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Country report

Non-discrimination

Germany

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Country report

Non-discrimination

Germany

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List of Abbreviations

ADS	German Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes)
AGG	General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz)
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 of which are 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. In particular due to Germany's efforts in the refugee crisis, the number of foreigners in Germany has risen by 1.9 million since 2015 to about 10 million foreigners in Germany as of 31 December 2016 (of a total population of around 82 million). The rise of the population of foreigners between 2014 and 2016 was caused mainly by migrants from Syria (519 700), Afghanistan (178 100) and Iraq (138 500). 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 22 million members each. Thus, about 25 % of the population belong to one of the two main Christian denominations, about 50 % 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) is about 4.5 million, which is about 4.5 % of the population. 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. Since 2017, same-sex partners have been able to marry.¹ The reform of the German Nationality Act has liberalised the rules for obtaining German citizenship to foster integration. Many people in Germany have shown 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 2017 – as in previous years – saw local demonstrations with considerable numbers of people mobilised to express what are generally regarded as xenophobic attitudes. A xenophobic party achieved strong election results in 2017 and is now represented in the German Parliament.

¹ Germany, *Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* 20.07.2017.

The refugee crisis has stirred many violent acts, including numerous attacks on shelters for refugees, including arson. The Federal Criminal Police (*Bundeskriminalamt*) counted about 1 000 such attacks on refugee shelters in 2016² and more than 250 in 2017, which is considerably less, but still a significant number.³

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*).⁴ 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-

² Federal Criminal Police (*Bundeskriminalamt*) (2016), *Kriminalität im Kontext von Zuwanderung*, Bundeslagebild 2016, p. 60.

³ Federal Criminal Police (*Bundeskriminalamt*) (2017), Kernaussagen "Kriminalität im Kontext von Zuwanderung", 2017, S. 56:
https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2017.html.

⁴ Germany, BGBl. 2006, 1897.

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-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 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, opening marriage to same-sex couples⁵ and 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

⁵ Sec. 1353 para. 1 sentence 1 Civil Code as amended by the bill, Bt. Drs. 18/6665; 18/12989 Bundesgesetzblatt 2017 Teil I Nr. 52, 28.07.2017, 2787 Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts vom 20.07.2017.

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.⁶ This case law concerns a highly contested area with significant social impact given the importance of the Christian churches and their organisations as employers. A preliminary reference to the CJEU will lead to a much-desired clarification of the EU law in this respect.⁷ 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.

⁶ 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.

⁷ Federal Labour Court (Bundesarbeitsgericht), 17 March 2016 – 8 AZR 501/14 (A), see the case law section on the country report for 2016). The case concerns an employer (the 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. See the opinion of Advocate General Tachev, 9 November 2017, Case C-414/16 (Egenberger) on this matter with a more restrictive interpretation of the autonomy of religious communities in this respect. The case was decided after the cut-off date of this report, and circumscribes the autonomy of religious communities more narrowly than previously accepted in German law, see CJEU, 17 April 2018, C-414/16 (Egenberger), confirmed by CJEU, 11 September 2018, C-68/17 (IR vs. JQ).

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 2017. An interesting case that may be worth highlighting given its subject matter is the following:⁸

The case concerns a woman who was pursuing the second part of legal education in Germany after her university degree in law. During this time, the trainee (*Referendar/Referendarin*) is employed as a public employee and serves various legal functions including in courts, prosecution and administration. In this role, she takes on certain official functions, including for instance the questioning of parties to court proceedings under the supervision of a judge. The complainant wears a headscarf due to her Muslim belief. The administration ordered that she must not carry out any functions in which she visibly displays her religious belief to parties of the proceedings, such as when fulfilling judicial duties in court proceedings. The exclusion would not have negative consequences for the evaluation of her performance but would be compensated for by other achievements. The complainant asked for a temporary injunction to allow her to fully participate in the trainee programme. The exclusion from parts of it would, she argued, violate her rights to personal identity, freedom of religion, freedom of profession and discriminate against her.

The Federal German Constitutional Court did not grant a temporary injunction. Such a temporary injunction, if granted, is not based on the constitutional merits of the case but on the possible negative consequences of granting or not granting the injunction. It argued that the possible violations of the fundamental rights of the complainant were limited. Granting her the possibility to fulfil judicial functions wearing a headscarf would, in contrast, endanger state neutrality and the freedom of religion of the parties to the court proceedings.

The case concerns an important question of the admissibility of religious symbols worn by members of the legal professions in legal proceedings widely discussed in the media. The case also concerns the issue of a temporary injunction. A final decision about the constitutionality of the ban of headscarves will follow later. The court emphasised, however, the importance of the religious neutrality of the state, especially of the judiciary and the freedom of parties not to be confronted with religious manifestations of members of the judiciary. This raises the question whether the court will follow a stricter line of argument than in its recent case law on the permissibility of headscarves being worn by teachers.⁹ The case, and others like it, are thus symptomatic of the on-going renegotiation of the presence of religious symbols in the public sphere.

⁸ Order, German Federal Constitutional Court (Bundesverfassungsgericht), 27 June, 2017, 2 BvR 1333/17.

⁹ A second instance administrative court has by now overturned a lower instance decision allowing the wearing of a headscarf in the court room, cf. Bavarian Administrative Court (*Bayerischer Verwaltungsgeschichtshof*), 7 March 2018, AZ: 3 BV 16.2040.

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 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*)).¹⁰

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 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 EUR 4.4 million. The agency has a public presence, through conferences, publications and commissioned surveys and studies on particular issues, such as empirical findings on discrimination, discrimination on religious grounds, multiple discrimination and 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.

¹⁰ Last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

7. Key issues

Germany has established in principle a comprehensive legal framework to combat acts of discrimination, that is constantly evolving.¹¹ 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, and the considerable success of a xenophobic party in the 2017 election despite the strong reaction of civil society, Government and political groups, give reason 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 that it sometimes provokes. In addition, one should be mindful of the threat of religiously motivated terror, such as the attack that tragically struck Germany in 2016 and that may augment these problems.

¹¹ Germany, 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.

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 notamment de la présence de demandeurs d'asile et de réfugiés. Les efforts plus particulièrement 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 1,9 million en 2015 pour atteindre 10 millions environ au 31 décembre 2016 (sur une population de l'ordre de 82 millions d'habitants). Cette montée de la population étrangère entre 2014 et 2016 s'explique principalement par l'arrivée de migrants en provenance de Syrie (519 700), d'Afghanistan (178 100) et d'Iraq (138 500). 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 22 millions de membres en Allemagne: elles représentent donc respectivement 25 % de la population et conjointement 50 % 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) est de 4,5 millions environ, ce qui représente approximativement 4,5 % de la population. L'Allemagne compte près de 100 000 Juifs, soit 0,12 % de ses habitants.

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, convictions, 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. Les partenaires de même sexe peuvent se marier depuis 2017.¹² 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 ont fait preuve en Allemagne de beaucoup de solidarité à l'égard des réfugiés.

¹² Allemagne, loi du 20 juillet 2017 sur l'institution du droit au mariage pour les personnes de même sexe (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*).

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 2017 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. Ayant obtenu de bons résultats lors des élections de 2017, un parti xénophobe est désormais représenté au parlement allemand. 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'accueil¹³ et plus de 250 en 2017, ce qui reste un nombre important en dépit de sa forte baisse.¹⁴

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*),¹⁵ 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

¹³ Office fédéral de police criminelle (*Bundeskriminalamt*), «*Kriminalität im Kontext von Zuwanderung*», Bundeslagebild 2016, p. 60.

¹⁴ Office fédéral de police criminelle (*Bundeskriminalamt*), «*Kriminalität im Kontext von Zuwanderung*», 2017, p. 56:
https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2017.html.

¹⁵ Allemagne, BGBl. 2006, 1897.

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 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 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, l'ouverture du mariage aux couples de même sexe¹⁶ et 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.¹⁷ 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. Une demande de décision préjudicielle à la CJUE devrait aboutir à une clarification très attendue du droit de l'UE à cet égard.¹⁸ 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

¹⁶ Article 1353, paragraphe 1, première phrase, du code civil tel que modifié par le projet de loi BT-Drs. 18/6665; BT-Drs. 18/12989, Journal officiel (*Bundesgesetzblatt*) 2017, Partie I, n° 52 du 28 juillet 2017, p. 2787, loi du 20 juillet 2017 sur l'institution du droit au mariage pour les personnes de même sexe (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* vom 20.07.2017).

¹⁷ 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.

¹⁸ Cour fédérale du travail (*Bundesarbeitsgericht*), 17 mars 2016 – 8 AZR 501/14 (A), voir la rubrique consacrée à la jurisprudence dans le rapport national 2016. L'affaire concerne un employeur (la défenderesse) membre de l'Église protestante allemande et tenu de respecter le règlement intérieur de cette institution en matière d'emploi. La défenderesse avait spécifié la confession protestante en tant que critère d'embauche à un poste vacant avec contrat à durée déterminée. Une candidate sans appartenance religieuse, qui n'avait pas été conviée à un entretien dans le cadre de ce recrutement, a réclamé conséquemment une indemnisation financière en invoquant une violation du principe de non-discrimination. Voir à ce propos les conclusions de l'Avocat général Tanchev en date du 9 novembre 2017 dans l'affaire C-414/16 (Egenberger), qui donnent une interprétation plus restrictive de l'autonomie des communautés religieuses à cet égard. L'arrêt, rendu après la date limite fixée pour le présent rapport, définit en matière d'autonomie des communautés religieuses des limites plus étroites que celles antérieurement admises en droit allemand, voir l'arrêt de la CJUE du 17 avril dans l'affaire C-414/16 (Egenberger), confirmé par l'arrêt de la CJUE du 11 septembre 2018 dans l'affaire C-68/17 (IR contre JQ).

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. 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 2017 plusieurs interprétations importantes de dispositions légales pertinentes en matière de discrimination. L'affaire suivante mérite sans doute d'être mise en évidence en raison de son objet:¹⁹

L'affaire concerne une femme qui suit la seconde partie de sa formation juridique en Allemagne après avoir obtenu son diplôme universitaire en droit, et qui occupe dans le même temps un poste de fonctionnaire stagiaire (*Referendar/Referendarin*) en remplissant diverses fonctions juridiques auprès des tribunaux, du parquet et de l'administration. Elle

¹⁹ Injonction, Cour constitutionnelle fédérale allemande (*Bundesverfassungsgericht*), arrêt 2 BvR 1333/17 du 27 juin 2017.

assure à ce titre certaines fonctions officielles, y compris notamment l'interrogatoire de parties dans le cadre de poursuites judiciaires sous la supervision d'un juge. La plaignante porte un foulard en raison de sa foi musulmane. L'administration lui a ordonné de ne pas exécuter de fonctions dans lesquelles elle affiche visiblement ses convictions religieuses aux parties de la procédure (lorsqu'elle exerce des devoirs judiciaires dans le cadre de poursuites, par exemple). Il était prévu que cette exclusion n'aurait aucune répercussion négative sur l'évaluation de sa performance car elle serait compensée par d'autres accomplissements. La plaignante a demandé une injonction temporaire afin de pouvoir suivre intégralement le programme de formation – le fait qu'elle soit exclue de certains volets de celui-ci constituant selon elle une violation de ses droits en matière d'identité personnelle, de liberté de religion et de liberté de profession, et partant une discrimination à son égard.

