service law. The regulation has implications modified according to the inquisitorial system.<sup>379</sup> 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 must be proved to the full conviction of the court. In addition, it is relevant in *non liquet* situations.<sup>380</sup>

The Directives foresee the possibility of the non-application of the burden of proof regulations in inquisitorial proceedings, Article 8.5 Directive 2000/43/EC, Article 10.5 Directive 2000/78/EC. It is thus in accordance with European law that the burden of proof

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<sup>376</sup> Cf. for details the Law on Prohibitory Action (*Unterlassungsklagengesetz, UklG*, of 27.08.2002 (BGBl. I, 3422, 4346)), last amended on 11.04.2016 (BGBl. I, 720).

<sup>377</sup> Cf. for details the Law on Unfair Competition (*Gesetz gegen unlauteren Wettbewerb, UWG*) of 03.03.2010 (BGBl. I, 254), last amended on 17.02.2016 (BGBl. I, 233).

<sup>378</sup> Cf. e.g. BAG, 16.09.2008, 9 AZR 791/07; Bertzbach in: Däubler/Bertzbach, AGG (2013), § 22 for discussion, arguing that in terms of the establishment of the unequal treatment, a preponderant probability suffices, para. 15ff.

<sup>379</sup> Some state disability laws 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 8.3 Law of Saxony-Anhalt on Promoting the Equality of Disabled People (*Gesetz des Landes Sachsen-Anhalt zur Gleichstellung von Menschen mit Behinderungen*); Section 7.2 Thuringian Law on Promoting Equality and Improving the Integration of People with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderung*).

<sup>380</sup> Cf. Mahlmann, in Däubler/Bertzbach, AGG (2013), § 24 para. 77ff.

regulation is not extended to all lawsuits under public law, especially with regard 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 lawsuits are such inquisitorial proceedings.

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

In Germany, there are legal measures of protection against victimisation.

Section 16 AGG prohibits victimisation in employment relations. The employer is not allowed to disadvantage employees because they claim rights flowing from the AGG or because they refuse to follow an order contrary to the AGG (Section 16.1 sentence 1 AGG).

The same principle holds for witnesses or people who support the employee (Section 16.1 sentence 2 AGG). Section 16.2 AGG provides that the rejection or toleration of a discriminatory act is not to be used as the basis of a decision against the employee. Parallel provisions exist in Section 13 SoldGG.

There are further prohibitions of victimisation in other legal norms.<sup>381</sup> There is no special prohibition in civil law as foreseen in Article 9 Directive 2000/43/EC, which constitutes a deficit in implementation.<sup>382</sup> Apart from civil service law (through Section 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). However, given the authoritative standards of the rule of law (Article 20.3 GG), any victimisation is illegal. It is thus tenable to assume that no breach of European law exists in this respect. There is no special regulation on a shift of the burden of proof in the case of victimisation.

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

##### **a) Applicable sanctions in cases of discrimination – in law and in practice**

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

The Act does not establish a duty to establish a contractual relationship, unless such duty is derived from other parts of the law (Section 15.6 AGG), e.g. tort law.

These norms are applied analogously according to civil service law (Section 24 AGG).<sup>383</sup>

In the case of a violation of the prohibition of discrimination in general civil law, the victim has a claim of forbearance (that the discriminatory act be stopped) and removal of the disadvantage and can sue for an injunction (Section 21.1 AGG). The discriminator is liable to pay damages for material loss caused by the breach of duty (wilful or negligent wrongdoing) (Section 21.2 sentence 2 AGG). There is strict liability for damages for non-material loss (Section 21.2 sentence 3 AGG).

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<sup>381</sup> Cf. e.g. prohibition on reprimand and disciplinary action in cases where employees pursue their lawful enjoyment of rights in the Civil Code, Section 612a BGB; persons of confidence (people 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 SGB IX.

<sup>382</sup> Cf. Armbrüster, in B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 9 para. 6.

<sup>383</sup> For details, cf. Mahlmann in Däubler, Bertzbach, *AGG*, § 24 para. 66ff.



Given the case law of the ECJ,<sup>384</sup> demanding strict liability in the case of damages awarded in civil law for discrimination, the regulations in Section 15.1 sentence 2 and Section 21.2 sentence 2 AGG are in breach of European law.<sup>385</sup>

In addition, other norms of law can form the basis of compensation (Section 15.5 AGG). Section 21.3 AGG mentions only tort law, although other claims are not excluded by the application of the AGG.<sup>386</sup>

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

#### b) Ceiling and amount of compensation

In the case of non-material damage in labour law, the amount of compensation must be appropriate. If the discrimination was not a causal factor in the decision not to recruit an individual, the compensation for non-material loss is limited to a maximum of three months' salary (Section 15.2 sentence 2 AGG).

The compensation in civil law for non-material damage must also be appropriate (Section 21.2 sentence 3 AGG). It has been held that the damages due to discrimination do not encompass the difference between the salary of the previous employment and the lower, current salary till retirement.<sup>387</sup>

#### c) Assessment of the sanctions

There is some experience with existing rules (apart from sex, which is not covered by this report), for example on disability discrimination.<sup>388</sup> However, it is difficult to extrapolate any average patterns from the case law.

The norms of the AGG would enable the courts to apply sanctions which are effective, proportionate and dissuasive, as required by the Directives, in the many differentiated spheres of law, with their particular standards and demands, in which anti-discrimination law is applicable.

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<sup>384</sup> Cf. ECJ, ECR 1997, I-2195, *Draehmpaehl*, para. 37.

<sup>385</sup> It may be argued that the same extends to Section 15.3 AGG as to collective agreements.

<sup>386</sup> For comments on civil law, cf. Armbrüster, in B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 7 para. 199ff.

<sup>387</sup> Cf. Wiesbaden Labour Court (*Arbeitsgericht Wiesbaden, AG Wiesbaden*), 18.12.2008, 5 Ca 46/08 (the parties settled in the next instance, Hesse Land Labour Court (*Landesarbeitsgericht Hessen, LAG Hessen*), 12 SA 68/09 and 12 Sa 94/09).

<sup>388</sup> Berlin Labour Court (*Arbeitsgericht Berlin, AG Berlin*), 10.10.2003, Az.: 91 Ca 17871/03 held that a general minimum for cases in which a disabled applicant would possibly have been employed is the equivalent of three months' salary; Berlin Labour Court (*Arbeitsgericht Berlin, AG Berlin*), 13.07.2005, Az.: 86 Ca 24618/04: non-material damages: three months' salary, finally (after decision by the BAG) confirmed by the Regional Labour Court Berlin (*Landesarbeitsgericht Berlin, LAG Berlin*), 31.01.2008, 5 Sa 1755/07. Frankfurt am Main Labour Court (*Arbeitsgericht Frankfurt am Main, AG Frankfurt am Main*), 19.02.2003, 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 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

According to Section 25 AGG the Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes, ADS*)<sup>389</sup> was established in August 2006 in Berlin. In addition, there are various agencies concerned with some tasks related to discrimination, most notably the Federal and Land Commissioners for Migration, Refugees and Integration/Foreigners and the Commissioner for National Minorities and Immigrants of German Ethnicity (*Beauftragter für Aussiedlerfragen und nationale Minderheiten*), for the Concerns of Disabled Persons (*Beauftragte der Bundesregierung für die Belange behinderter Menschen*), or the German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) on the federal and regional level, which undertake advisory work for the government and other public bodies, publish (extensive) reports and, to a limited degree, provide individual advice to victims of discrimination.

- b) Status of the designated body – general independence

The Federal Anti-Discrimination Agency is organisationally associated with the Ministry of Family Affairs, Senior Citizens, Women and Youth (Section 26 AGG). The head of the agency is appointed by the Minister of Family Affairs, 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 could raise concerns with regard to the independence of the head of the body. Given the period of 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. However, since the head is by explicit regulation legally independent and can only be removed in exceptional circumstances of breach of official duties, the Agency may still be regarded as independent in the sense of the Directives. Funding is provided through the Ministry of Family Affairs, but the financial resources (about € 3 000 000) are administered independently by the Agency.

- c) Grounds covered by the designated body

The role of the Agency is to support people to protect their rights against discrimination on all grounds regulated by the AGG (race, ethnic origin, sex, religion, belief, disability, age and sexual identity), notwithstanding the powers of specialised governmental agencies dealing with related subject matters. As discrimination against migrants may raise questions of discrimination in particular on the ground of race, ethnic origin, religion and belief, the Agency deals with this issue as well (cf. 7. d) below).

- d) Competences of the designated body – and their independent exercise

According to Section 27 AGG, the competences of the Agency encompass information provided to complainants about the legal resources against discrimination. They include:

- arranging legal advice by other agencies, mediating between the parties, providing information to the public in general, taking action;
- for the prevention of discrimination, producing scientific studies and (every four years) a report on the issue of discrimination;
- dealing together with the Commissioners with related matters (Section 27.4 AGG) (e.g. Commissioners for Integration);

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<sup>389</sup> Website: [http://www.antidiskriminierungsstelle.de/DE/Home/home\\_node.html](http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html).

- the agencies can give recommendations and can jointly commission research studies. The Agency can demand a statement of position in case of discrimination from the alleged discriminator, if the alleged victim of discrimination agrees (Section 28.1 AGG).

Other public agencies are obliged to support the Agency in its work (Section 28.2 AGG). The Agency must co-operate with NGOs and other associations (Section 29 AGG). An advisory body for the Agency has been created, which includes stakeholders and some experts. The Agency has organised conferences, distributed information about discrimination issues and published numerous studies. On the premise of positive experience gained in other countries, the Agency launched a nationwide pilot project in Germany in November 2010 in which various enterprises, public bodies and local authorities would test depersonalised application procedures.<sup>390</sup> An English translation of the AGG is available on the Agency's website, as are short manuals on the AGG ('AGG-Wegweiser') in German, English, French, Spanish and Turkish, among other languages.<sup>391</sup>

Representative activities of the body include the pilot project 'Non-discriminatory university. Creating diversity with knowledge', dealing with the issue of the role of the grounds of discrimination in access to higher education and employment at universities. Eleven colleges and universities, from both western and eastern Germany, participated in the project. The results are already published and available.<sup>392</sup> Another publication deals with experiences of discrimination of people with and without a migration background. The East-West Germany comparative study is also available online.<sup>393</sup> Another example is a substantial study on the situation of Sinti and Roma in Germany in 2014.<sup>394</sup> An award for work against discrimination was created and the Agency has also initiated a Coalition against Discrimination, bringing together the Länder and local authorities to foster anti-discrimination activities. Studies commissioned by the Federal Agency have dealt with the rehabilitation of homosexual men convicted under criminal law, abrogated since several years, prosecuting homosexual contacts<sup>395</sup> or have evaluated the AGG.<sup>396</sup> The Agency deals with problems of discrimination of migrants in various forms.<sup>397</sup> The main theme of 2014

<sup>390</sup> For more information, see [http://www.antidiskriminierungsstelle.de/SharedDocs/Artikel\\_Interviews/DE/2012/FAZ\\_Anonymisierte\\_Bewerbungen\\_20120418.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Artikel_Interviews/DE/2012/FAZ_Anonymisierte_Bewerbungen_20120418.html). [http://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/anonymisierte\\_bewerbungen/das\\_pilotprojekt/anonymisierte\\_bewerbungen\\_node.html](http://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/anonymisierte_bewerbungen/das_pilotprojekt/anonymisierte_bewerbungen_node.html). <http://www.faz.net/aktuell/wirtschaft/arbeitsmarkt-und-hartz-iv/pilotprojekt-besser-anonym-bewerben-11720693.html> and <http://www.sueddeutsche.de/karriere/anonyme-bewerbungen-inkognito-zum-neuen-job-1.1334284>. And for the final report: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AnonymBewerbung/Abschlussbericht-anonymisierte-bewerbungsverfahren-20120417.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AnonymBewerbung/Abschlussbericht-anonymisierte-bewerbungsverfahren-20120417.pdf?__blob=publicationFile).

<sup>391</sup> [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Wegweiser/agg\\_wegweiser\\_erlaeuterungen\\_beispiele.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Wegweiser/agg_wegweiser_erlaeuterungen_beispiele.html).

<sup>392</sup> For more information, see [http://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2012/nl\\_04\\_2012/nl\\_04\\_aus\\_der\\_arbeit\\_03.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2012/nl_04_2012/nl_04_aus_der_arbeit_03.html). Cf. also [http://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Projekte/Bildung/zweiter\\_Bericht\\_Bundestag/Zweiter\\_Bericht\\_node.html](http://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Projekte/Bildung/zweiter_Bericht_Bundestag/Zweiter_Bericht_node.html). [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Be\\_nachteilig\\_Migrant\\_innen\\_Ost\\_West\\_Vergleich.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Be_nachteilig_Migrant_innen_Ost_West_Vergleich.html).

<sup>394</sup> Antidiskriminierungsstelle des Bundes, Zwischen Gleichgültigkeit und Ablehnung [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Be\\_voelkerungseinstellungen\\_gegenueber\\_Sinti\\_und\\_Roma\\_20140829.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Be_voelkerungseinstellungen_gegenueber_Sinti_und_Roma_20140829.pdf?__blob=publicationFile).

<sup>395</sup> Burgi/Wolff, Rehabilitation der nach § 175 StGB verurteilten homosexuellen Männer, 2016.

<sup>396</sup> Cf. Berghahn/Klapp/Tischbirek, Evaluation des AGG, erstellt im Auftrag der Antidiskriminierungsstelle des Bundes 2016.

<sup>397</sup> The Federal Agency has published a guide to inform refugees and immigrants about their rights under anti-discrimination law, cf. Antidiskriminierungsstelle des Bundes, Protection against Discrimination in Germany. A Guide for Refugees and New Immigrants, 2016, <http://www.antidiskriminierungsstelle.de/>. The Federal Agency has published a guide to inform refugees and immigrants about their rights under anti-discrimination law, cf. Antidiskriminierungsstelle des Bundes, Protection against Discrimination in Germany. A Guide for Refugees and New Immigrants, 2016, <http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Refugees/Fluechtlingsbr>

was discrimination on the ground of race. The main theme of the year 2016 of the Agency was freedom of religion and belief and equal rights,<sup>398</sup> both themes particularly relevant for the topic of discrimination of migrants.

The Agency thus has the competencies demanded in the Directives and does exercise them independently.

e) Legal standing of the designated body/bodies

In Germany, the designated body has no legal standing to bring discrimination complaints on behalf of identified victim(s) and cannot intervene in legal cases concerning discrimination.

The Agency has no legal standing in cases of discrimination and cannot bring cases to court. Possible victims of discrimination can contact the Agency and submit a query or complaint. The online contact form is mostly used for this purpose. The Agency will then, if necessary, provide referrals to other anti-discrimination bodies. The complainants are informed by the Agency with regard to their rights based on the AGG.

f) Quasi-judicial competences

In the case of legal claims to be pursued, the Agency seeks amicable settlement between the parties. The Agency can demand a statement of position in cases of discrimination from the alleged discriminator, if the alleged victim of discrimination agrees.<sup>399</sup> However, there is no legal duty for the submission of such statements.<sup>400</sup> Other public agencies have a duty to cooperate with the Agency (Section 28.2 AGG). The Agency can give recommendations.

Assistance provided to victims does not typically lead to court proceedings or tribunals, as the Agency endeavours to achieve out-of-court settlements between the parties involved.<sup>401</sup> As the Agency cannot issue binding decisions and does not possess the power to impose any sanctions against the parties, it cannot be regarded as a quasi-judicial institution.

There have been several conflicts settled in advance by the intervention of the Agency. The Agency engages in informal conflict resolution processes between parties, which appears to be done on a case-by-case basis. There is no larger scale conflict resolution practice in place.

The Agency has contributed to the legal discourse on discrimination through its activities, e.g. commissioned studies and reports. Given its competencies, the Agency does not take action on its own initiative in court proceedings and is not active in strategic litigation.

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<sup>398</sup> Cf. e.g. Heinrichs, T./Weinbach, H. : Weltanschauung als Diskriminierungsgrund - Begriffsdimensionen und Diskriminierungsrisiken, 2016. Available at: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Uebersichtsa rtikel\\_Weltanschauung\\_als\\_DiskrGrund\\_20160922.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Uebersichtsa rtikel_Weltanschauung_als_DiskrGrund_20160922.html); Federal Anti-Discrimination Agency, Umgang mit religiöser Vielfalt am Arbeitsplatz, 2016: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_U mgang\\_mit\\_religioeser\\_Vielfalt\\_am\\_Arbeitsplatz\\_20160922.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_U mgang_mit_religioeser_Vielfalt_am_Arbeitsplatz_20160922.html); Akzeptanz religiöser und weltanschaulicher Vielfalt in Deutschland. Ergebnisse einer repräsentativen Umfrage im Auftrag der Antidiskriminierungsstelle des Bundes. (2016) Available at: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Umfragen/Bericht\\_zur\\_Umfrage\\_Akzeptanz\\_religioeser\\_und\\_weltanschaulicher\\_Vielfalt\\_in\\_Deutschland.pdf?\\_blob=publicationFile &v=2.](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Umfragen/Bericht_zur_Umfrage_Akzeptanz_religioeser_und_weltanschaulicher_Vielfalt_in_Deutschland.pdf?_blob=publicationFile &v=2.)

<sup>399</sup> Section 28.1 AGG.

<sup>400</sup> Ernst, in Däubler/Bertzbach, AGG, 3rd ed. (2013), Section 28.1.

<sup>401</sup> Section 27.2 Nr. 3 AGG.

g) Registration by the body of complaints and decisions

In Germany, the body registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are only partially and not systematically available to the public, depending on the occasional needs e.g. in the framework of thematic studies.<sup>402</sup>

h) Roma and Travellers

The body has not yet developed any special programme with regard to Sinti and Roma in Germany.<sup>403</sup> However, a representative of the Sinti and Roma community is part of the advisory body. Various activities address the topic, e.g. in the context of International Roma Day. In 2015 *an Association for Solidarity with Sinti and Roma in Europe* (Bündnis für Solidarität mit den Sinti und Roma Europas) which unites NGOs, religious groups, cultural and public institutions, including the Federal Anti-Discrimination Agency has been founded with a special view but not limited to the international Roma day in 2016. Activities are manifold, including public discussions, art campaigns etc.<sup>404</sup>

In 2014 the Agency published a study regarding the opinions and attitudes of the German people towards Sinti and Roma.<sup>405</sup> The study concluded that various forms of distance and rejection exist in Germany towards Sinti and Roma.

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<sup>402</sup> See, for example, the relevant publications by the body which present anti-discrimination cases, available at: [http://www.antidiskriminierungsstelle.de/DE/Publikationen/publikationen\\_node.html](http://www.antidiskriminierungsstelle.de/DE/Publikationen/publikationen_node.html).

<sup>403</sup> The existing report by Germany (Ministry of the Interior, 2011) to the European Commission in the context of the EU Framework for National Roma Integration Strategies (available at: [http://ec.europa.eu/justice/discrimination/files/roma\\_germany\\_strategy\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_germany_strategy_en.pdf)) was extensively questioned by the relevant 2012 assessment by the European Commission, as stated in the National Roma Strategy – Country Factsheet Germany (available at: [http://ec.europa.eu/justice/discrimination/files/roma\\_country\\_factsheets\\_2013/germany\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_country_factsheets_2013/germany_en.pdf)) where, of 22 check points assessing progress in implementing the National Roma Integration Strategy, according to the Commission only one was met (allocation of resources to local and regional authorities).

<sup>404</sup> <http://www.romaday.org/Buendnis>.

<sup>405</sup> Federal Anti-Discrimination Agency (2014), *Zwischen Gleichgültigkeit und Ablehnung - Bevölkerungseinstellungen gegenüber Sinti und Roma (Between indifference and rejection - Population attitudes towards Sinti and Roma)*, available at: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Bevölkerungseinstellungen\\_gegenueber\\_Sinti\\_und\\_Roma\\_20140829.html;jsessionid=5E9577EF246F7504031322D4400DA9A2.2\\_cid322?nn=4193516](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Bevölkerungseinstellungen_gegenueber_Sinti_und_Roma_20140829.html;jsessionid=5E9577EF246F7504031322D4400DA9A2.2_cid322?nn=4193516).

## 8 IMPLEMENTATION ISSUES

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

The Anti-Discrimination Agency has produced information material, commissioned studies and held conferences on matters of discrimination.<sup>406</sup> Other programmes do not focus on the legal framework of the AGG but rather on social issues of inclusion and equality.