La Cour constitutionnelle fédérale allemande n'a pas accordé d'injonction temporaire, laquelle, lorsqu'elle est octroyée, ne se fonde pas sur le bien-fondé constitutionnel de la cause mais sur les répercussions négatives éventuelles de son octroi ou de son non-octroi. La Cour a fait valoir que l'éventualité de violations des droits fondamentaux de la plaignante était limitée mais que le fait de lui accorder la possibilité d'exercer des fonctions judiciaires en portant le foulard compromettrait en revanche la neutralité de l'État et la liberté de religion des parties à la procédure judiciaire.

Cette affaire porte donc sur l'importante question de l'admissibilité du port de symboles religieux par des membres des professions juridiques lors de procédures judiciaires – une question qui fait l'objet de vastes débats dans les médias. Elle porte aussi sur la question de l'injonction temporaire. Une décision finale quant à la constitutionnalité de l'interdiction du port du foulard suivra ultérieurement. Mais la Cour n'en a pas moins insisté sur l'importance de la neutralité religieuse de l'État, en particulier au niveau du pouvoir judiciaire, et sur la liberté des parties de ne pas se trouver confrontées à des manifestations religieuses de la part des membres de la magistrature. On peut se demander dès lors si la Cour va opter pour une argumentation plus stricte que dans sa récente jurisprudence concernant la licéité du port du foulard par des enseignantes.²⁰ L'affaire, et d'autres semblables, sont donc symptomatiques de la perpétuelle renégociation de la présence de symboles religieux dans la sphère publique.

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.

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.

²⁰ Une juridiction administrative de seconde instance a aujourd'hui renversé la décision d'une instance inférieure d'autoriser le port d'un foulard dans une salle d'audience: voir Tribunal administratif de Bavière (*Bayerischer Verwaltungsgerichtshof*), arrêt AZ: 3 BV 16.2040 du 7 mars 2018.

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*)).²¹

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 4,4 millions d'euros. Elle fait connaître son action auprès du public 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 et 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 l'intégration/des étrangers, des immigrants d'origine ethnique allemande (*Aussiedler*) et des minorités nationales, et des personnes handicapées.

²¹ Modifiée en dernier lieu le 23 décembre 2016 (BGBl. I, 3234 (n° 66)).

7. Points essentiels

L'Allemagne a instauré en principe un cadre juridique complet pour lutter contre les actes de discrimination. Ce cadre en évolution permanente²² 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, 2^e 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 et le succès considérable remporté par un parti xénophobe lors des élections de 2017, font penser qu'en dépit de vives réactions de la part de la société civile, du gouvernement et de groupes politiques, des efforts doivent impérativement être poursuivis à cet égard – surtout dans le contexte de la crise des 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, telle l'attaque qui a frappé l'Allemagne de façon tragique en 2016 et qui pourrait amplifier ces problèmes.

²² Allemagne, 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.

ZUSAMMENFASSUNG

1. Einleitung

Wie viele andere Länder hat Deutschland eine pluralistische Gesellschaft. Die autochthonen Minderheiten des Landes, Dänen und Sorben, sind beide zahlenmäßig nicht sehr bedeutend. 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. Namentlich aufgrund der deutschen Anstrengungen während der Flüchtlingskrise ist die Zahl der in Deutschland lebenden Ausländer seit 2015 um 1,9 Millionen auf rund 10 Millionen gestiegen (Stand 31. Dezember 2016, bei einer Gesamtbevölkerung von rund 82 Mio.). Der Anstieg der Ausländerzahl zwischen 2014 und 2016 wurde vor allem durch Migranten aus Syrien (519 700), Afghanistan (178 100) und dem Irak (138 500) verursacht. 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 22 Millionen Mitgliedern. Jeweils 25 % der Bevölkerung gehören einer der beiden großen christlichen Konfessionen an, insgesamt also rund 50 %. 2015 waren etwa 1,7 Millionen Muslime deutsche Staatsbürger, was rund 2 % der Bevölkerung entspricht. Die Gesamtzahl der Muslime (mit oder ohne Staatsbürgerschaft) beträgt rund 4,5 Millionen, was etwa 4,5 % der Bevölkerung entspricht. Knapp 100 000 Menschen (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. Es wurde ein spezielles Rechtsinstitut geschaffen, um gleichgeschlechtlichen Partnerschaften einen sicheren Rechtsrahmen als Äquivalent zur Ehe für heterosexuelle Paare zu geben. Seit 2017 können gleichgeschlechtliche Paare heiraten.²³ Die Reform des Staatsangehörigkeitsgesetzes hat die Regeln für die Erlangung der deutschen Staatsbürgerschaft liberalisiert; Ziel der Reform war unter anderem die Förderung der Integration. Viele Menschen in Deutschland haben sich Flüchtlingen gegenüber sehr solidarisch 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.

²³ Deutschland, Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, 20.07.2017.

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. 2017 kam es – wie schon in den Vorjahren – zu lokalen Demonstrationen, die eine beträchtliche Zahl von Menschen mobilisierten, um das auszudrücken, was im Allgemeinen als fremdenfeindliche Haltung angesehen wird. Eine fremdenfeindliche Partei hat bei den Wahlen 2017 gute Ergebnisse erzielt und ist seither im Bundestag vertreten. Im Zuge der Flüchtlingskrise ist es zu zahlreichen Gewalttaten, darunter auch zu vielen Angriffen auf Flüchtlingsheime, einschließlich Brandstiftung, gekommen. Das Bundeskriminalamt verzeichnete 2016²⁴ rund 1000 solcher Angriffe auf Flüchtlingsunterkünfte und 2017 mehr als 250, was zwar deutlich weniger, aber immer noch eine beträchtliche Anzahl ist.²⁵

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 Rechtsvorschriften

Am 18. August 2006 wurde ein umfassendes Antidiskriminierungsgesetz verabschiedet, das Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung (EUGleichbUmsG).²⁶ 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

²⁴ Bundeskriminalamt (2016), Kriminalität im Kontext von Zuwanderung, Bundeslagebild 2016, S. 60.

²⁵ Bundeskriminalamt (2017), Kernaussagen „Kriminalität im Kontext von Zuwanderung“, 2017, S. 56: https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2017.html.

²⁶ Deutschland, BGBl. 2006, 1897.

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 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 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.

Was Behinderung betrifft, so wurden mehrere Rechtsinstrumente geschaffen, die vor Diskriminierung schützen und die soziale Eingliederung von Menschen mit Behinderung fördern sollen. Im Bereich der sexuellen Orientierung wurden Rechtsvorschriften erlassen, die entweder direkt darauf abzielen, Schutz vor Diskriminierung zu etablieren, oder dies indirekt tun, indem sie Möglichkeiten eröffnen, die Menschen mit einer bestimmten sexuellen Orientierung bis dahin nicht hatten, z. B. durch Einführung einer gesetzlich geregelten Form von Partnerschaft, die Ermöglichung der Eheschließung für gleichgeschlechtliche Paare²⁷ oder die Ermöglichung von Adoption.

Was 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

²⁷ § 1353 Absatz 1 Satz 1 Bürgerliches Gesetzbuch in der Fassung des Gesetzentwurfs, Bt.-Drs. 18/6665; 18/12989 Bundesgesetzblatt 2017 Teil I Nr. 52, 28.07.2017, 2787 Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts vom 20.07.2017.

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.²⁸ Dieses Fallrecht betrifft einen äußerst umstrittenen Bereich, der – angesichts der Bedeutung der christlichen Kirchen und ihrer Organisationen als Arbeitgeber – von großer gesellschaftlicher Relevanz ist. Ein Vorabentscheidungsersuchen an den EuGH wird diesbezüglich zu einer dringend erforderlichen Klärung des EU-Rechts führen.²⁹ 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.

²⁸ Siehe Bundesarbeitsgericht, BAG, 24. September 2014, 5 AZR 611/12 und entsprechend Bundesverfassungsgericht, BVerfG, 20. Oktober 2014, 2 BvR 661/12.

²⁹ Bundesarbeitsgericht, 17. März 2016 – 8 AZR 501/14 (A) (vgl. den Abschnitt zur Rechtsprechung („Case law“) im Länderbericht für 2016). Der Fall betrifft einen Arbeitgeber (der Beklagte), der Mitglied der Evangelischen Kirche in Deutschland (EKD) ist und für den die internen Vorschriften der EKD über Beschäftigung gelten. Der Beklagte hatte die Zugehörigkeit zum evangelischen Glauben als Einstellungskriterium für eine befristete Stelle angegeben. Eine konfessionslose Bewerberin, die nicht zu einem Vorstellungsgespräch für die ausgeschriebene Stelle eingeladen worden war, verlangte daraufhin eine finanzielle Entschädigung wegen Verstoßes gegen den Grundsatz der Nichtdiskriminierung; siehe die Schlussanträge des Generalanwalts Tanchev vom 9. November 2017 in der Rechtssache C-414/16 (Egenberger), in denen diesbezüglich eine restriktivere Auslegung der Autonomie von Religionsgemeinschaften vertreten wird. Der Rechtsstreit wurde nach Redaktionsschluss dieses Berichts entschieden und fasst die Autonomie von Religionsgemeinschaften enger als bisher im deutschen Recht geschehen; vgl. EuGH, 17. April 2018, C-414/16 (Egenberger), bestätigt durch EuGH, 11. September 2018, C-68/17 (IR gg. JQ).

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 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 2017 einige wichtige Auslegungen diskriminierungsrelevanter Rechtsvorschriften bestätigt. Ein interessanter Rechtsstreit, der in Anbetracht seines Gegenstands besondere Aufmerksamkeit verdient, ist folgender:³⁰

Der Fall betrifft eine Frau, die sich nach ihrem Jurastudium im zweiten Teil der juristischen Ausbildung in Deutschland befand. Während dieser Zeit sind Rechtsreferendare/-referendarinnen als Angestellte im öffentlichen Dienst tätig und üben verschiedene Rechtsfunktionen aus, unter anderem bei Gerichten, bei der Staatsanwaltschaft und in der Verwaltung. In dieser Funktion führt die betreffende Person bestimmte offizielle Tätigkeiten, etwa die Befragung von Prozessparteien unter Aufsicht eines Richters, aus. Die Beschwerdeführerin trägt aufgrund ihres muslimischen Glaubens ein Kopftuch. Die zuständige Behörde verfügte, dass sie keine Tätigkeiten ausüben dürfe, in denen sie gegenüber den Verfahrensbeteiligten ihren religiösen Glauben sichtbar zum Ausdruck bringt, etwa bei der Wahrnehmung richterlicher Aufgaben im Gerichtsverfahren. Der Ausschluss hätte keine negativen Auswirkungen auf die Bewertung ihrer Gesamtleistung, sondern würde durch andere Leistungen kompensiert. Die Beschwerdeführerin beantragte den Erlass einer einstweiligen Anordnung, um ihre

³⁰ Beschluss, Bundesverfassungsgericht, 27. Juni 2017, 2 BvR 1333/17.

Ausbildung vollumfänglich wahrnehmen zu können. Die Tatsache, dass ihr die Teilnahme an bestimmten Teilen der Ausbildung verwehrt werde, so ihre Argumentation, verletze sie in ihren Rechten auf persönliche Identität, Religionsfreiheit, und Berufsfreiheit und diskriminiere sie.

Das Bundesverfassungsgericht lehnte den Erlass einer einstweiligen Anordnung ab. Die Entscheidung über den Erlass einer solchen einstweiligen Anordnung basiert nicht auf dem verfassungsrechtlichen Sachverhalt, sondern auf den möglichen Nachteilen, die aus dem Ergehen bzw. Nichtergehen der einstweiligen Anordnung entstehen. Eventuelle Verletzungen der Grundrechte der Beschwerdeführerin seien, so das Gericht, begrenzt. Ihr die Möglichkeit einzuräumen, die hoheitlichen Tätigkeiten auszuüben und dabei ein Kopftuch zu tragen, würde hingegen die staatliche Neutralität und die Glaubens- und Bekenntnisfreiheit der Verfahrensbeteiligten gefährden.

In dem Fall geht es um eine wichtige Frage, die in den Medien breit diskutiert wird, nämlich um die Zulässigkeit religiöser Symbole, die von Angehörigen der Rechtsberufe in Gerichtsverfahren getragen werden. In dem Fall geht es auch um die Frage des Erlassens einer einstweiligen Anordnung. Eine endgültige Entscheidung über die Verfassungsmäßigkeit des Kopftuchverbots wird zu einem späteren Zeitpunkt erfolgen. Das Gericht unterstrich jedoch die Bedeutung der religiösen Neutralität des Staates, insbesondere der Justiz, und der Freiheit der Verfahrensbeteiligten, nicht mit religiösen Bekundungen von Angehörigen der Justiz konfrontiert zu werden. Es stellt sich die Frage, ob das Gericht eine strengere Argumentation anwenden wird als in seiner neueren Rechtsprechung zur Zulässigkeit des Kopftuchs bei Lehrerinnen.³¹ Dieser Fall und andere ähnliche Fälle sind symptomatisch für die derzeitige Neuverhandlung der Präsenz religiöser Symbole im öffentlichen Raum.

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 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

³¹ Ein Verwaltungsgericht zweiter Instanz hat inzwischen ein erstinstanzliches Urteil aufgehoben, in dem das Tragen eines Kopftuchs im Gerichtssaal erlaubt wurde; vgl. Bayerischer Verwaltungsgerichtshof, 7. März 2018, AZ: 3 BV 16.2040.

(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 Umrisse 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 mindestens 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).³²

³² Zuletzt geändert am 23.12.2016 (BGBl. I Nr. 66, S. 3234).

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 4,4 Millionen Euro. Die Stelle ist in der Öffentlichkeit durch Konferenzen, Publikationen sowie durch Befragungen und Studien präsent, die sie zu bestimmten Themen (empirische Erkenntnisse über Diskriminierung, Diskriminierung aus religiösen Gründen, Mehrfachdiskriminierung und positive Maßnahmen, Situation der Sinti und Roma in Deutschland usw.) in Auftrag gibt.

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. Zentrale Punkte

Grundsätzlich hat Deutschland einen umfassenden Rechtsrahmen zur Bekämpfung diskriminierender Handlungen geschaffen, der sich ständig weiterentwickelt.³³ Es gibt jedoch einige Mängel:

- a) die Ausnahme von Kündigungen vom Geltungsbereich des Diskriminierungsverbots (§ 2 Absatz 4 AGG), die jedoch im Fallrecht kaum angewendet wird;
- b) die mögliche Nichtanwendung des AGG auf die betriebliche Altersvorsorge (§ 2 Absatz 2 Satz 2 AGG), die jedoch von der juristischen Auslegung der jeweiligen Vorschrift abhängt;
- c) die Ausnahme sämtlicher 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 sachlichen Geltungsbereich des Zugangs zu Gütern und Dienstleistungen in Bezug auf sämtliche Diskriminierungsgründe, auch „Rasse“ und ethnische Herkunft

³³ Deutschland, Gesetz zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen, BTHG, BGBl. I, S. 3234, das ab 2017 stufenweise in Kraft tritt.

- (§ 19 Absatz 5 AGG), die – je nach Auslegung – möglicherweise gegen die Antirassismusrichtlinie verstößt;
- d) je nach rechtlicher Auslegung die Ausnahmeregelung bei der Vermietung von Wohnraum, der zufolge eine unterschiedliche Behandlung zur Schaffung ausgeglichener sozialer und kultureller Verhältnisse zulässig ist (§ 19 Absatz 3 AGG);
 - e) die Zulässigkeit unterschiedlicher Behandlung wegen der Religion oder Weltanschauung, je nach rechtlicher Auslegung (§ 9 Absatz 1 AGG);
 - f) das Zivilrecht enthält kein ausdrückliches Verbot von Viktimisierung wie in Artikel 9 der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse (2000/43/EG) vorgesehen;
 - g) die Tatsache, dass Schadensersatz von einem Verschulden (vorsätzliches oder fahrlässiges Fehlverhalten) bzw. von grober Fahrlässigkeit abhängt (§ 15 Absatz 1 und Absatz 3 sowie § 21 Absatz 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 existiert keine allgemeine Regelung angemessener 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. Jüngste Ereignisse wie z. B. fremdenfeindliche Demonstrationen beträchtlicher Größe und der beachtliche Erfolg, den eine fremdenfeindliche Partei – trotz der entschlossenen Reaktion der Zivilgesellschaft, der Regierung und politischer Gruppen – bei den Wahlen 2017 einfuhr, geben Grund zu der Annahme, dass es in dieser Hinsicht beharrlicher Anstrengungen bedarf, nicht zuletzt aufgrund der Flüchtlingskrise und der fremdenfeindlichen Reaktionen, die diese bisweilen hervorruft. Außerdem ist die Bedrohung durch religiös motivierten Terror – z. B. der Anschlag, der Deutschland im Jahr 2016 auf tragische Weise traf – zu bedenken, der diese Probleme noch verschärfen kann.

INTRODUCTION

The national legal system

The Constitution, or Basic Law (*Grundgesetz*, GG),³⁴ 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.³⁵ Fundamental rights are part of this directly effective constitutional order. They are binding on the legislature, executive, and judiciary as directly valid law.³⁶ 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*).³⁷ 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,³⁸ 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.³⁹ 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.⁴⁰ He or she is, in addition, protected against degrading or humiliating treatment.⁴¹ 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.⁴² Other important constitutional guarantees are the guarantee of equality⁴³ and special constitutional equality rights concerning children born outside of marriage,⁴⁴ equality of status and office⁴⁵ and equality of electoral rights.⁴⁶

Germany is a democratic and social federal state under the rule of law.⁴⁷ As it is a social state, the state has a duty to promote the welfare of its citizens. In the field of anti-

³⁴ Basic Law (*Grundgesetz*, GG) of 23.05.1949 (BGBl. 1949, 1), last amended on 13.07.2017 (BGBl. I, 2347).

³⁵ Article 20.3 GG.

³⁶ Article 1.3 GG.

³⁷ Article 93.1 Nr. 4a GG.

³⁸ Here understood in the narrow sense, excluding criminal law.

³⁹ Article 1.1 GG: 'Human dignity is inviolable. To respect and protect it is the duty of all state authority.'

⁴⁰ 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.

⁴¹ BVerfG, 15.02.2006 (1BvR 357/05), BVerfGE 115, 118.

⁴² 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.

⁴³ Article 3 GG.

⁴⁴ 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.'

⁴⁵ 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.

⁴⁶ Article 38.1 sentence 1, and Article 38.2 GG.

⁴⁷ 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.⁴⁸

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.⁴⁹

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 Gleichbehandlungsgesetz* AGG) of 14.08.2006 (BGBl. I, 1897) which was last amended on 03.04.2013 (BGBl. I, 610).⁵⁰ 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).⁵¹

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.⁵²

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)⁵³ and the fundamental principle of equal treatment of employees has been consistently established by case law.⁵⁴ 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.⁵⁵

⁴⁸ See below for examples.

⁴⁹ Articles 70-74 GG.

⁵⁰ The German Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle 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. Accessed on 31.12.2017.

⁵¹ 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).

⁵² 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), on 21.11.2016 (BGBl. I, 2570). and most recently on 08.06.2017 (BGBl. I, 1570).

⁵³ Section 75.1 Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG), of 25.09.2001 (BGBl. I, 2518). This codification was last amended on 17.07.2017 (BGBl. I, 2509).

⁵⁴ Settled case law, see Federal Labour Court (*Bundesarbeitsgericht*, BAG), 12.10.2005, 10 AZR 640/04.

⁵⁵ 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) refers to the regulation of the AGG. The SGB IX of 19.06.2001 (BGBl. I, 1046) was last amended on 17.07.2017 (BGBl. I, 2541). The SGB IX was thoroughly reformed in 2017. The changes restructuring the SGB IX entered into force on 1 January 2018. The references in this report are thus as to the legal situation as of 31.12.2017. 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 17.07.2017 (BGBl. I, 2541). See below for more and for details on

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.⁵⁶

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.⁵⁷ 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.

disability.

⁵⁶ See below, 2.6.

⁵⁷ In particular, in relation to race and ethnic origin, see T. Bezenberger, '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.⁵⁸

The guarantee of equality⁵⁹ provides, first, for equality before the law,⁶⁰ 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.⁶¹ The guarantee of equality contains, secondly, special protection against discrimination on the ground of sex,⁶² parentage, race, language, homeland and origin, faith, or religious or political opinions.⁶³ There is a prohibition against disadvantaging somebody because of their disability, which implies the admissibility of positive action.⁶⁴ 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.⁶⁵ 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.⁶⁶ In addition, the doctrine of positive duties can give rise to the obligation of state authorities to protect against discrimination.

⁵⁸ There are 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.

⁵⁹ Article 3 GG.

⁶⁰ Article 3.1 GG: 'All humans are equal before the law.'

⁶¹ Settled case law, BVerfGE 49, 148 (165); 98, 365 (385).

⁶² Article 3.3 and Article 3.2 GG: men and women are equal.

⁶³ Article 3.3 sentence 1 GG.

⁶⁴ Article 3.3 sentence 2 GG.

⁶⁵ Article 3.2 sentence 2 GG.

⁶⁶ 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.⁶⁷ The guarantees in the Länder constitutions differ in their details from this list⁶⁸ although this is of no great significance in practice.⁶⁹

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.

⁶⁷ 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.