There are various anti-discrimination initiatives in Germany, most importantly in the case of discrimination on the ground of race and ethnic origin including (institutionalised) dialogue with NGOs and social partners.<sup>407</sup> Legislative consultation processes routinely include a wide range of NGOs.

The Anti-Discrimination Agency, for example, has sought to communicate the value of anti-discrimination policies for an efficient economy through a conference on the matter and related publications.

As already mentioned, there is no special programme of the Agency concerning Sinti and Roma. Various of its activities, however, deal with the matter. A representative of Germany's Sinti and Roma community is a member of the Agency's advisory committee.

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

#### a) Mechanisms

Section 7.2 AGG provides that (individual or collective) agreements contrary to the prohibition of discrimination in labour law are null and void. According to Section 21.4 AGG, the discriminating party cannot rely on a discriminating agreement in civil law matters. Section 134 BGB, which makes such acts null and void, is applicable in civil law only for unilateral legal acts and agreements with discriminatory effects on third parties.<sup>408</sup> The common rules to solve clashes of legal rules apply.<sup>409</sup>

#### b) Rules contrary to the principle of equality

As explained, certain laws may be considered to be in breach of the Directives. There has been no systematic survey by the public authorities as to whether or not norms exist which are contrary to the Directives.

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<sup>406</sup> On the activities of the Agency, see [http://www.antidiskriminierungsstelle.de/DE/Home/home\\_node.html](http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html).

<sup>407</sup> One example is the Alliance for Democracy and Tolerance (*Bündnis für Demokratie und Toleranz*), founded in 2000, which with active support from the German state, currently brings together hundreds of initiatives working among other things against racism and xenophobia: <http://www.buendnis-toleranz.de>. For other examples of initiatives against discrimination including social partners cf. 10 below.

<sup>408</sup> Cf. Bundestagsdrucksache 16/1780, p. 47; Armbrüster, in B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 9 para. 202ff.

<sup>409</sup> There are transitional rules for contractual obligations created before the coming into force of the AGG: Art. 33.2 AGG: "As regards discrimination on the grounds of race or ethnic origin, Sections 19 to 21 shall not apply to relationships under the law of obligations entered into prior to 18 August 2006. The first sentence shall not apply to subsequent changes to continuous obligations." Art. 33.3: "As regards discrimination on the grounds of sex, religion, disability, age or sexual orientation, Sections 19 to 21 shall not apply to relationships under the law of obligations entered into prior to 1 December 2006. The first sentence shall not apply to subsequent changes to continuous obligations." Art. 33.4: "As regards relationships under the law of obligations whose object is a private-law insurance, Section 19(1) shall not apply where these were entered into prior to 22 December 2007. The first sentence shall not apply to subsequent changes to such obligations."

## 9 COORDINATION AT NATIONAL LEVEL

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

In 2008, the Federal Government adopted a National Action Plan against Racism, Xenophobia, anti-Semitism and Related Intolerance (*Nationaler Aktionsplan der Bundesrepublik Deutschland zur Bekämpfung von Rassismus, Fremdenfeindlichkeit, Antisemitismus und darauf bezogene Intoleranz*). It claims to aim to prevent violence and discrimination by emphasising that neither society nor politics are willing to tolerate such phenomena, to integrate minorities and to promote a "politics of recognition" of diversity. However, the plan has been criticised for mainly containing descriptions of already existing political and legal measures to combat racism, xenophobia and anti-Semitism.<sup>410</sup> The coalition government of Germany has expressed its intention to include in the Action plan "Homo – and Transphobie", homophobia and transphobia. A concrete governmental proposal is expected for 2017.<sup>411</sup>

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<sup>410</sup> Follmar-Otto/Cremer (2009), *Der Nationale Aktionsplan der Bundesrepublik Deutschland gegen Rassismus. Stellungnahme und Empfehlungen*, Deutsches Institut für Menschenrechte, Policy Paper Nr. 12, January 2009.

<sup>411</sup> Vgl. BT Drs. 18/7936.

## 10 CURRENT BEST PRACTICES

To take some examples from different actors and different spheres of life: The Federal Antidiscrimination Agency, the Federal Agency for Employment and the Association of German Employers have identified best practices of employers against age discrimination, e.g. through targeted recruitment of older employees (55+).<sup>412</sup>

Various universities in Germany have taken steps for an active diversity management.<sup>413</sup>

Another very concrete example is the attempt of a school and its pupils to combat racism and discrimination, by information and concrete actions aiming at deeper mutual respect.<sup>414</sup> The Federal Agency and a publisher have launched in cooperation with educational experts a competition for innovative school projects designed to fight discrimination.<sup>415</sup> The Federal Agency identified various activities of private and public actors as good practices in the field of discrimination on the ground of religion and belief, including diversity management of Fraport, cultural mediators at ThyssenKrupp, diversity training at the Anti-Discrimination Agency in Berlin or equality monitoring of the British Council.<sup>416</sup>

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<sup>412</sup> <http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Broschuere-Good-Practice-Altersvielfalt-20121126.html?nn=6575290>.

<sup>413</sup> Cf. for some examples, [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/BT\\_Bericht/Gemeinsamer\\_Bericht\\_zweiter\\_2013.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/BT_Bericht/Gemeinsamer_Bericht_zweiter_2013.pdf?__blob=publicationFile), p. 154.  
For examples of good practice in education and in the work area cf.: "Für Chancengleichheit im Bildungsbereich und im Arbeitsleben. Beispiele für gute Praxis." (2014): [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Broschuere\\_Fuer\\_Chancengleichheit\\_im\\_Bildungsbereich\\_und\\_im\\_Arbeitsleben.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Broschuere_Fuer_Chancengleichheit_im_Bildungsbereich_und_im_Arbeitsleben.pdf?__blob=publicationFile).

<sup>414</sup> Cf.: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/Dokumente\\_ohne\\_anzeige\\_in\\_Publikationen/Albert-Schweitzer\\_Schule\\_Jugendwettbewerb.html?nn=6575434](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/Dokumente_ohne_anzeige_in_Publikationen/Albert-Schweitzer_Schule_Jugendwettbewerb.html?nn=6575434).

<sup>415</sup> Fair@ school - Schulen gegen Diskriminierung, <http://www.fair-at-school.de/page/>.

<sup>416</sup> Cf. Antidiskriminierungsstelle des Bundes, Umgang mit religiöser Vielfalt am Arbeitsplatz, 2016, [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Umgang\\_mit\\_religioeser\\_Vielfalt\\_am\\_Arbeitsplatz\\_20160922.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Umgang_mit_religioeser_Vielfalt_am_Arbeitsplatz_20160922.html).



## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives (if any)

It is intended that the AGG and the accompanying legislation should provide a full transposition of the directives. There are, however, some shortcomings.<sup>417</sup> Other problematic issues have been identified in this report, but the main points are:<sup>418</sup>

- a) the exception of dismissal from the application of the prohibition of discrimination, Section 2.4, AGG, though mitigated by case law (cf. 3.2.3);
- b) the possible non-application of the AGG to occupational pension schemes, Section 2.2, AGG, depending, however, on the judicial interpretation of the respective norm (cf. 3.2.3);
- c) the exception from the material scope of the provision of goods and services of all transactions concerning a special relationship of trust and proximity between the parties or their family, including the letting of flats on the premises of the landlord for all grounds including race and ethnic origin, Section 19.5, AGG, which raises problems under the Racial Equality Directive, albeit depending on its contentious interpretation in this respect, (cf. 3.2.9; 3.2.10);
- d) the exception in relation to housing, including unequal treatment on the ground of race and ethnic origin, to provide for socially and culturally balanced settlements, Section 19.3, AGG, depending on judicial interpretation (cf. 3.2.10);
- e) the formulation of the justification of unequal treatment for religion and belief, depending on judicial interpretation, Section 9.1, AGG, (cf. 4.2);
- f) Section 622.2 sentence 2, BGB provides that employment periods under the age of 25 are not taken into account when determining notice periods. This regulation is – as the CJEU has ruled<sup>419</sup> – not reconcilable with Article 6, Directive 2000/78/EC (cf. 4.7.5. a) and is no longer applied by German courts (cf. 12.2);
- g) there is no special prohibition of victimisation in civil law, as foreseen in Article 9, Racial Equality Directive (2000/43/EC) (cf. 6.4);
- h) 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, is contrary to ECJ jurisprudence in this respect (cf. 6.5);
- i) 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 with regard to harassment and the instruction to discriminate, depending on judicial interpretation (cf. 3.2.4; 3.2.6 – 3.2.9);
- j) there is no general regulation of reasonable accommodation (cf. 2.6.a).

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<sup>417</sup> Assuming that European law demands a differentiated transposition, see ECJ C-49/00, ECR 2001 I-8575 Commission vs. Italy, para. 21ff; 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, <http://curia.europa.eu/>, 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.' With regard 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', ECJ C-144/99 Commission vs. Kingdom of the Netherlands, para. 21.

<sup>418</sup> For the following list in the main text it is assumed that Article 3 GG 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 3.1, GG 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 jurisprudence of the BVerfG.

<sup>419</sup> CJEU, C-555/07 (Kücükdeveci), 19.01.2010.

## 11.2 Other issues of concern

The two attempts to transpose the Directives in Germany 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.<sup>420</sup> This background is still relevant for the problems the transposition and implementation of the directives face. A particular point 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, although today – in the light of experience with the new law – this has widely changed. There is enough empirical evidence of discriminatory opinions and behaviour in Germany to be concerned about the problem, although methodologically sound studies on many grounds of discrimination are rare.<sup>421</sup> There are some empirical studies about the particular experiences of discrimination of migrants and refugees confirming the existence of discrimination on a significant scale.<sup>422</sup> The substantial amount of violence against shelters of refugees and refugees themselves in the context of the arrival of refugees in Germany add further reasons for concern.