⁶⁸ 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 18.03.2015 (GVBl. 1 Nr. 6), 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.

⁶⁹ 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*)⁷⁰ 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 soldiers⁷¹ 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*)⁷² 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.⁷³ 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*)⁷⁴ 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.⁷⁵

According to Section 75.1 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*),⁷⁶ 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*)⁷⁷ 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.⁷⁸ There is some law

⁷⁰ Last amended on 31.07.2008 (BGBl. I, 1629).

⁷¹ 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.

⁷² Last amended on 08.06.2017 (BGBl. I, 1570).

⁷³ 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.'

⁷⁴ Last amended on 17.07.2017 (BGBl. I, 2581).

⁷⁵ See Annex 1.

⁷⁶ Last amended on 17.07.2017 (BGBl. I, 2581).

⁷⁷ Last amended on 31.10.2006 (BGBl. I, 2407).

⁷⁸ 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-Wuerttemberg: 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 orientation⁷⁹ and other Land laws against discrimination.⁸⁰

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 to the AGG provides some, albeit non-binding, indications, referred to in the relevant section below.⁸¹

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 on 19.12.2017 (GVBl. 695); 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 02.08.2016 (Brem. GBl. 434); 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, LBGG 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 14.07.2005 (SächsGVBl. 167); 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, THürGIG*), of 04.05.2007 (GVBl. 2007, 69), last amended on 15.05.2012 (GVBl. 139).

⁷⁹ 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).

⁸⁰ Section 15.2 sentence 3 of the Saarland Media Law (*Saarländisches Mediengesetz, SMG*) of 27.02.2002 (Abl. 2002, 498), last amended on 01.12.2015 (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 12.07.2017 (GVBl. LSA 130), 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.

⁸¹ 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 criticism⁸² which has an impact on the legal terminology used in (draft) legislation dealing with the matter.⁸³ 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.⁸⁴ 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.⁸⁵ 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,⁸⁶ or the law on restitution for victims of persecution during the period of Nazi government.⁸⁷ In criminal law, there are provisions penalising incitement to racial hatred.⁸⁸ 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)⁸⁹ is determined in Land law with reference to subjective standards such as self-definition and other indicators like language.⁹⁰

⁸² 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.

⁸³ The Federal German Constitutional Court uses the term "racial" (*rassisch*) only in quotation marks, cf. BVerfGE 23, 98, 105 et seq.

⁸⁴ Osterloh in M. Sachs, 7th ed. 2014, GG, Art.3, para. 293.

⁸⁵ See BVerfGE 23, 98; Federal Constitutional Court, 1 BvR 1056/95, 06.09.2000.

⁸⁶ E.g. Section 60.1 Residence Law (*Aufenthaltsgesetz, AufenthG*), of 25.02.2008 (BGBl. I, 162), last amended on 30.10.2017 (BGBl. I, 3818): residence rights in the case of persecution on the grounds of race in a person's country of origin.

⁸⁷ 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).

⁸⁸ Section 130 Penal Code (*Strafgesetzbuch, StGB*), of 13.11.1998 (BGBl. I, 3322), last amended on 30.10.2017 (BGBl. I, 3618).

⁸⁹ 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".

⁹⁰ See below 3.2.8 and references.

- Religion and belief

The most important assistance for the understanding of the meaning of religion and belief provides the interpretation of the guarantee of freedom of religion⁹¹ 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.⁹² 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.⁹³ 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.⁹⁴ 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.⁹⁵ It relied in this context on current trends in society, cultural tradition and the understanding of religion in general and in religious studies.⁹⁶ Beyond that, a teleological interpretation of the fundamental freedom of religion is regarded as being decisive.⁹⁷

- Disability

Section 2 Social Code IX (*Sozialgesetzbuch IX, SGB IX*) and Section 3 of the Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*)⁹⁸ 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 CJEU 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 IX⁹⁹ and Section 3 BGG.¹⁰⁰ This reference was upheld by the BAG.¹⁰¹

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

⁹¹ Article 4.1 GG.

⁹² 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.

⁹³ BVerfGE 90, 112 (115).

⁹⁴ BVerfGE 90, 112 (115).

⁹⁵ BVerfGE 83, 341 (353).

⁹⁶ BVerfGE 83, 341 (353).

⁹⁷ BVerfGE 83, 341 (353).

⁹⁸ Last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66)).

⁹⁹ Social Code IX (*Sozialgesetzbuch IX, SGB IX*) of 19.06.2001 (BGBl. I, 1046), last amended on 17.07.2017 (BGBl. I, 2541). Cf. Fn 49 above.

¹⁰⁰ Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*) of 27.04.2002 (BGBl. I, 1467, 1468), last amended on 17.07.2017 (BGBl. I, 2541).

¹⁰¹ Federal Labour Court (*Bundesarbeitsgericht, BAG*), 22.10.2009, 8 AZR 642/08.

word 'long-term' used by the CJEU in that decision.¹⁰² The reference to a state typical for a person's age excludes age-related impairments from the concept of disability. 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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ The degree of disability is established by the relevant administrative authorities,¹⁰⁶ 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.¹⁰⁷ 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*.¹⁰⁸

¹⁰² 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.

¹⁰³ BAG, 19.12.2013, 6 AZR 190/12, para. 43ff.

¹⁰⁴ 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.

¹⁰⁵ Section 2.3 *SGB IX*.

¹⁰⁶ Section 69.1 *SGB IX*.

¹⁰⁷ 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 14.08.2017 (BGBl. I, 3214).

¹⁰⁸ 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 (*Landesgleichbehandlungsgesetz 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.

- Age

Age is generally understood as biological age.¹⁰⁹

- Sexual orientation

Like the AGG, other laws refer to sexual identity (*sexuelle Identität*) rather than sexual orientation.¹¹⁰ 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.¹¹¹ The Federal Constitutional Court refers to both as aspects of the individual's autonomous personality.¹¹² This encompasses homosexuality and transsexuality, without excluding any other imaginable orientation.¹¹³

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.¹¹⁴ Although a number of cases have concerned several grounds,¹¹⁵ 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.

¹⁰⁹ E.g. Hamm Higher Regional Court (*Oberlandesgericht Hamm, OLG Hamm*), 12.01.2011, 20 U 102/10, I-20.

¹¹⁰ See Article 10.2 Constitution of Berlin (Verfassung von Berlin, VvB).

¹¹¹ 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).

¹¹² See Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), 06.12.2005, 1 BvL 3/03, para. 48.

¹¹³ Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), 06.12.2005, 1 BvL 3/03, para. 48 ff. On transsexuals, see Footnote 67.

¹¹⁴ 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 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. 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.

¹¹⁵ 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. 82), p. 53 ff.

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. 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.¹¹⁶

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.¹¹⁷ Hidden direct discrimination is taken to occur if unequal treatment is based on apparently objective criteria, which are, however, necessarily linked to a forbidden ground of discrimination.¹¹⁸

The guarantee of equality establishes the principle of equal treatment as a fundamental right at the constitutional level.¹¹⁹ 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.¹²⁰ This case law forms the blueprint for the concept of discrimination as used in other areas of the law as well.

¹¹⁶ 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.

¹¹⁷ 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.

¹¹⁸ Cf. Federal Labour Court (*Bundesarbeitsgericht*), 9 AZR 141/17, 21.11. 2017, para 21. The court referred to CJEU, 12.10.2010, C-499/08 (Andersen) para 23, which concerns a case where a regulation referring to the entitlement to a pension was regarded as directly linked to age because of a mandatory minimum age for being entitled to the pension.

¹¹⁹ Article 3 GG.

¹²⁰ Article 3.2 and 3.3 GG.

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.¹²¹ 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*).¹²² Consequently, no decisive causal link between the characteristic and the discrimination is needed. It suffices that the characteristic is part of the (negative) criteria that lead to the discriminatory behaviour.¹²³

The Federal Labour Court regarded the objective qualification of a job candidate as a condition for possible discrimination,¹²⁴ 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.¹²⁵ The Federal Labour court underlined that filing suit for discrimination may form abuse of rights, ruling out a violation of the prohibition of discrimination.¹²⁶

Section 81.2 SGB IX prohibits discrimination on the ground of disability in work relations for severely disabled people and people of equivalent status,¹²⁷ referring to the AGG, including its regime of justifications.¹²⁸

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.¹²⁹

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,¹³⁰ may constitute direct discrimination.¹³¹ 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.

¹²¹ BVerfGE 75, 40 (70).

¹²² BVerfGE 89, 276 (289).

¹²³ Cf. Federal Labour Court, 19.05.2016, 8 AZR 470/14, para 53.

¹²⁴ BAG, 19.08.2010, 8 AZR 370/09.

¹²⁵ Cf. BAG, 19.05.2016, 8 AZR 470/14, para 24ff.

¹²⁶ Cf. BAG, 19.05.2016, 8 AZR 470/14. This is in line with CJEU, C-423/15, (*Kratzer*), 28. July 2016.

¹²⁷ 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.

¹²⁸ 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.

¹²⁹ This definition therefore only covers discrimination against disabled people. There is no definition of what constitutes compulsory reasons in the law.

¹³⁰ Cf. for example: Schleswig-Holstein Land Labour Court (*Landesarbeitsgericht Schleswig-Holstein, LAG Schleswig-Holstein*), 09.12.2008, 5 Sa 286/08.

¹³¹ See W. Däubler, in: Däubler/Bertzsch (eds.), AGG, § 3 para. 16a.

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 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 AGG). 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*)¹³² (Section 10 No 5);
- differentiations of benefits in compensation plans in the sense of the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*),¹³³ 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

¹³² Social Code VI (*Sozialgesetzbuch VI, SGB VI*) of 19.02.2002 (BGBl. I, 754, 1404, 1384), last amended on 17.07.2017 (BGBl. I, 2575).

¹³³ Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), of 25.09.2001 (BGBl. I, 258), last amended on 17.07.2017 (BGBl. I, 2509).

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);
- the granting of special advantages when there is no specific interest in enforcing equal treatment (Section 20.1 No. 3);¹³⁴
- 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.¹³⁵

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.¹³⁶ 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.¹³⁷

¹³⁴ 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.

¹³⁵ 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*.

¹³⁶ BVerfGE 57, 335 (342); 85, 191 (207).

¹³⁷ Cf. Osterloh, in Sachs 7th ed. 2014, GG, Article 3 para. 239ff, 254 (justification possible).

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.¹³⁸ 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 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.¹³⁹ 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.¹⁴⁰

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.¹⁴¹

b) Practice

In Germany, situation testing is not used much in practice.¹⁴²

¹³⁸ BVerfGE 1, 14 (52); 25, 101 (105).

¹³⁹ BVerfGE 88, 87 (96).

¹⁴⁰ 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 18.07.2017 (BGBl. I, 2745), 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.

¹⁴¹ Cf. the explanatory report, Bundestagsdrucksache 16/1780 p. 47.