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 makes

<sup>420</sup> On the debate see e.g. the overview in Bauer/Krieger, AGG, 4th ed. 2015, para. 32b; J. Braun, 'Forum: Übrigens – Deutschland wird wieder totalitär', in *Juristische Schulung* 2002, p. 424ff. F.-J. Säcker, '„Vernunft statt Freiheit“ – Die Tugendrepublik der neuen Jakobiner', in *Zeitschrift für Rechtspolitik* 2002, p. 286. See S. Baer, '„Ende der Privatautonomie“ oder grundrechtlich fundierte Rechtsetzung? – Die deutsche Debatte um das Antidiskriminierungsrecht', in *Zeitschrift für Rechtspolitik* 2002, p. 290ff; E. Eichenhofer, 'Diskriminierungsschutz und Privatautonomie', in *Deutsches Verwaltungsblatt* 2004, p. 1078ff; K. Hailbronner, 'Die Antidiskriminierungsrichtlinien der EU', in *Zeitschrift für Ausländerrecht*, p. 254ff; J. Neuner, 'Diskriminierungsschutz durch Privatrecht', in *Juristen Zeitung* 2003, p. 57ff; U. Mager, 'Möglichkeiten und Grenzen rechtlicher Maßnahmen gegen die Diskriminierung von Ausländern', in *Zeitschrift für Ausländerrecht* 1992, p. 170ff; R. Nickel 'Handlungsaufträge zur Bekämpfung von ethnischen Diskriminierungen in der neuen Gleichbehandlungsrichtlinie 2000/43/EG', in *Neue Juristische Wochenschrift* 2001, p. 2668ff; E. Picker, 'Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie?' in *Juristen Zeitung* 2002, p. 880ff; E. Picker, 'Antidiskriminierung als Zivilrechtsprogramm?' in *Juristen Zeitung* 2003, p. 540ff; D. Schiek, 'Diskriminierung wegen „Rasse“ oder „ethnischer Herkunft“ – Probleme der Umsetzung der RL 2000/43/EG im Arbeitsrecht', in *Arbeit und Recht* 2003, p. 44ff; D. Schiek (2000), *Differenzierte Gerechtigkeit: Diskriminierungsschutz und Vertragsrecht*, Baden-Baden, Nomos; H. Wiedemann and G. Thüsing, 'Zum Entwurf eines zivilrechtlichen Antidiskriminierungsgesetzes', in *Der Betrieb* 2002, p. 463ff; M. Mahlmann, 'Gleichheitsschutz und Privatautonomie', in *Zeitschrift für europarechtliche Studien* 2002, p. 407ff; M. Mahlmann, 'Gerechtigkeitsfragen im Gemeinschaftsrecht', in *Loccumer Protokolle* 40/03, p. 47ff.

<sup>421</sup> Cf. A. Klose in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, Baden-Baden, Nomos, § 10. A substantive study was conducted by the author of this report in collaboration with Prof Dr Hubert Rottleuthner, Freie Universität Berlin (*Diskriminierung in Deutschland*, 2011), financed by the European Union and the German government to provide further information. See H. Rottleuthner and M. Mahlmann (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Nomos Verlag. The executive summary (in German) is available here: [http://ec.europa.eu/ewsi/UDRW/images/items/doc1\\_16487\\_986472583.pdf](http://ec.europa.eu/ewsi/UDRW/images/items/doc1_16487_986472583.pdf). The Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*) commissioned similar work, see e.g.: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/BT\\_Bericht/Gemeinsamer\\_Bericht\\_zweiter\\_2013.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/BT_Bericht/Gemeinsamer_Bericht_zweiter_2013.pdf?__blob=publicationFile). First results of another study are available under, Antidiskriminierungsstelle des Bundes, *Diskriminierungserfahrungen in Deutschland Erste Ergebnisse einer repräsentativen Erhebung und einer Betroffenenbefragung*, 2016, [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Handout\\_Umfrage\\_Diskriminierung\\_in\\_Dtschl\\_2015.html?nn=6560636](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Handout_Umfrage_Diskriminierung_in_Dtschl_2015.html?nn=6560636).

<sup>422</sup> Vgl. z.B. Antidiskriminierungsstelle des Bundes, *Diskriminierungsrisiken für Geflüchtete in Deutschland Eine Bestandsaufnahme der Antidiskriminierungsstelle des Bundes*, 2016, [http://www.antidiskriminierungsstelle.de/DE/Service/Datenbanken/Infodatenbank/PDF-IDB\\_neu/Forschung/Berichte\\_Artikel\\_Broschueren/2016/PDF\\_Diskriminierungsrisiken\\_fuer\\_Gefluechtete\\_AD\\_S\\_20161214.pdf?\\_\\_blob=publicationFile&v=1](http://www.antidiskriminierungsstelle.de/DE/Service/Datenbanken/Infodatenbank/PDF-IDB_neu/Forschung/Berichte_Artikel_Broschueren/2016/PDF_Diskriminierungsrisiken_fuer_Gefluechtete_AD_S_20161214.pdf?__blob=publicationFile&v=1). The Federal Agency has published a guide to inform refugees and immigrants about their rights under anti-discrimination law, cf. Antidiskriminierungsstelle des Bundes, *Protection against Discrimination in Germany. A Guide for Refugees and New Immigrants*, 2016, [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Refugees/Fluechtlingsbroschuere\\_englisch.pdf?\\_\\_blob=publicationFile&v=7](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Refugees/Fluechtlingsbroschuere_englisch.pdf?__blob=publicationFile&v=7).

discrimination against human beings because of any characteristics, such as race, ethnic origin, religion, belief, disability, age or sexual orientation, impermissible on the most fundamental level. The Directives aim to provide legal tools protecting individuals against such discrimination in the public and private spheres.<sup>423</sup> The values the Directives aim to protect are therefore part of the core of the German legal system.

In addition, the regime of legal regulations envisaged by the Directives was already in part 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 was therefore not a radical new start for German law but rather the further development of relevant parts of the existing law.<sup>424</sup>

Germany has established a in principle comprehensive legal framework to combat acts of discrimination. There are some shortcomings, as reported in the section on potential breaches of the directives, (11.1.). The challenge ahead is to interpret and apply this legal framework in a consistent way realizing the purposes of anti-discrimination law that are, as indicated above part of fundamental values enshrined in the German constitutional order, foremost human dignity. The case law is still, in absolute terms, limited. There are reasons to belief, as reported above, that this is due to informal barriers to access to justice and problems of proof. Another issue of concern is the prevention of attitudes that give rise to discrimination. Recent events, including xenophobic demonstrations of a significant scale, despite a strong reaction of civil society, government and political actors give reasons to believe that persistent efforts may be of great importance in this respect.

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<sup>423</sup> See: C. McCrudden (ed.), *Anti-discrimination law*, 2nd ed. (2004), Ashgate, Aldershot; S. Fredman (2011), *Discrimination law*, 2<sup>nd</sup> ed. Oxford, Oxford University Press. S. Fredman, 'Equality: A new generation?', in *Industrial law journal* 2001, pp. 145, 154ff; S. Baer (1995), *Würde oder Gleichheit*, Baden-Baden, Nomos; D. Schiek (2000), *Differenzierte Gerechtigkeit* Baden-Baden, Nomos; M. Bell (2002), *Anti-discrimination law and the European Union*, Oxford, Oxford University Press, p. 52; For some more technical remarks on the German situation, see M. Mahlmann, 'Prospects of German anti-discrimination law', in *Transnational law and contemporary problems*, 2005, p. 1045; for a general criticism from the point of view of the economic analysis of law: R. A. Epstein (1992), *Forbidden grounds: The case against anti-discrimination law*, Harvard University Press, Cambridge, Ma; M. Grünberger, *Personale Gleichheit*, Nomos, Baden-Baden, 2013.

<sup>424</sup> Cf. on the legal ethics of anti-discrimination law, M. Mahlmann in B. Rudolf and M. Mahlmann (2007), *Gleichbehandlungsrecht*, Baden-Baden, Nomos, § 1.

## 12 LATEST DEVELOPMENTS IN 2016

There are some legislative developments to be reported (cf. next section below).

The jurisprudence of the courts has confirmed some important interpretations of legal provisions relevant for discrimination. A decision of the Federal German Constitutional Court concerns the permissibility of wearing an Islamic headscarf by a kindergarten teacher employed by a public authority. The court decided that the basic right to freedom of religion entitles the teacher to wear such a headscarf and that held that provisions of anti-discrimination law do not provide legal rights of the claimants beyond those derived from the fundamental right to freedom of religion. The court underlined that such a garment is by now common in Germany and a necessary consequence of a pluralist society.<sup>425</sup> The court confirms with this decision its case law on the issue of headscarves worn by teachers in public education (cf. Federal German Constitutional Court, BVerfGE 138, 296) and extends it to the sphere of pre-school education.

On a related issue, the so called Burkini, the Federal German Constitutional Court handed down another decision: The complainant, a school girl, demanded dispensation from swimming lessons in a public school because of prescriptions stemming from her Muslim faith to show her body forms to men. Although the school allows for the use of so-called burkinis, this option was not regarded as sufficient by the complainant.

The court regarded the complaint as inadmissible. The complainant did not show that the burkini is not sufficient to comply with religious rules on the concealment of the body. The fact that the complainant is exposed to the sight of male bodies in swimming suits is not sufficient to justify a dispensation from swimming lessons.<sup>426</sup> These decisions illustrate the attempt of the court to balance interests in religious freedom and accommodation and public interests, for instance of integration and individual development of pupils in schooling.

The Federal Labour court has formulated a preliminary reference asking questions concerning the interpretation of the provisions determining the scope of justification of unequal treatment on the ground of religion. This preliminary reference is of crucial importance for clarifying the legal framework in which organisations with a religious ethos can rely on religious exceptions in employment. Given the importance of the Christian Churches as employers in Germany, this is of great practical significance. So far, religious organisations enjoy a wide discretion as to the application of religious exceptions to equal treatment, as explained above.<sup>427</sup>

The Federal Court of Germany held a common symposium with representatives of the Sinti and Roma community on case law of the Federal Courts from the 1950 and 1960, acknowledging violent acts against this group, but denying racist prosecution having taken place till 1943. This assessment was relevant for compensation claims. The reasoning of the Court in these cases – as now acknowledged – was loaded with racist prejudice. The respective case law was later abandoned. The President of Federal Court expressed her “shame” about this jurisprudence.<sup>428</sup>

### 12.1 Legislative amendments

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<sup>425</sup> Federal German Constitutional Court, 1 BvR 354/11, 18 October 2016.

<sup>426</sup> Federal German Constitutional Court, 1 BvR 3237/13, 8 November 2016.

<sup>427</sup> Federal Labour Court (Bundesarbeitsgericht), 17 March 2016 – 8 AZR 501/14 (A), cf. 4.2 and 12 (case law section).

<sup>428</sup> Gemeinsames Symposium des Bundesgerichtshofs und des Zentralrats Deutscher Sinti und Roma, [http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&pm\\_nummer=0042/16](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&pm_nummer=0042/16).

On 1 December, the German Bundestag and on 16 December the German Bundesrat passed Law on the improvement of inclusion and self-determination of persons with disabilities (Gesetz zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen, BTHG). The law aims at implementing the demand of the Convention on the Rights of Persons with Disabilities to provide for effective inclusion of persons with disabilities in society. Art. 1 of the Convention states in this respect that persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. The legislation aims at diminishing the effects of such barriers and thus to prevent discrimination on the ground of disability.

It encompasses measures to prevent incapacity for employment, to facilitate the procedure for measures of rehabilitation, to improve structures of advice for persons with disability, to improve financial aid and to expand the rights of representative bodies of persons with disabilities in employment provided for by the current law. The financial support will no longer be granted as part of social aid, which will improve the financial situation of entitled persons, for example by higher personal allowances for financial assets and income of persons with disabilities. This means that they are entitled to financial support despite them having themselves larger some personal funds than they are allowed to have now. Such personal allowances for assets are for example currently 2600 Euros and will be in the future 50000 Euros. In addition, the assets of spouses will not be considered when determining the assets of the person claiming financial aid.

Employers will be able to claim subsidies of up to 75% of the salaries of employees with disabilities.

The financial aid for social inclusion has increased since 2005 from 11,3 to 16,4 billion Euros. It is foreseen that the additional entitlements will cost the Federation 1,5 billion Euros and the Länder 350 million Euros until 2020. The law enters into force in several steps from 2017 onwards.<sup>429</sup>

## 12.2 Case law

Numerous decisions by German courts in 2016 referred to the Directives as well as to German law covering the same grounds.

### Age

**Name of the court:** Federal Labour Court (Bundesarbeitsgericht, BAG)

**Date of decision:** 19 May 2016

**Reference number:** 8 AZR 470/14, 8 AZR 583/14

**Address of the webpage:** <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=18923>  
<http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&sid=87d563b29a5b347e92181f20697da5a5&nr=18912&pos=0&anz=1>

**Brief summary:** Born in 1953, the plaintiff holds a doctorate and works as a sole practitioner lawyer. He passed both legal state examinations with the result satisfactory (7 points). The defendant in the first case is a law firm, specializing in public and real estate law. All lawyers hired by the defendant have passed both state examinations with final marks of at least 9 points. In November 2012, the defendant published a job advertisement seeking a "lawyer (male/female) with 0 to 2 years of work experience". Under "we offer" the announcement mentioned a "young and dynamic team". Under "we expect" the requirement of a "high-class juridical qualification" was mentioned. The plaintiff applied for the position but his application was not successful. The plaintiff has applied for a number

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<sup>429</sup> (BGBl. I, 3234).

of such positions, leading to 16 law suits. The plaintiff brought an action against this rejection, alleging age discrimination. The Labour Court and the Higher Labour Court rejected the action. The plaintiff's appeal was successful.

The Federal Labour Court decided that an applicant, who is not objectively suitable for the advertised position, is nevertheless in a comparable situation or comparable position within the meaning of Sections 3.1 and 3.2 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) with other applicants. Therefore, even an applicant who is not suitable for a particular position may be entitled to a claim for prohibited discrimination in the hiring process.

Regarding a second action filed by the plaintiff against another law firm, the Labour Court Hamm found that in the case of systematic applications for age discriminating job offers, it can be assumed that the applications are not aiming at seriously applying for the advertised job but are only meant as means for enabling compensation claims on the ground of age discrimination according to the AGG. The form of the application correspondence can be an additional indication that the applicant was not seriously applying for the position in question.

The plaintiff successfully appealed against this decision (reference number: 8 AZR 583/14). The Federal Labour Court found that the lower Labour Courts have misjudged the legal concept of abuse of law (*Rechtsmissbrauch*), Section 242 BGB (*Civil Code*), and have interpreted and applied this provision in such a way that the prohibition of discrimination of the AGG and Directive 2000/78/EC were not applicable. The circumstances, on which the Labour Court has made its decision, do neither individually nor collectively allow the conclusion that the plaintiff has acted in a fashion of abuse of law, the Federal Labour Court decided. The cases have to be reconsidered by the lower instances.

Lower Court: Landesarbeitsgericht (LAG) Hamm judgment of 25.07. 2014 - 10 Sa 503/14 - regarding 8 AZR 583/14.

Lower Court: LAG Hamburg, judgment of 28.01.2014 - 2 Sa 50/13 – regarding 8 AZR 470/14.

**Name of the court:** Federal Labour Court (Bundesarbeitsgericht, BAG)

**Date of decision:** 12 April 2016

**Reference number:** 9 AZR 659/14

**Address of the webpage:** <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=18685>

**Brief summary:** The court ruled that a clause in a collective bargaining agreement according to which employees aged 50 years or older are granted extra holiday per year is invalid. In the case at hand, the applicable collective bargaining agreements awarded three additional days holiday for every employee who reached the age of 50 before 2009. Therefore, employees who turned 50 in 2009 or later were not entitled to extra holiday. The plaintiff turned 50 in 2009 and claimed the additional holiday for the period of 2009 until 2012.

The Federal Labour Court ruled that the clause was discriminatory by reason of age according to Section 7.1 in conjunction with Section 1 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*). The discrimination could not be justified by Section 10 sentence 3 no. 1 AGG. That provision allows distinctions by reason of age under the condition that they are objectively and reasonably justified by the legitimate aim of the protection of older employees. The Court did not follow the defendant's reasoning that increasing age generally goes hand in hand with a growing need for recovery and therefore a longer recuperation period. However, the plaintiff was only awarded with additional holidays for 2012 since for 2009 to 2011 the cut-off period had already passed.



**Name of the court:** Federal Labour Court (Bundesarbeitsgericht, BAG)

**Date of decision:** 18 February 2016

**Reference number:** 6 AZR 700/14

**Address of the webpage:** <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=18626>

**Brief summary:** The Court ruled that imputation of income increases on the income security allowance (*Einkommenssicherungszulage*) in accordance with Section 6 of the collective agreement on socially responsible accompanying measures (*Tarifvertrag über sozialverträgliche Begleitmaßnahmen*) in connection with the transformation of the Bundeswehr (Federal Armed Forces) of 18 July 2001 (*TV UmBw*) leads to a direct disadvantage for younger employees compared to older employees, as far as the employment period is less than 25 years and the differentiation is made after the completion of the 55th year of life. A legitimate aim within the meaning of Section 10 AGG, which could justify such a disadvantage, is not pursued by the provision. With this ruling the BAG confirmed its prior case law.<sup>430</sup>

**Name of the court:** Federal Labour Court (Bundesarbeitsgericht, BAG)

**Date of decision:** 17 March 2016

**Reference number:** 8 AZR 677/14

**Address of the webpage:** <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=18734>

**Brief summary:** The plaintiff, born in October 1952, was employed by the defendant, a company of the automotive industry, from 1995 to October 2012 as sales manager for passenger cars in one of the defendant's branches. He therefore belonged to the group of senior executives. In the employment contract, the parties agreed on the termination of employment with reaching the age of 65. In 2003, the defendant introduced the concept "60+" for senior executives, which provided for the possibility of terminating the employment relationship at the age of 60, including the payment of a capital amount. In July 2003, the defendant submitted to the plaintiff an offer to amend his employment contract, which the plaintiff could accept by 31 December 2005. He accepted the offer in time. In the year 2012, the concept "60+" was replaced by the concept "62+". All senior executives who had a contract based on the concept "60+" and who completed their 57th birthday in 2012 received an offer from November 2012 to conclude a contract on the basis of the new concept. The plaintiff ended the employment relationship as of 31.10.2012 and received a capital amount of 123,120 euros. The plaintiff did not bring an action against the limitation period for his employment contract but later put in a claim for damages. The plaintiff holds, among other things, he was disadvantaged by the fact that his employment contract was terminated at the age of 60 and that he was discriminated because of his age, as the defendant had refused to offer him a conversion of his employment contract to the concept "62+". The plaintiff demanded that the defendant should replace the material damage resulting from the premature departure pursuant to Section 15.1 AGG, as well as payment of an indemnity according to Section 15.2 AGG. The lower courts dismissed the action. The applicant brought an appeal. The Federal Labour Court dismissed the appeal. The plaintiff has not received less favourable treatment from the defendant than another person in a comparable situation "experiences, has experienced, or would have experienced", Section 3.1 AGG, found the court. If the relevant comparison group were the group of employees below the level of senior management, the plaintiff was not treated less favourably than the latter. He had merely been given an additional opportunity by the defendants' offer, whereby he could freely decide whether he wanted to avail himself of this possibility. With regard to the conversion of his employment contract to the concept "62+" which he was not offered, the plaintiff was not comparable to the employees who received this offer in November/ December 2012, because at that time he had already resigned from the employment relationship.

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<sup>430</sup> Cf. also BAG, judgment of 15.11.2012 - 6 AZR 359/11, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&sid=0424f8bfdd945afc6caa039ee04fe327&nr=16486&pos=0&anz=1>.

Lower Court: Landesarbeitsgericht Baden-Württemberg, judgment of 24. June 2014 - 15 Sa 46/13.

**Name of the court:** North Rhine-Westphalia Administrative Appeals Court (Oberverwaltungsgericht Nordrhein-Westfalen, OVG NRW)

**Date of decision:** 13 March 2016

**Reference number:** 1 A 2070/15

**Address of the webpage:**

[https://www.justiz.nrw.de/nrwe/ovgs/ovg\\_nrw/j2016/1\\_A\\_2070\\_15\\_Beschluss\\_20160311.html](https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2016/1_A_2070_15_Beschluss_20160311.html)

**Brief summary:** The plaintiff filed an appeal against his dismissed action for age discriminatory remuneration. The Court confirmed the judgment of the Lower Court. The relevant deadline for a claim under Section 15 AGG had begun with the publication of the judgment of the ECJ on 8 September 2011<sup>431</sup> (and therefore here expired on 8 November 2011). Moreover the Court emphasised, that it is not sufficient in the present case to claim any "claims because of the remuneration system" without addressing the aspect of age discrimination. On the contrary, it is necessary (also according to the case law of the Federal Administrative Court) that the remuneration or compensation claim is based on the fact that the first-time assignment of the official to a grade of his grade-scale is linked to the age criterion, and furthermore, that this leads to unequal treatment based directly on the criterion of age.