¹⁴² 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; Hamburg Local Court (*Amtsgericht Hamburg-Barmbek*, AG Hamburg-Barmbek), 03.02.2017, 811bC 273/15 acknowledged that evidence of discrimination can also be obtained through fictitious applications using a 'testing procedure', in this case regarding applications for a flat where fictitious German and foreign-sounding names were used. Cf. case law section of this report. 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.

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.¹⁴³

The criterion must affect a group of people protected by the AGG significantly more than others.¹⁴⁴ This can be determined by statistical comparison,¹⁴⁵ although recourse to statistics is not mandatory.¹⁴⁶ Instead it is sufficient if the criterion is typically likely to have these consequences.¹⁴⁷

The case law on predecessors of this norm gives some further indications of its possible interpretation.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ In another decision, a ratio of about 80 % women to 20 % men was deemed sufficient to establish a significant difference.¹⁵¹

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

¹⁴³ 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.'

¹⁴⁴ 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.

¹⁴⁵ BAG, 24.09.2008, 10 AZR 639/07.

¹⁴⁶ BAG, 18.08.2009, 1 ABR 47/08.

¹⁴⁷ 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.

¹⁴⁸ 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.

¹⁴⁹ See BAG, *Neue Juristische Wochenschrift* 1992, 1125; BAG, *Neue Juristische Wochenschrift* 1993, 3091, 3093.

¹⁵⁰ BAG, *Neue Juristische Wochenschrift* 1993, 3091, 3094.

¹⁵¹ BAG, *Neue Juristische Wochenschrift* 1992, 1125, 1126f.

regulation, contract or actual behaviour of the employer on one sex.¹⁵² This case law is based on ECJ case law.¹⁵³

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.¹⁵⁴

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.¹⁵⁵

Section 7.2 sentence 2 of the 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.¹⁵⁶

¹⁵² BAG, *Neue Juristische Wochenschrift* 1993, 3091, 3094.

¹⁵³ ECJ, ECR Cs. 170/84, 1986 I-1607 (Bilka).

¹⁵⁴ 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.

¹⁵⁵ See Federal Administrative Court (*Bundesverwaltungsgericht*, *BVerwG*), 23.06.2005, 2 C 21/04.

¹⁵⁶ 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 02.08.2016 (Brem.GBl. 434); 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 (GVBl. M-V 2006, 539), last amended on 24.10.2012 (GVBl. 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 (GVBl. 2002, 264), last amended on 18.11.2008 (GVBl. 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.

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.¹⁵⁷ 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.¹⁵⁸

b) Justification test for indirect discrimination

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.¹⁵⁹

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.¹⁶⁰

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.¹⁶¹

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.¹⁶²

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.¹⁶³

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

¹⁵⁷ BVerfGE 97, 35 (43).

¹⁵⁸ Cf. BVerfGE 121, 241 (254ff).

¹⁵⁹ Cf. Osterloh, in: Sachs (ed.), GG (2014), Article 3 para. 255f.

¹⁶⁰ BVerfG 2 BvR 1476/01, 19.11.2003, www.bverfg.de.

¹⁶¹ BVerfG 1 BvR 1748/99 20.04.2004, www.bverfg.de.

¹⁶² BAG, 18.08.2009, 1 ABR 47/08 referring to ECJ, 05.03.2009, C-388/07 (Age Concern England).

¹⁶³ Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 17th ed. 2017, § 3 AGG, para. 9ff for an overview, the balance of interests reasoning: para. 13.

regulated by the law, in order to assess convincingly whether or not they are in conformity with European standards.¹⁶⁴

c) Comparison in relation to age discrimination

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

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 ruled¹⁶⁵ 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*)¹⁶⁶ stipulates as a general principle that a public authority is allowed to collect data, if this is necessary for carrying out its tasks.¹⁶⁷ 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.¹⁶⁸

¹⁶⁴ 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.

¹⁶⁵ See BVerfGE 65, 1 (154ff).

¹⁶⁶ Federal Law on the Protection of Data (*Bundesdatenschutzgesetz, BDSG*) of 14.01.2003 (BGBl. I, 66), last amended on 31.10.2017 (BGBl. I, 3618).

¹⁶⁷ Section 13.1 BDSG.

¹⁶⁸ Section 28.1 BDSG.

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.¹⁶⁹

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.

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.¹⁷⁰ Article 286 ZPO¹⁷¹ 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.¹⁷² 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.

¹⁶⁹ 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.

¹⁷⁰ Cf. the explanatory report Bundestagsdrucksache 16/1780, p. 47.

¹⁷¹ Code of Civil Procedure (*Zivilprozessordnung, ZPO*) of 30.01.1879, last amended on 18.07.2017 (BGBl. I, 2745).

¹⁷² See BVerfGE 97, 35 (44).

As the examples discussed indicated before,¹⁷³ 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 %.¹⁷⁴

The groups to be compared are determined by the personal scope of the regulation challenged. For example, for a collective agreement all people bound by this agreement form the relevant group. The group of applicants is relevant for a guideline on the selection of applicants for employment, 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*)¹⁷⁵ (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.¹⁷⁶ 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,¹⁷⁷ 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.¹⁷⁸

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.¹⁷⁹ 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

¹⁷³ See above 2.3 a).

¹⁷⁴ Cf. on the debate Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 17th ed., 2017, § 3 AGG, para. 7, on the discussion about the significance and relevance of quotas see para. 10.

¹⁷⁵ Civil Code (*Bürgerliches Gesetzbuch, BGB*), of 02.01.2002 (BGBl. I, 42, 2909; 2003 I, 738), last amended on 20.07.2017 (BGBl. I, 2787).

¹⁷⁶ BVerfGE 89, 276 (189), see above.

¹⁷⁷ BAG, 19.08.2010, 8 AZR 370/09.

¹⁷⁸ Cf. BAG, 19.05.2016, 8 AZR 470/14, para 24ff.

¹⁷⁹ See Großmann, *Gemeinschaftskommentar, Sozialgesetzbuch IX*, § 81, para. 240.

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,¹⁸⁰ of certain severity, beyond mere onerousness.¹⁸¹ 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 right to personality, which is protected by tort law.¹⁸² 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.¹⁸³

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.¹⁸⁴ 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.¹⁸⁵ There are no special rules for discrimination.¹⁸⁶ A service provider

¹⁸⁰ 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.

¹⁸¹ 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.

¹⁸² Section 823.1 BGB of 02.01.2002 (BGBl. I, 42, 2909; 2003 I, 738), last amended on 20.07.2017 (BGBl. I, 2787). 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.

¹⁸³ Section 185 StGB.

¹⁸⁴ BAG, 22.01.2009, 8 AzR 906/07.

¹⁸⁵ Most importantly, Section 31, 278 and 831 BGB, see below 2.5.

¹⁸⁶ In cases of sex discrimination, employers have been held liable for the actions of others, e.g. an employer

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.¹⁸⁷

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 applicable, according to which legal persons are liable for damage caused by executive employees.¹⁸⁸

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.¹⁸⁹ Responsibility for agents in contractual relations and in tort law is relevant in this respect.¹⁹⁰ Another example from criminal law is incitement to discrimination that amounts to a criminal offence, e.g. criminal insult.¹⁹¹

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.¹⁹² There are no special rules or case law for discrimination.¹⁹³

for a discriminatory job advertisement by an employment agency, see BAG, 05.02.2004, Az. 8 AZR 112/03.
¹⁸⁷ 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.

¹⁸⁸ Arnold, *MünchKommBGB zum Bürgerlichen Gesetzbuch*; *BGB*, 7th ed. (2015), *BGB*, § 31, para. 11, 20ff, 30ff.

¹⁸⁹ 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.

¹⁹⁰ Section 31, 278, 831 *BGB*.

¹⁹¹ Section 26, 185 *StGB*.

¹⁹² Most importantly, Section 31, 278 and 831 *BGB*, see above 2.5.

¹⁹³ 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.

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.¹⁹⁴ From this point of view, it is a contractual duty of the employer to take proper care of the legitimate needs of their employees. For people with disabilities, this means that the duty exists to reasonably accommodate their needs.

Nevertheless, the legislation on disability, constitutionally buttressed by the disability clause of the Basic Law¹⁹⁵ 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 needs¹⁹⁶ and establishes claims to material means of integration.¹⁹⁷ The German welfare agencies provide support for participation in working life.¹⁹⁸ 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.¹⁹⁹

Section 81.4 Social Code IX (SGB IX) imposes various duties on public and private employers in providing reasonable accommodation for severely disabled people.²⁰⁰

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.

¹⁹⁴ BAG, 19.12.2013, 6 AZR 190/12 para. 53.

¹⁹⁵ Article 3.3 sentence 2 GG.

¹⁹⁶ Section 10 Social Code I (*Sozialgesetzbuch I, SGB I*) of 11.12.1975 (BGBl. I, 3015), last amended on 14.08.2017 (BGBl. I, 3214).

¹⁹⁷ Section 4ff Social Code IX (*Sozialgesetzbuch IX, SGB IX*) of 19.06.2001 (BGBl. I, 1046), last amended on 17.07.2017 (BGBl. I, 2541); Section 53ff Social Code XII. (*Sozialgesetzbuch XII, SGB XII*) of 27.12.2003 (BGBl. I, 3022), last amended on 17.08.2017 (BGBl. I, 3214). Special regulations for blind people: Section 72 Social Code XII (*Sozialgesetzbuch XII, SGB XII*).

¹⁹⁸ Section 97ff Social Code III (*Sozialgesetzbuch III, SGB III*) of 24.03.1997 (BGBl. I, 594), last amended on 17.07.2017 (BGBl. I, 2581), Section 104 SGB IX.

¹⁹⁹ See e.g. Section 33 SGB IX.

²⁰⁰ On the definition of this, see above 2.1.1.

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.²⁰¹ The employers are under a duty to promote part-time work.²⁰² Under certain circumstances, the severely disabled person can have a claim to part-time work.²⁰³ They also have a claim to additional paid holidays.²⁰⁴

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. for accessibility to financial institutions. These agreements determine the relevant measures in general terms. This regulation is not limited to severely disabled people.²⁰⁵

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.²⁰⁶ There are special regulations in pension law, including a lower minimum age for severely disabled people to collect a state pension.²⁰⁷

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 legislation if the financial burden is disproportionate, despite support from the Federal Labour Agency and the integration agencies, using funds from the equalisation levy.²⁰⁸ There is only limited case law clarifying precise standards.²⁰⁹

²⁰¹ Section 81.4.3 SGB IX.

²⁰² Section 81.5 SGB IX.

²⁰³ Section 81.5 sentence 3 SGB IX.

²⁰⁴ Section 125 SGB IX.

²⁰⁵ Section 5 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*). This may concern a variety of accessibility issues – from buses to buildings.

²⁰⁶ Section 83 SGB IX.

²⁰⁷ Section 37 SGB VI of 18.12.1989 (BGBl. I, 2261; 1990 I, 1337), last amended on 17.07.2017 (BGBl. I, 2509).

²⁰⁸ Section 77.5, 102.3 SGB IX.

²⁰⁹ 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.

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—reasonable accommodation and protection from discrimination.

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.²¹⁰

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.²¹¹ Higher education in universities should take account of the needs of people with disabilities.²¹²

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),²¹³ and other aspects of mobility, to name just a few examples.²¹⁴

There are particular regulations for disabled people in civil law relating to their special needs.²¹⁵

²¹⁰ Section 4.3 SGB IX. The school laws of the Länder contain detailed regulations on the matter.

²¹¹ See BVerfG 96, 288.

²¹² 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 23.05.2017 (BGBl. I, 1228).

²¹³ Section 145-147 SGB IX.

²¹⁴ 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 30.10.2017 (BGBl. I, 3618); Section 483 Code of Civil Procedure (*Zivilprozessordnung, ZPO*) last amended on 18.07.2017 (BGBl. I, 2745); Section 66, 259.2 Code of Criminal Procedure (*Strafprozessordnung, StPO*) of 07.04.1987 (BGBl. I, 1074, 1319), last amended on 30.10.2017 (BGBl. I, 3618); 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.

²¹⁵ 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.

A special regulation of general contract law allows for valid contracts with people with intellectual disabilities.²¹⁶

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.²¹⁷ 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, concerning genuine occupational requirements) is possible.²¹⁸ Meeting the duties to reasonable accommodation is a precondition for the 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.²¹⁹

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.²²⁰

²¹⁶ See Section 105a BGB.

²¹⁷ BVerfG 96, 288. This judgment is not limited to severely disabled people.

²¹⁸ BAG, 19.12.2013, 6 AZR 190/12 para. 50ff.

²¹⁹ 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.

²²⁰ 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 29.03.2017 (BGBl. I, 626) 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.

Employers must pay due consideration to the fundamental right to freedom of religion.²²¹ 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.²²²

g) Accessibility of services, buildings and infrastructure

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.²²³

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.²²⁴

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.²²⁵ 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.

²²¹ 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, the Berlin-Brandenburg Land Labour Court regarded a rejection of an application in connection with the Muslim headscarf as discrimination, *LArbG Berlin-Brandenburg*, Az.: 14 Sa 1038/16, 09.02.2017; also see: Osnabrück Administrative Court (*Verwaltungsgericht Osnabrück*), Az.: 3 A 24/16, 18.01.2017, on the withdrawal of a recruitment offer. The Federal Constitutional Court decided on a case where a trainee lawyer wanted to wear a headscarf during her training, BVerfG, 2 BvR 1333/17, of 27.06.2017, and did not grant a temporary injunction on her behalf (for details see case law section below). 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. The impact of CJEU, 14 March 2017, C-157/15 (Achbita) and CJEU, 14 March 2017, C-188/15 (Boungaoui) has to be seen.

²²² Section 70 SGB XII provides for help to maintain a household; for further social security benefits for older people see Section 71 SGB XII.

²²³ Section 8 in conjunction with Section 4 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz*, BGG). Similar provisions exist at the Land level.

²²⁴ See e.g. Section 51 Berlin Regulation on Construction (*Bauordnung Berlin*, *BauOBl*), 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).

²²⁵ 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.

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*)²²⁶ 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*)²²⁷ 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 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.²²⁸ 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.²²⁹ 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.²³⁰

²²⁶ 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.

²²⁷ 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.

²²⁸ Section 6.2 BGG.

²²⁹ 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.

²³⁰ See also Section 68.b, 259.2, 406.2 Code of Criminal Procedure (*Strafprozessordnung, StPO*).

In addition, the Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales, BMAS*)²³¹ 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, 115.²³²

²³¹ <https://www.bmas.de/DE/Startseite/start.html>.

²³² By dialling 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.

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.²³³ Other special legislation applies to German citizens and other qualified countries, especially EU countries only.²³⁴

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.²³⁵ 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.²³⁶ 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.²³⁷

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.

²³³ Section 2.2 sentence 2 SGB IX.

²³⁴ 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.

²³⁵ For example, Section 81.2 SGB IX.

²³⁶ Article 3 in conjunction with Article 19.3 GG.

²³⁷ 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 17.07.2017 (BGBl. I, 2581).

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.²³⁸ 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.

²³⁸ Cf. Section 81.2 SGB IX.

In addition, public employment (civil service and other employees) is covered by the guarantee of equality,²³⁹ the guarantee of equal access,²⁴⁰ civil service laws (which exclusively concern civil servants),²⁴¹ prohibitions of discrimination in the law on the representation of public employees²⁴² and – with regard to disability – a special regulation prohibiting discrimination which applies to private employers as well.²⁴³ 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.²⁴⁴ 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*).²⁴⁵ 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.²⁴⁶

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

²³⁹ Article 3 GG.

²⁴⁰ Article 33.2 and 33.3 GG.

²⁴¹ 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.

²⁴² See Section 67.1 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*, *BPersVG*) and the respective Land-level regulations.

²⁴³ Section 81.2 SGB IX, now referring to the AGG.

²⁴⁴ Section 82 SGB IX.

²⁴⁵ 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*).

²⁴⁶ 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*).²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ 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 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.²⁵⁰

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.²⁵¹ 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.²⁵² 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)²⁵³ 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)²⁵⁴ provides that the employment agency (*Agentur für Arbeit*) may only consider limitations imposed by employers for job and training applicants on the

²⁴⁷ Law on Protection against Dismissal (*Kündigungsschutzgesetz, KSchG*) of 25.08.1969 (BGBl. I, 1317). Last amended on 17.07.2017 (BGBl. I, 2509).

²⁴⁸ 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.

²⁴⁹ BAG, 06.11.2008, 2 AZR 523/07; BAG, 05.11.2009, 2 AZR 676/08. On the concept of social choice (*Sozialauswahl*) cf. Section 1.3 sentence 1 Law on Protection against Dismissal.

²⁵⁰ BAG, 19.12.2013, 6 AZR 190/12 para. 22.

²⁵¹ 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.

²⁵² 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 14.08.2017 (BGBl. I, 3214)) does not contain a special regulation (BAG, 11.12.2007, 3 AZR 249/06).

²⁵³ SGB IV of 23.12.1976 (BGBl. I, 3845), last amended on 18.07.2017 (BGBl. I, 2757 (Nr.52)).

²⁵⁴ SGB III of 24.03.1997 (BGBl. I, 594), last amended on 17.07.2017 (BGBl. I, 2581).

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 certain 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)²⁵⁵ 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.

²⁵⁵ SGB I of 11.12.1975 (BGBl. I, 3015), last amended on 14.08.2017 (BGBl. I, 3214).

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.²⁵⁶

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.²⁵⁷ According to Section 2.2 sentence 1 AGG, Section 33c Social Code I (SGB I)²⁵⁸ 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.²⁵⁹ 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,²⁶⁰ 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.²⁶¹ Such jurisdiction is contrary to the regulation contained in the AGG.²⁶² The ECJ has clarified that it is a violation of the principle of non-discrimination, Articles 1 and 2 Directive 2000/78/EC,

²⁵⁶ Cf. Eichenhofer, Däubler/Bertzbach, AGG, § 2 para. 66.

²⁵⁷ Cf. Eichenhofer, Däubler/Bertzbach, AGG, § 2 para. 78.

²⁵⁸ SGB I of 11.12.1975 (BGBl. I, 3015), last amended on 14.08.2017 (BGBl. I, 3214).

²⁵⁹ 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.

²⁶⁰ BVerwG 2 C 43.04, 26.01.2006, NJW 2006, 1828.

²⁶¹ Article 6 GG.

²⁶² 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.²⁶³

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.²⁶⁴ The German courts have followed this line of argument, as the decisions of the Federal Constitutional Court are binding.²⁶⁵ 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.²⁶⁶

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.²⁶⁷ Private schools, possibly with a religious or philosophical ethos, have a right to equal treatment as regards state support.²⁶⁸ 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.²⁶⁹ 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. Nevertheless, the underrepresentation of migrants in higher schooling and universities persists.²⁷⁰

There are special regulations for indigenous minorities in Germany,²⁷¹ which provide special protection of cultural identity, including the use of language in schools.

²⁶³ ECJ, 01.04.2008, C-267/06, Tadao Maruko.

²⁶⁴ BVerfG, 07.07.2009, 1 BvR 1164/07.

²⁶⁵ See, for example, Saxony Administrative Appeals Court (*Sächsisches Oberverwaltungsgericht, 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.

²⁶⁶ Cf. B. Rudolf in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 6 para. 154.

²⁶⁷ 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 15.12.2016 (GV. NRW. 1052): no discrimination on basis of economic status, origin or sex.

²⁶⁸ BVerfGE 75, 40.

²⁶⁹ Article 7.4 sentence 3 GG.

²⁷⁰ Cf. Bildungsbericht, Bildung und Migration (2016) (<https://www.bildungsbericht.de/de/bildungsberichte-seit-2006/bildungsbericht-2016>.) on the tendency towards segregation because schooling is based on the family's place of residence and the existence of areas with a high concentration of migrants, who sometimes do not have sufficient German language abilities, *ibid.*, p. 185ff.

²⁷¹ See Footnotes 57, 58 above and Footnotes 333, 334 below.

a) Pupils with disabilities

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

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.²⁷²

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.²⁷³ Higher education in universities should take account of the needs of people with disabilities.²⁷⁴

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.²⁷⁵

²⁷² Section 4.3 SGB IX. The school laws of the Länder contain detailed regulations on the matter.

²⁷³ See BVerfG 96, 288.

²⁷⁴ 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 23.05.2017 (BGBl. I, 1228).

²⁷⁵ 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.

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.²⁷⁶

The Passenger Transport Act (*Personenbeförderungsgesetz, PBefG*)²⁷⁷ 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.²⁷⁸ Telecommunications and postal service regulations require companies with a dominant market position to offer their services to everyone on the same conditions.²⁷⁹ The Licensing Law (*Gaststättengesetz*)²⁸⁰ makes authorisation for the establishment of a restaurant dependent on the provision of

²⁷⁶ Section 81e Insurance Supervision Law (*Versicherungsaufsichtsgesetz, VAG*) of 17.12.1992 (BGBl. 1993 I, 2). The codification was last amended on 20.07.2017 (BGBl. I, 3214 (Nr.58)).

²⁷⁷ Passenger Transport Act (*Personenbeförderungsgesetz, PBefG*) of 08.08.1990 (BGBl. I, 1690), last amended on 20.07.2017 (BGBl. I, 2808).

²⁷⁸ Section 22 Passenger Transport Act (*Personenbeförderungsgesetz PBefG*, of 08.08.1990 (BGBl. I, 1690)), last amended on 20.07.2017 (BGBl. I, 2808). Disabled people are consequently included.

²⁷⁹ 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 29.03.2017 (BGBl. I, 626 (Nr.16)). 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.

²⁸⁰ Licensing Law (*Gaststättengesetz, GastG*) of 20.11.1998 (BGBl. I, 3418), last amended on 10.03.2017 (BGBl. I, 420).

rooms which reasonably accommodate the needs of disabled people.²⁸¹ The licence itself can be denied in cases of discriminatory behaviour.²⁸² There is some case law in this area.²⁸³

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.²⁸⁴

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,²⁸⁵ 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.²⁸⁶

²⁸¹ 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 14.03.2017 (Brem. GBl., 121). 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. 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').