Lower Court: Verwaltungsgericht Gelsenkirchen, 12 K 2665/12.

**Name of the court:** Stuttgart Administrative Court (Verwaltungsgericht Stuttgart, VG Stuttgart)

**Date of decision:** 31 March 2016

**Reference number:** 12 K 1708/16

**Address of the webpage:** <http://www.landesrecht-bw.de/jportal/?quelle=link&docid=MWRE160001267&psml=bsbawueprod.psml&max=true&doc.part=L&doc.norm=all>

**Brief summary:** The court ruled that the expiration of the office of a publicly appointed surveying engineer with the completion of the 70th year of age is an admissible age discrimination under Section 13.1 No. 2 Surveying Act Baden-Wuerttemberg (*Vermessungsgesetz für Baden-Württemberg, VermG BW*), Sections 8, 10 AGG.

**Name of the court:** Münster Finance Court (Finanzgericht Münster, FG Münster)

**Date of decision:** 24 February 2016

**Reference number:** 10 K 1959/15 E

**Address of the webpage:**

[https://www.justiz.nrw.de/nrwe/fgs/muenster/j2016/10\\_K\\_1979\\_15\\_E\\_Urteil\\_20160224.html](https://www.justiz.nrw.de/nrwe/fgs/muenster/j2016/10_K_1979_15_E_Urteil_20160224.html)

**Brief summary:** The fact that the old-age allowance in tax law is not granted until the age of 64 is not an unjustified discrimination disavouring younger taxpayers, ruled the Court. Furthermore, the court held that the AGG, as a simple law standard, is not capable of replacing the provisions of the Income Tax Act.

**Name of the court:** Hessian Administrative Appeals Court (Hessischer Verwaltungsgerichtshof, VGH Hessen)

**Date of decision:** 11 May 2016

**Reference number:** 1A 1926/15

**Address of the webpage:**

[http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht\\_lareda.html#docid:7576058](http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7576058)

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<sup>431</sup> C-298/10 (Hennigs and Mai).



**Brief summary:** The plaintiff is a teacher and an official of the Land Hessen (defendant). He opposes the remuneration system of Hesse for teaching officials and claims that the remuneration paid according to age-grades is age-discriminatory. The Court held that the exclusion period of Section 15.4 AGG for the written assertion of the claim, which is decisive for a claim for compensation by federal civil servants for age-discriminatory remuneration (Section 15.2 AGG), began on the grounds of the originally doubtful legal situation after clarification by the judgment of the Court of Justice of the European Union (C-297/10) and the provision of the full text of the decision on the same day. It is to be assumed that each monthly payment of the remuneration on the basis of a discriminatory assessment system constitutes, in itself, a discriminatory single act, for which a new period of notice may in principle begin as soon as the person concerned has knowledge of it.

Insofar as the jurisprudence, beyond the wording of the law, has postponed the beginning of the period up to the possible clarification by the highest judicial instance of the legal situation in the exceptional case of an uncertain and doubtful legal situation, it does not additionally matter whether or when the person concerned is aware of the clarifying court decision, stated the Court.

**Name of the court:** Cologne Labour Court (Arbeitsgericht Köln, ArbG Köln)

**Date of decision:** 20 July 2016

**Reference number:** 7 Ca 6880/15

**Address of the webpage:**

[https://www.justiz.nrw.de/nrwe/arbgs/koeln/arb\\_g\\_koeln/j2016/7\\_Ca\\_6880\\_15\\_Urteil\\_20160720.html](https://www.justiz.nrw.de/nrwe/arbgs/koeln/arb_g_koeln/j2016/7_Ca_6880_15_Urteil_20160720.html)

**Brief summary:** A pension regulation can reduce the amount of a widow's pension in proportion to the difference in age between the spouses. According to a judgment of the Cologne Labour Court, this does not constitute an unacceptable disadvantage on the grounds of age in the sense of the AGG.

**Name of the court:** Federal Labour Court (Bundesarbeitsgericht, BAG)

**Date of decision:** 27 January 2016

**Reference number:** 5 AZR 263/15 (A)

**Address of the webpage:** <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=18575>

**Brief summary:** In the case at hand the plaintiff had been employed by the defendant as a flight captain since 1986 and was also employed in the training of other pilots. He completed his 65th year of life in October 2013 and by reaching statutory retirement age thus left the company on 31.12.2013. However, in the months of November and December 2013 the defendant did not employ the plaintiff. It had relied on the fact that the applicant is no longer allowed to operate in commercial air transport after he had reached the age of 65. The plaintiff requests compensation for these two months.

The Lower Courts decided in favour of the plaintiff. The defendant continues to pursue its application for dismissal of the action, while the applicant seeks for his action to be fully upheld. It is important for the Senate if FCL.065 b of Annex I to Regulation (EU) No 1178/2011 of 3 November 2011, which provides that a holder of a pilot license who has reached the age of 65 is not allowed to operate in commercial air transport, is compatible with the Charter of Fundamental Rights of the European Union (GRC). Therefore, the Fifth Senate of the Federal Labour Court has submitted to the Court of Justice of the European Union, pursuant to Article 267 TFEU (AEUV), the following questions on the validity and interpretation of the law of the Union:

1. Is FCL.065 b of Annex I to Regulation (EU) No 1178/2011 compatible with the prohibition of age discrimination in Article 21 (1) GRC?

2. Is FCL.065 b of Annex I to Regulation (EU) No 1178/2011 compatible with Article 15 (1) GRC, according to which any person has the right to engage in work and to pursue a freely chosen or accepted occupation?

3. If the first and second questions are answered in the affirmative,

(A) Does the so-called "commercial air transport" within the meaning of FCL.065 b or the definition of this term in FCL.010 of Annex I to Regulation (EU) No 1178/2011 also cover so-called "empty flights" in which neither passengers, freight nor mail are carried?

(B) Does the concept of "commercial air transport" within the meaning of FCL.065 b or the definition of this term in FCL.010 of Annex I to Regulation (EU) No 1178/2011 cover the training and the procedure of taking exams, where a pilot over 65 years old is a non-flying member of the crew in the cockpit of the aircraft?

Lower Court: Landesarbeitsgericht Köln, judgment of 20 March 2015 - 4 Sa 966/14.

**Name of the court:** North Rhine-Westphalia Administrative Appeals Court  
(Oberverwaltungsgericht Nordrhein-Westfalen, OVG NRW)

**Date of decision:** 20 January 2016

**Reference number:** 1 A 1432/13

**Address of the webpage:**

[https://www.justiz.nrw.de/nrwe/ovgs/ovg\\_nrw/j2016/1\\_A\\_1432\\_13\\_Urteil\\_20160120.html](https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2016/1_A_1432_13_Urteil_20160120.html)

**Brief summary:** The plaintiff, born in 1970, is a federal civil servant with life long tenure (*Beamter auf Lebenszeit*). His last promotion to administrative officer (grade A 11 BBesO) took place in April 2003. In December 2011, the plaintiff demanded that his remuneration had to be scaled (retrospectively to 1 January 2008) on the basis of the highest level of the basic salary table A 11 (*Grundtabelle A 11*) because his previous assessment would be age discriminatory according to the case law of the ECJ. The Lower Court granted him an extra amount of 5,500 euros gross. The defendant appealed this decision. The Court granted the appeal. The plaintiff has no claim due to direct discrimination on grounds of age within the meaning of Article 1 and Article 2 (1) and (2) (a) of Directive 2000/78/EC, that would entitle him to be granted the extra payment. According to the court, even if an age-discriminatory effect is acknowledged, the plaintiff is not entitled to remuneration according to the highest scale of payment for the period in dispute.

Lower Court: Verwaltungsgericht Düsseldorf, 13 K 5215/12.

**Name of the court:** Federal Administrative Court (Bundesverwaltungsgericht, BVerwG)

**Date of decision:** 11 October 2016

**Reference number:** 2 C 11.15

**Address of the webpage:**

<http://www.bverwg.de/entscheidungen/entscheidung.php?ent=111016U2C11.15.0>

**Brief summary:** The new provisions in the State Law for Officials of North Rhine-Westphalia (*Landesbeamtengesetz, LBG NRW* - which have been in force since January 2016), according to which an appointment as an official can only take place before the 42nd year of life, do not infringe either the Basic Law nor Union Law.

Proceedings: Bundesverfassungsgericht, judgment of 21.04.2015 - 2 BvR 1322/12 and 1989/12)

See also: OLG Hamm, judgment of 02.09.2016 - 11 U 16/16.

## Disability

**Name of the court:** Federal Labour Court (Bundesarbeitsgericht, BAG)

**Date of decision:** 21 April 2016

**Reference number:** 8 AZR 402/14

**Address of the webpage:** <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2016&anz=20&pos=1&nr=18802&linked=urt>

**Brief summary:** The plaintiff, a person with severe disabilities of a degree of 50%, had been working for the defendant as head of the organisation unit Quality Management/Controlling of the State Criminal Police Office (*LKA*) since 01. October 2012. The parties had agreed on a probationary period of six months in the employment contract. In a staff meeting held on 11 February 2013, the President of the *LKA* informed the applicant that he intended to terminate the employment relationship at the end of the probationary period. By letter dated 08 March 2013, the defendant terminated the employment relationship as of 31 March 2013. The applicant did not take legal action for dismissal protection. In the present proceedings, she claims compensation under Section 15.2 AGG. She maintains that the defendant has discriminated her because of her severe disability by not carrying out the preventive procedure under Section 84.1 of Social Code IX (*SGB IX*). The preventive procedure is a special safeguard to prevent disadvantages for persons with severe disabilities, as well as a "reasonable accommodation" within the meaning of Article 2 of the UN Disability Rights Convention (*UN-Behindertenrechtskonvention, UN-BRK*) and Article 5 of Directive 2000/78/EC. If such a precaution was not taken, this would be regarded as discrimination. The fact that the defendant had failed to implement the preventive procedure prevented her from having the opportunity to remedy any disability-related mistakes.