²⁸² Cf. A. Klose in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 6 para. 177ff.

²⁸³ 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.

²⁸⁴ 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.

²⁸⁵ Cf. M. Mahlmann, in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 3 para. 89.

²⁸⁶ Cf. Armbrüster, in B. Rudolf and M. Mahlmann (eds.) (2007), *Gleichbehandlungsrecht*, § 7 para. 75ff;

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). 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.²⁸⁷ 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: housing²⁸⁸ 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.²⁸⁹ 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 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.²⁹⁰ A recent decision confirmed the interpretation that

explanatory report, *Bundestagsdrucksache* 16/1780 p. 32.

²⁸⁷ 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.

²⁸⁸ Cf. background information: A. Müller, Expertise "Diskriminierung auf dem Wohnungsmarkt". Strategien zum Nachweis rassistischer Benachteiligungen (2015), on cases of discrimination based on race and ethnic origin in the area of housing and above (fn. 103).

²⁸⁹ *Bundestagsdrucksache* 16/1780 p. 42.

²⁹⁰ 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/Bertzach, *AGG* § 19 para. 40 et seq.

the clause permits positive action but not discrimination on the ground of race or ethnic origin.²⁹¹

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 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 Directive 2000/43/EC and the legal reach of considerations of privacy (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.²⁹²

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.

²⁹¹ Cf. AG Hamburg-Barmbek, 3.2.2017, 811b C 273/15.

²⁹² 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.²⁹³ 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

²⁹³ 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.²⁹⁴ Article 140 GG incorporates several articles of the Weimar Constitution,²⁹⁵ 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.²⁹⁶ 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

²⁹⁴ 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.

²⁹⁵ The Constitution of the German Reich (*Die Verfassung des Deutschen Reichs*) of 11.08.1919, usually known as the Weimar Constitution (*Weimarer Verfassung*).

²⁹⁶ 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).

faith. Acts concerning the internal workings of a church are not acts by public authorities and thus not regulated by public law.

Given this autonomy, provisions of law do not apply to religious communities without qualification. For example, according to the Federal Constitutional Court, the 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.²⁹⁷ 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.²⁹⁸ Another provision in the law directly exempts religious communities.²⁹⁹

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.³⁰⁰ If, however, exercise their private autonomy, they are in principle regulated by general labour law.³⁰¹

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.³⁰²

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

²⁹⁷ S. Federal Labour Court (*Bundesarbeitsgericht*), 24.09.2014, 5 AZR 611/12.

²⁹⁸ Section 118.1 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*). This provision applies if the character of the organisations justifies the exemption.

²⁹⁹ Section 118.2 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*).

³⁰⁰ BVerfGE 70, 138, 164.

³⁰¹ BVerfGE 70, 138, 164.

³⁰² BVerfGE 70, 138, 168.

particular religion or belief, with 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). 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 4.1³⁰³ 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.³⁰⁴

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.³⁰⁵ 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.³⁰⁶

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

³⁰³ 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.

³⁰⁴ 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.

³⁰⁵ 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.

³⁰⁶ Federal Labour Court (*Bundesarbeitsgericht*), 17 March 2016 – 8 AZR 501/14 (A), (see section 12 on case law in the country report for 2016). 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. The opinion of Advocate General Tanchev, 9 November 2017, Case C-414/16 (Egenberger) on this matter took a more restrictive interpretation of the autonomy of religious communities in this respect. The case was decided after the cut-off date of this report and circumscribed the autonomy of religious communities more narrowly than before accepted in German law, (see CJEU, 17 April 2018, C-414/16 (Egenberger), confirmed by CJEU, 11 September 2018, C-68/17 (IR vs. JQ)).

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

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.³⁰⁷ 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.³⁰⁸ 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.³⁰⁹ 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

³⁰⁷ 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.

³⁰⁸ 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).

³⁰⁹ Cf. Tagesspiegel, 15.05.2012.

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).

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.³¹⁰

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,³¹¹ 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.³¹²

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.³¹³ 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.³¹⁴

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.³¹⁵

³¹⁰ Constitutional Court of Bavaria (Bayerischer Verfassungsgerichtshof, BayVerfGH), BayVerfGHE 33, p. 65 et seq.

³¹¹ 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, 7th ed. 2014, *GG*, Article 140, 136, para. 3, both with further references to the extensive discussion.

³¹² 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.

³¹³ Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgeschichtshof, BayVerwGH*), 30.4.2009, 7 CE 09.661, 7 CE 09.662.

³¹⁴ 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.

³¹⁵ It should be noted that the compulsory military service is suspended since 2011.

In addition, in the Soldiers Act (*Soldatengesetz, SG*),³¹⁶ there is a legal prohibition of discrimination against soldiers on the grounds of sexual identity, parentage, race, faith, belief, religious or political opinion or ethnic origin, amongst others.³¹⁷ 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.³¹⁸

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.³¹⁹ 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.³²⁰

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.³²¹

Some professions are open only to German nationals and specified groups of non-Germans, such as EU citizens and stateless people.³²² Nationality discrimination, including the example cited, can however be judged unlawful, if it is not justifiable under the general guarantee of equality.

³¹⁶ Soldiers Act (*Gesetz über die Rechtsstellung der Soldaten, SG*) of 30.05.2005 (BGBl. I, 1482), last amended on 08.06.2017 (BGBl. I, 1570).

³¹⁷ 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.

³¹⁸ Section 128.4 SGB IX.

³¹⁹ Article 1 GG.

³²⁰ 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).

³²¹ 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 29.03.2017 (BGBl. I, 626)). See also Section 63.1 and 63.2 SGB III.

³²² See Section 2.1 Nr. 1 Law on Pharmacies (*Apothekengesetz, ApoG*, of 15.10.1980 (BGBl. I, 1993)), last amended on 29.03.2017 (BGBl. I, 626). 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 23.12.2016 (BGBl. I, 3191)) 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.

In Germany, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.³²³

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 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,³²⁴ 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.³²⁵ 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.³²⁶ 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.³²⁷ Accordingly, the Federal Constitutional Court has clarified, as mentioned above, that same-sex life partners and spouses must be treated equally.³²⁸ 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.

³²³ For a recent decision, see: Frankfurt-Main Land Court (LG Frankfurt Main), 16.11.2017, 2-24 O 37/17 and the case law section of this report.

³²⁴ Article 9.3 GG.

³²⁵ BAG, 29.04.2004, Az: 6 AZR 101/03.

³²⁶ Section 40 Civil Servants Remuneration Act (*Bundesbesoldungsgesetz, BBesG*, of 19.06.2009 (BGBl. I, 1434)). Last amended on 23.06.2017 (BGBl. I, 1822).

³²⁷ ECJ, 01.04.2008, C-267/06, Tadao Maruko (for case law on this matter cf. above, 2.3.c); 3.2.7).

³²⁸ BVerfG, 07.07.2009, 1 BvR 1164/07.

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).

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.³²⁹

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.³³⁰ 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.³³¹ For Section 10 No. 5 on retirement ages, see below 4.7.4. Before the ECJ Age Concern decision,³³² and later clarifications by the CJEU on aims of social policy

³²⁹ ECJ, 22.11.2005, C-144/04 (Mangold).

³³⁰ 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).

³³¹ The issue is contentious in legal theory, for discussion cf. Brors in: Däubler/Bertzsch, *AGG*, § 10 para. 129ff; Voggenreiter in: B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 8 para. 46 (both: admissible).

³³² ECJ, 05.03.2009, C-388/07, (Age Concern England).

as a precondition for the application of Article 6 of the Directive,³³³ 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.³³⁴ 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,³³⁵ which is a test of proportionality, like other existing case law.

b) Permitted differences of treatment based on age

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.³³⁶ 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.³³⁷

³³³ Cf. e.g. ECJ, 13.09.2011, C-447/09 (Prigge).

³³⁴ BAG, 22.01.2009, 8 AzR 906/07.

³³⁵ ECJ, 22.11.2005, C-144/04 (Mangold).

³³⁶ The provisions under scrutiny in the Mangold case (see fn. 304) 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).

³³⁷ 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 12.07.2017 (GVBl. 362)). Federal Judges, minimum: 35 (Section 125.2 Court Constitution Act (*Gerichtsverfassungsgesetz, GVG*), last amended on 30.10.2017 (BGBl. I, 3618)). Federal Constitutional Judges, minimum 40: (Section 3.1 Federal Constitutional Court Law (*Bundesverfassungsgerichtsgesetz, BVerfGG*, of 11.08.1993 (BGBl. I, 147)), last amended on 08.10.2017

For example, Section 5 of the Federal Police Career Structures Regulation (*Bundespolizei-Laufbahnverordnung, BpolLV*)³³⁸ 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 28th 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).³³⁹

Exempted from this regulation are holders of certificates of inclusion and acceptance, in accordance with Section 9 Military Pensions Act (*Soldatenversorgungsgesetz, SVG*),³⁴⁰ 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.

(BGBl. I, 3546)). 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 18.01.2017 (BGBl. I, 89, 406). 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 (*Bundespolizeibeamtengesetz, BpolBG*, of 03.06.1976 (BGBl. I, 1357)), last amended on 08.06.2017 (BGBl. I, 1570)). 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 08.06.2017 (BGBl. I, 1570)). Aircraft personnel, maximum: 60 years (Section 41.1 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 17.07.2017 (BGBl. I, 2495) 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 29.03.2017 (BGBl. I, 626)). Federal Ombudsman on Data Protection: minimum 35 years (Section 22.1 Federal Law on Data Protection (*Bundesdatenschutzgesetz, BDSG*), last amended on 31.10.2017 (BGBl. I, 3618)). Notaries, maximum entry age: 60 (Section 6.1), maximum age: 70 years (Section 48a Federal Notary Act (*Bundesnotarordnung, BNotO*), last amended on 30.10.2017 (BGBl. I, 3618)). 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), this provision was abrogated on 31.12.2017. 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 12.07.2017 (GVBl. 362)).

³³⁸ Federal Police Career Structures Regulation (*Bundespolizei-Laufbahnverordnung, BpolLV*) of 12.02.2009 (BGBl. I, 284), last amended on 17.07.2017 (BGBl. I, 2581).

³³⁹ 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.

³⁴⁰ Military Pensions Act (*Soldatenversorgungsgesetz, SVG*) of 16.09.2009 (BGBl. I, 3054), last amended on 29.03.2017 (BGBl. I, 626).

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 wish to work longer, the pension can be deferred. An individual can collect a pension and still work.

Meanwhile, the 'Flexi-Pension' (*Flexi-Rente*) has been implemented.³⁴¹ 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 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.³⁴²

After a reform in 2008, the normal state pension age for both women and men is 67 (instead of 65).³⁴³ 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.³⁴⁴

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.³⁴⁵ If an individual wish 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.³⁴⁶ 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.³⁴⁷

c) State imposed mandatory retirement ages

In Germany, there is no state-imposed mandatory retirement age.