The lower Courts dismissed the action. The applicant's appeal was also dismissed by the Federal Labour Court. The pre-litigation procedure according to Section 84.1 Social Code IX (*SGB IX*) itself is not to be regarded as an "appropriate precaution" safeguarding the duty to reasonable accommodation within the meaning of Article 2 of the UN Disability Rights Convention (*UN-BRK*) and Article 5 of Directive 2000/78/EC. In addition, the employer is not obliged to carry out a preventive procedure in accordance with Section 84.1 *SGB IX* within the first six months of the employment relationship (waiting period pursuant to Section 1.1 Law on Protection against Dismissal (*Kündigungsschutzgesetz, KSchG*)).

**Name of the court:** Federal Labour Court (Bundesarbeitsgericht, BAG)

**Date of decision:** 11 August 2016

**Reference number:** 8 AZR 375/15

**Address of the webpage:** <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2016&anz=42&pos=0&nr=19036&linked=urt>

**Brief summary:** In 2013, the defendant, a city, put out to public tender a job position for "Technical Employees for the management of the operational area of the complex palm garden" which they maintain. The vacancy notice says: "We expect: Dipl.-Ing. (FH) or state-certified technician or master in the trade union heating/sanitary/electrical engineering or comparable qualification". The plaintiff, severely disabled with a degree of 50%, who is trained as a central heating and ventilation engineer as well as state-approved environmental protection technician in the "Alternative Energies" department, applied to the vacancy. He added a detailed CV to his application letter. The defendant did not invite the plaintiff to an interview, and decided on another candidate.

The plaintiff has asked the defendant to pay compensation under Section 15 AGG. He alleged that the defendant city had discriminated against him because of his severe disability. It had not complied with its obligation under Section 82 Social Code IX (*Sozialgesetzbuch IX, SGB IX*) to invite him to an interview. This fact alone constitutes the

presumption that he was discriminated against because of his severe disability. The defendant has argued that she did not have to invite the applicant for an interview because he was obviously unsuitable for the vacancy. The Labour Court has upheld the action and ordered the defendant to pay compensation to the plaintiff in the amount of three gross monthly salaries. The Labour Court has amended the judicial verdict on the appeal of the defendant and reduced the compensation sum to one gross monthly salary. The defendant appealed against this.

The Court dismissed this appeal. The defendant was not exempt from its obligation to invite the plaintiff to an interview (Section 82 sentence 3 SGB IX). On the basis of the information supplied by the plaintiff in his application, the defendant was not entitled to assume that the applicant was obviously lacking the necessary professional qualifications. The Court held that, it hence can be assumed, the defendant discriminated against him because of his severe disability.

Lower Court: Hessisches Landesarbeitsgericht, judgment of 02.06.2015 - 8 Sa 1374/14.

**Name of the court:** Federal Labour Court (Bundesarbeitsgericht, BAG)

**Date of decision:** 13 October 2016

**Reference number:** 3 AZR 439/15

**Address of the webpage:** <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=19024>

**Brief summary:** The plaintiff is recognised as a severely disabled person. Since the age of 60 he has been receiving a statutory retirement pension for severely disabled persons and a retirement pension. In the past, it was possible to receive full occupational pension from the defendant, if the employee received as well full pension from the statutory pension insurance. Even after a change to the pension scheme, employees are entitled to a company pension if a full pension is drawn from the statutory pension insurance. However, the completion of the age of 65 was uniformly defined as a fixed age limit and at the same time a reduction in the actuarial rate of 0.4% per month was applied for an early occupational pension, insofar as the entitlement to employment was based on employment periods after 1 January 1996. Accordingly, the defendant reduced the occupational pension. The plaintiff brought an action against this.

The Court ruled that there is no discrimination against the plaintiff due to his disability. Direct discrimination in accordance with Section 3.1 of the AGG is excluded because the deductions are not based on the "disability attribute". Other workers can also retire earlier. Similarly, there is no indirect discrimination in accordance with Section 3.2 of the AGG. If the prerequisites for early retirement are met in the case of employees who are not severely disabled, they must also accept reductions. Insofar as only severely disabled persons can claim the statutory pensions and thus the company pays occupational pensions earlier, they are not disadvantaged against other employees.

However, the court's dismissal of the plaintiff's appeal was to be annulled and referred back to the Labour Court. The court decided that it will have to examine whether there have been materially proportionate reasons for the amendment of the pension scheme, and thus safeguard the principles of the protection of legitimate expectations and proportionality.

**Name of the court:** Ulm Labour Court (Arbeitsgericht Ulm, ArbG Ulm)

**Date of decision:** 02 August 2016

**Reference number:** 5 Ca 86/16

**Address of the webpage:** [http://lrbw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&nr=21206](http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=21206)

**Brief summary:** The Court found that infringement of the duty to invite a severely disabled candidate to a job interview (pursuant to Section 82 sentence 2, Social Code IX (SGB IX)), does not allow for the assumption that this is automatically discrimination on the grounds of disability within the framework of Section 22 AGG. Especially, as in the case

at hand, if the employer particularly wants to hire a person with a disability, stated the Court.

### **Race and ethnic origin**

**Name of the court:** Baden-Württemberg Land Labour Court (Landesarbeitsgericht Baden-Württemberg, LAG Baden-Württemberg)

**Date of decision:** 15 January 2016

**Reference number:** 19 Sa 27/15

**Address of the webpage:** [http://lrbw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&nr=20423](http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=20423)

**Brief summary:** The Court ruled that the demand for very good language skills in English and German as a prerequisite for hiring a software developer in an internationally operating company is objectively justified in the sense of Section 3.2 AGG.

**Name of the court:** Rhineland-Palatinate Administrative Appeals Court (Oberverwaltungsgericht Rheinland-Pfalz, OVG Rheinland-Pfalz)

**Date of decision:** 21 April 2016

**Reference number:** 7 A 11108/14.OVG

**Address of the webpage:** [https://www.jurion.de/urteile/ovg-rheinland-pfalz/2016-04-21/7-a-11108\\_14ovg/](https://www.jurion.de/urteile/ovg-rheinland-pfalz/2016-04-21/7-a-11108_14ovg/).

**Brief summary:** In the case at hand the plaintiffs are German nationals and have a dark skin colour. On January 25, 2014, they drove with their two children, five and a half years old, in a regional train, which runs between Mainz and Koblenz. Three officers from the Federal Police later entered the train. One of the officers called the plaintiffs and asked them to show their IDs. The plaintiffs handed over two German identity cards. The police officer passed the ID data via phone on for a data comparison. After returning the identity cards, the police officers got out at the next stop. No further controls took place in this train.

The Court found that the control has been unlawful. According to the results of the investigation, the Senate was not convinced that the selection of the persons concerned was not due to their skin colour. According to Article 3.3 sentence 1 Basic Law (*Grundgesetz, GG*), no one should be disadvantaged because of his "race", which also includes skin colour. According to the case law of the Federal Constitutional Court (*BVerfG*), this feature should not be used as a link for a legal unequal treatment. The constitutional regulation binds not only the legislator, but also the authorities in the application of the laws. The plaintiffs file suit for declaratory action (*Feststellungsklage*) and the court did not decide on further sanctions.

### **Religion and belief**

**Name of the court:** Federal Constitutional Court (Bundesverfassungsgericht, BVerfG)

**Date of decision:** 18 October 2016

**Reference number:** 1 BvR 354/11

**Address of the webpage:** [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/10/rk2\\_0161018\\_1bvr035411.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/10/rk2_0161018_1bvr035411.html)

**Brief summary:** The Federal Constitutional Court ruled that a general prohibition on wearing a headscarf which applied to a teacher in a local nursery violates the constitutional right of freedom of belief.

In the case at hand the appellant wore a headscarf as a symbol of her Muslim belief during her work as a teacher in a local nursery. After refusing to take off the headscarf during her working hours, she was given a warning by her employer, based on an alleged violation of Section 7.6 of the local rules on nurseries (now Section 7.8) (*Kindertagesstättengesetz*). This rule prohibits teachers from making any kind of political, religious or other

manifestation if they can lead to a violation of the neutrality of the institution towards parents and their children or a violation of the general peace in the institution.

The Court ruled that there is no violation of the institution's or the state's neutrality if a teacher wears a headscarf typical for her religious belief. The wearing of such religious symbols is protected under the constitutional right of freedom of belief and there is no constitutional protection whatsoever for being spared from other peoples' religious manifestations. The court underlined that such a garment is by now common in Germany and a necessary consequence of a pluralist society. Furthermore, it is the state's duty of neutrality to treat each religion equally. The court argued that provisions of anti-discrimination law do not provide legal rights of the claimants beyond those derived from freedom of religion.

**Name of the court:** Federal Labour Court (Bundesarbeitsgericht, BAG)

**Date of decision:** 17 March 2016

**Reference number:** 8 AZR 501/14 (A)

**Address of the webpage:** [http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2016&nr=18549&pos=0&anz=15&titel=Ber%FCcksichtigung der Konfession bei der Einstellung](http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2016&nr=18549&pos=0&anz=15&titel=Ber%FCcksichtigung+der+Konfession+bei+der+Einstellung)

**Brief summary:** The case concerns an employer (defendant) who is affiliated with the Protestant Church in Germany and bound by the internal regulations of the Protestant Church in Germany on employment. The defendant had specified a protestant confession as a hiring criterion for a job vacancy for a limited-term contract. An applicant without religious affiliation, who had not been invited for a job interview regarding the advertised vacancy, consequently claimed financial compensation based on a violation of the principle of non-discrimination.

After two lower instance decisions, the first instance finding the complaint in part well-founded, the second instance dismissing the claim, the Federal Labour Court has formulated a preliminary reference to the CJEU.

The first question is whether an employer can determine himself whether a certain religious affiliation is a genuine, legitimate and justified for a certain professional activity.

The second question is whether Section 9.1 General Act on Equal Treatment (AGG)<sup>432</sup> on justification of unequal treatment on religious ground is applicable in this case. The question refers to the following formulation of Section 9.1. AGG that provides: "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".

The third question concerns a clarification of the content of Art. 4.2 Directive 2000/78/EC dealing with occupational requirements.<sup>433</sup>

<sup>432</sup> Cf. Fn. 17 for the link to an English text version of the AGG.

<sup>433</sup> Article 4.2. (Directive 2000/78/CE): "Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith



**Name of the court:** Berlin Labour Court (Arbeitsgericht Berlin, ArbG Berlin)

**Date of decision:** 14 April 2016

**Reference number:** 58 Ca 13376/15

**Address of the webpage:**

<http://www.berlin.de/gerichte/arbeitsgericht/presse/pressemitteilungen/2016/pressemitteilung.468202.php>

**Brief summary:** The plaintiff applied for a position as a primary school teacher in the Land of Berlin. The application was rejected by the defendant because the applicant was wearing a Muslim headscarf. The defendant (Land Berlin) referred to the so-called Berlin Neutrality Act, the Act on Article 29 of the Constitution of Berlin of January 27, 2005, specifically Section 2 Neutrality Act. It stipulates inter alia that teachers in public schools are prohibited from wearing religiously characterized garments. By doing so, the plaintiff felt disadvantaged within the meaning of Article 7 AGG and demanded compensation under Section 15 of the AGG.

The action was dismissed. The Court regarded Section 2 Berlin Neutrality Act as constitutional, according to which the state of Berlin was allowed to reject the application. In view of the decision of the Federal Constitutional Court (BVerfG) of 27 January 2015 (1 BvR 471/10, 1 BvR 1181/10), the Labour Court was also not convinced of the unconstitutionality of Section 2 of the Berlin Neutrality Act and therefore refrained from submitting to the Federal Constitutional Court for standards control. In this respect, the differences between the Berlin regulation and the provisions of Section 57.4 of the "Schulgesetz von Nordrhein-Westfalen", which was the subject of the decision of the BVerfG, were taken into account. These include, inter alia, that the Berlin regulation does not provide for privileges for the benefit of Christian-Western educational and cultural values or traditions that would be contrary to the principle of equality. The Berlin Neutrality Act treats all religions alike. Moreover, the prohibition of religious clothing under Section 3 of the Berlin Neutrality Act does not apply to teachers at vocational schools. Therefore, the teaching activity at a vocational school is still possible for the plaintiff.

**Name of the court:** Federal Constitutional Court (Bundesverfassungsgericht, BVerfG)

**Date of decision:** 08 November 2016

**Reference number:** 1 BvR 3237/13

**Address of the webpage:**

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/11/rk20161108\\_1bvr323713.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/11/rk20161108_1bvr323713.html)

**Brief summary:** The complainant, a school girl, demands dispensation from swimming lessons in a public school because of prescriptions stemming from her Muslim faith to show her body forms to men. Although the school allows for the use of so-called burkinis, this option was not regarded as sufficient by the complainant.

The court regarded the complaint as inadmissible. The complainant did not show that the burkini is not sufficient to comply with religious rules on the concealment of the body. The fact that the complainant is exposed to the sight of male bodies in swimming suits is not sufficient to justify a dispensation from swimming lessons.

The decision clarifies that the possibility of the use of burkinis is sufficient to accommodate the needs of a person of Muslim faith, who wishes to conceal her body forms. It underlines that the mere sight of male persons in swimming suits is not interference in the rights of the person grave enough to entitle her to not take part in swimming lessons.

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and with loyalty to the organisation's ethos."

**Name of the court:** Oldenburg Labour Court (Arbeitsgericht Oldenburg, ArbG Oldenburg)

**Date of decision:** 10 February 2016

**Reference number:** 3 Ca 334/14

**Address of the webpage:** Not available

**Brief summary:** If a job advertisement for a position of staff assistant to a hospital, run by a Catholic institution, calls for a "positive attitude to the basics/aims of a Catholic institution" and a candidate is not taken because she is not baptized, the candidate is entitled to a claim for damages under Section 15.1 AGG as well as compensation according to Section 15.2 AGG.

**Name of the court:** Augsburg Administrative Court (Verwaltungsgericht Augsburg, VG Augsburg)

**Date of decision:** 30 June 2016

**Reference number:** Au 2 K 15.457

**Address of the webpage:**

<http://www.vgh.bayern.de/media/vgaugsburg/presse/15a00457u.pdf>

**Brief summary:** The plaintiff is a legal trainee/junior lawyer who wants to wear a headscarf during her legal training in the justice system of Bavaria. A prohibition to wear a headscarf in the exercise of sovereign activities with contact with the public in the course of her practical training in the civil and criminal justice system, has been imposed by the decision of admission to the legal preparatory service by the responsible public authority based on civil service law. The Court held that the prohibition does not have a sufficiently defined legal basis, neither in Federal Law nor in the State Law of Bavaria and upheld on this basis the action.

## Sexual Orientation

**Name of the court:** Berlin Administrative Court (Verwaltungsgericht Berlin, VG Berlin)

**Date of decision:** 04 May 2016

**Reference number:** VG 26 K 238.14

**Address of the webpage:** [http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js\\_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoc=octodoc=yes&doc.id=JURE160009726&doc.part=L&doc.price=0.0#focuspoint](http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoc=octodoc=yes&doc.id=JURE160009726&doc.part=L&doc.price=0.0#focuspoint)

**Brief summary:** The plaintiff, who had been working for the Foreign Office since 1984, entered into a registered partnership in 2001. He insured his life partner in a private health insurance. This group of persons was not taken into account according to the state aid rules applicable to civil servants. At the end of 2009, the plaintiff asked for compensation of 70% of the expenses for the private health insurance fund, based on the aid rate applicable to spouses, from his employer, based on the Equal Treatment Act (AGG), which implements EU Directive No. 2000/78/EC. After the legislature had retroactively introduced a subsidy for life partners from January 1, 2009, the Federal Foreign Office reimbursed the plaintiff in March 2012 to health insurance contributions amounting to about 5,000 euros, but also rejected further claims. The plaintiff filed an action against this.

The Court denied the existence of a claim for damages. It is true that the applicant was disadvantaged because of his sexual identity prior to the entry into force of the amended aid schemes, stated the Court. The defendant, however, is not responsible for the discrimination. In those circumstances, it was considered that the failure to grant the aid to life partners was compatible with constitutional or European law, and that the Administrative Courts had judged accordingly. It was only in 2012 that the European Court of Justice ruled<sup>434</sup> on a preliminary reference by the Federal Administrative Court that aid for officials in cases of illness falls within the scope of the EU Directive. The so-called state liability based on EU law is also excluded. This is because there is a lack of a qualified

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<sup>434</sup> ECJ judgment of 06.12.2012, C-124/11 (Dittrich and Others).



breach of Union Law, as the questions here at issue were not settled before the ECJ decision.

### **Roma and Travellers**

No cases brought by Roma and Travellers within the scope of the AGG or the Directives were reported for 2016.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Germany  
**Date:** 1 January 2017

<b>Title of legislation (including amending legislation)</b>	Title of the law: Basic Law Abbreviation: GG Date of adoption: 23.05.1949 Latest amendments: 23.12.2014 Entry into force: 23.05.1949 Web link: <a href="http://www.gesetze-im-internet.de/gg">http://www.gesetze-im-internet.de/gg</a> Grounds covered: Sex, parentage, race, language, homeland and origin, faith, religious or political opinions, disability
	Constitutional law
	Material scope: Public authorities, indirect horizontal effect between private parties
	Principal content: General equality clause (Section 3.1); specific anti-discrimination clause (Section 3.3)
<b>Title of legislation (including amending legislation)</b>	Title of the law: General Act on Equal Treatment Abbreviation: AGG Date of adoption: 14.08.2006 Latest amendments: 03.04.2013 Entry into force: 18.08.2006 Web link: <a href="http://www.gesetze-im-internet.de/agg">http://www.gesetze-im-internet.de/agg</a> Grounds covered: Race or ethnic origin, sex, religion or belief ( <i>Weltanschauung</i> ), disability, age, sexual identity; belief not in civil law
	Civil and administrative law, esp. labour law (public and private), partially private contract law (not belief)
	Material scope: Relationship between public and private employers and employees, incl. civil servants and judges; partially contractual relationship between private parties
	Principal content: prohibition of discrimination, damages, anti-discrimination body
<b>Title of legislation (including amending legislation)</b>	Title of the law: Law on Equal Treatment of Soldiers Abbreviation: SoldGG Date of adoption: 14.08.2006 Latest amendments: 31.07.2008 Entry into force: 18.08.2006 Web link: <a href="http://www.gesetze-im-internet.de/soldgg">http://www.gesetze-im-internet.de/soldgg</a> Grounds covered: Race or ethnic origin, religion, belief, sexual identity, partly severely disability
	Public law
	Material scope: Soldiers: employment; (continuing) education; membership in union
	Principal content: prohibition of discrimination
<b>Title of legislation (including amending legislation)</b>	Title of the law: Equal Opportunities for Disabled People Act Abbreviation: BGG Date of adoption: 27.04.2002 Latest amendments: 23.12.2016 Entry into force: 01.05.2002 Web link: <a href="http://www.gesetze-im-internet.de/bgg">http://www.gesetze-im-internet.de/bgg</a> Grounds covered: Disability
	Public law

	Material scope: Barrier free access
	Principal content: Prohibition of discrimination, obligation to provide barrier free access; specialised body
<b>Title of legislation (including amending legislation)</b>	Title of the law: Social Code IX Abbreviation: SGB IX Date of adoption: 19.06.2001 Latest amendments: 23.12.2016 Entry into force: 23.06.2001 Web link: <a href="http://www.gesetze-im-internet.de/sgb_9">http://www.gesetze-im-internet.de/sgb_9</a> Grounds covered: Disability
	Labour law, Social law
	Material scope: Public and private employment
	Principal content: General legal protection of (severely) disabled

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country:** Germany  
**Date:** 1 January 2017

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	04.11.1950	05.12.1952	N/A	N/A	Yes
Protocol 12, ECHR	04.11.2000	Not ratified	N/A	N/A	N/A
Revised European Social Charter	29.06.2007	Not ratified	N/A	Ratified collective complaints protocol? Not ratified	N/A
International Covenant on Civil and Political Rights	09.10.1968	17.12.1973	N/A	Yes	No
Framework Convention for the Protection of National Minorities	11.05.1995  N/A	10.09.1997  N/A	N/A	N/A	No
International Covenant on Economic, Social and Cultural Rights	09.10.1968	17.12.1973	N/A	No	No
Convention on the Elimination of All Forms of Racial Discrimination	10.02.1967	16.05.1969	N/A	Yes	No
Convention on the Elimination of Discrimination Against Women	07.07.1980	10.07.1985	N/A	Yes	No
ILO Convention No. 111 on Discrimination	25.06.1958	15.06.1961	N/A	N/A	No

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Convention on the Rights of the Child	26.01.1990	06.03.1992	N/A	Yes	No
Convention on the Rights of Persons with Disabilities	30.03.2007	24.02.2009	N/A	Yes	No

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