³⁴¹ Cf. Pension-Performance Improvement Act (*RV-Leistungsverbesserungsgesetz*) adopted on 23.06.2014, (BGBl. I 2014,787) and the Flexi-Pension Act (*Flexirentengesetz*, FlexiRG), which provisions entered into force on 01.01.2017 and 01.07.2017 (BGBl. I, 2838).

³⁴² Section 77.3 sentence 3, Nr. 3 SGB VI.

³⁴³ Section 35 SGB VI.

³⁴⁴ Section 34.2 SGB VI.

³⁴⁵ 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.

³⁴⁶ See Sections 2 and 6 Law on Work Pensions (*Betriebsrentengesetz*, BetrAVG), last amended on 14.08.2017 (BGBl. I, 3214) and on the correlation between state pension and occupational pension the decision of the BAG, 15.05.2012, Az.: 3 AZR 11/10).

³⁴⁷ 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.

There is no general state-imposed mandatory retirement age, but there are various special regulations for particular professions.³⁴⁸ The regulation on retirement in the civil service law mirrors the general pension age (Section 51, BBG).

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 52.³⁴⁹

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.³⁵⁰

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.³⁵¹ 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.³⁵² 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.³⁵³ 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.³⁵⁴ 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

³⁴⁸ See above 4.7.3.

³⁴⁹ 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.

³⁵⁰ Reasons cover entitlement to a state pension and consequently social security, decreased performance typical of this age and the need for intergenerational planning of the workforce, Müller-Glöge, *Erfurter Kommentar zum Arbeitsrecht*, 17th ed. (2017), § 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.

³⁵¹ Section 41 SGB VI.

³⁵² See Section 1.3 sentence 1 Law on Protection against Dismissal. (*Kündigungsschutzgesetz, KschG*, of 25.08.1969 (BGBl. I, 1317), last amended on 17.07.2017 (BGBl. I, 2501)). 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.

³⁵³ BAG, 23.11.2000, Az.: 2 AZR 533/99: employee working in a kindergarten.

³⁵⁴ Cf. Brors, Däubler/Bertzbach, AGG (2013), § 10 para. 100.

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.³⁵⁵ 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.³⁵⁶ However, the entitlement to state pension, and therefore indirectly the age of an employee, can count as a consideration within social choice (*Sozialauswahl*) facilitating privileged dismissal. Before the age of entitlement to pension, age might have a similar effect within selection procedures for redundancy, although there is conflicting case law.³⁵⁷

The interest of the employer in maintaining an age balance among employees was also held to be reasonable in this context.³⁵⁸ 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.³⁵⁹

b) Age taken into account for redundancy compensation

In Germany, national law provides compensation for redundancy.

Age can and does 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.

³⁵⁵ Section 41 SGB VI.

³⁵⁶ See Section 1.3 sentence 1 Law on Protection against Dismissal (*Kündigungsschutzgesetz, KSchG*, of 25.08.1969 (BGBl. I, 1317), last amended on 17.07.2017 (BGBl. I, 2509)). 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.

³⁵⁷ 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.

³⁵⁸ BAG, 23.11.2000, Az.: 2 AZR 533/99: employee working in a kindergarten.

³⁵⁹ Cf. Brors, Däubler/Bertzach, AGG (2013), § 10 para. 100.

4.9 Any other exceptions

In Germany, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

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.³⁶⁰ Explicit regulations make permissible positive action promoting the equality of men and women and disabled people.³⁶¹ 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).³⁶² 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,³⁶³ which permits such treatment in principle, as long as the schemes allow for individual cases to be assessed.³⁶⁴

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,³⁶⁵ constitutionally buttressed by

³⁶⁰ Article 3, 33.2 and 33.3 GG.

³⁶¹ 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*).

³⁶² See: Osterloh in: Sachs, 7th ed. (2014), GG, Article 3 para. 241 et seq., 254.

³⁶³ 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.

³⁶⁴ Compare for such legislation e.g. Section 9, sentence 3 Federal Civil Service Law (*Bundesbeamtengesetz, BBG*).

³⁶⁵ 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 14.12.2017 (GVBl. 514); 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.³⁶⁶ There are many initiatives for the integration of migrants that offer support in various spheres of life, tailored to the needs of migrants with the aim of fostering equal standing in society – from after school tuition to sport.³⁶⁷ Around 465 000 refugees were assisted by job centres and employment agencies in March 2017. Most of the refugees are younger than 35 and are regarded by the German Government as potential workers needed in the labour market. Almost one in ten companies offered internships or training to refugees in 2016. The state provides numerous funding opportunities for companies hiring refugees, ranging from language courses to integration grants.

Recognised refugees can directly enter the labour market. Asylum seekers and persons with provisional residence status are not allowed to work for the first three months of legal residence in Germany. Thereafter, there is limited access to the labour market. Specifically, this means that before the start of employment, the Immigration Authority must allow employment. The approval of the Federal Employment Agency is generally required for the work permit, which is the first step. As a rule, asylum seekers can also begin vocational training after three months and those with provisional residence status can begin such training from the first day of the confirmation of their status. The training must lead to a recognised professional qualification. There are numerous programmes to support companies offering such training.³⁶⁸

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.³⁶⁹

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.³⁷⁰

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,³⁷¹ and also gives financial assistance to the employer for costs such as training and education, equipment and costs relating to integration.³⁷² A disabled person can claim preferential

³⁶⁶ 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*).

³⁶⁷ Cf. Federal Office for Migration and Refugees, <http://www.bamf.de/EN/Willkommen/Integrationsprojekte/integrationsprojekte-node.html>.

³⁶⁸ <https://www.bundesregierung.de/Content/DE/Artikel/2017/04/2014-04-13-integration-am-arbeitsplatz.html>.

³⁶⁹ 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.

³⁷⁰ 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 (*Bundespersönalvertretungsgesetz, BPersVG*).

³⁷¹ Section 33 SGB IX.

³⁷² Section 34 SGB IX.

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.³⁷³ 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.³⁷⁴ Furthermore there is a duty to conclude integration agreements,³⁷⁵ 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.³⁷⁶ There is an obligation to create a representative body for severely disabled people if there are at least five severely disabled workers.³⁷⁷ Severe disability must be taken into account within social choice (*Sozialauswahl*) in case of dismissals (*betriebsbedingte Kündigungen*).³⁷⁸ There is a special procedure involving the public authorities in the case of an ordinary dismissal of a disabled person.³⁷⁹ The employer is under an obligation to cooperate with the representative body for people with disabilities and the integration authority to avoid dismissal.³⁸⁰

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 anti-integrational 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.³⁸¹

³⁷³ Section 81.1 SGB IX.

³⁷⁴ Section 81.5 sentence 3 SGB IX.

³⁷⁵ Section 83 SGB IX.

³⁷⁶ On all this see above 2.6.

³⁷⁷ Section 94 SGB IX. In 2017, Section 95.2 Social Code IX (SGB IX) was amended. A new sentence 3 was added, which reads as follows: 'The dismissal of a person with severe disabilities by the employer without participation according to sentence 1 is ineffective.' Previously the norm corresponded to the settled case law of the Federal Labour Court that even without the participation of the representatives of severely disabled persons a dismissal was not ineffective for the failure to include the representatives in the process of dismissal and could be remedied by subsequently including them in the process. Therefore, the new rule strengthens the rights of the person with severe disabilities.

³⁷⁸ Section 1.3 Law on Protection against Dismissal (*Kündigungsschutzgesetz, KSchG*).

³⁷⁹ Section 85ff SGB IX. There is a period of three months between dismissal and conclusion of employment (comparable with a period of notice) (Section 89.1 SGB IX); an extraordinary dismissal is nevertheless admissible.

³⁸⁰ Section 84 SGB IX.

³⁸¹ 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). For a recent update on Government measures ranging from general support of integration of foreigners including Sinti and Roma, to measures in the framework of the federal programme 'Demokratie leben' (To live democracy), the support for the Sinti and Roma organisations and institutions, the conference 'Everyday is Roma day' at the occasion of the fifth anniversary of the establishment of the memorial of the Sinti and Roma murdered under National socialism or support for the European Rome Institute for Arts and Culture (ERIAC), established 2017 in Berlin, see 'Situation von Sinti und Roma in Deutschland', *Bundestagsdrucksache* 18/13498 (05.09.2017): <http://dipbt.bundestag.de/doc/btd/18/134/1813498.pdf>.

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.³⁸²

A claim can be brought after employment has ended, within the limits of general law, especially the statute of limitations.³⁸³

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

³⁸² 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/Bertzbach, 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.

³⁸³ 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.³⁸⁴

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.³⁸⁵ 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 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.³⁸⁶

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

³⁸⁴ Cf. H. Rottleuthner and M. Mahlmann (2011), *Diskriminierung in Deutschland*, including interviews with advocates dealing with discrimination cases.

³⁸⁵ 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/docl_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.

³⁸⁶ 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.

status has to be verified by the court in a specific case.³⁸⁷ 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.³⁸⁸ 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.³⁸⁹

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.³⁹⁰ 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.³⁹¹

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.³⁹²

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,

³⁸⁷ Cf. the explanatory report to the AGG, Bundestagsdrucksache 16/1780, 48.

³⁸⁸ These actions encompass both factual declarations as to the matter of the case and procedural actions (recognition of a claim etc.).

³⁸⁹ 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).

³⁹⁰ Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 17th ed. 2017, § 23 AGG, para. 1.

³⁹¹ Cf. Bundestagsdrucksache 16/1780, 26, 48.

³⁹² 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.

which must be included in the register for this purpose.³⁹³ Similar possibilities exist with regard to consumer protection.³⁹⁴ 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.³⁹⁵ According to this norm, the complainant must prove facts of circumstantial evidence that make it reasonable to assume unequal treatment on one of the grounds covered by the AGG, so that the defendant carries the burden of proof that no violation of the regulations 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.³⁹⁶

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.³⁹⁷ 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.³⁹⁸

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

³⁹³ Cf. for details the Law on Prohibitory Action (*Unterlassungsklagengesetz, UklG*, of 27.08.2002 (BGBl. I, 3422, 4346)), last amended on 17.07.2017 (BGBl. I, 2446).

³⁹⁴ 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).

³⁹⁵ For case law on Section 22 AGG, see the ruling of the Federal Labour Court, BAG, 26.1.2017 - 8 AZR 736/15 and the case law section of this report.

³⁹⁶ 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.

³⁹⁷ 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*).

³⁹⁸ 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.³⁹⁹ There is no special prohibition in civil law as foreseen in Article 9 Directive 2000/43/EC, which constitutes a deficit in implementation.⁴⁰⁰ 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, the employer is 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).⁴⁰¹

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).

³⁹⁹ 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.

⁴⁰⁰ Cf. Armbrüster, in B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 9 para. 6.

⁴⁰¹ For details, cf. Mahlmann in Däubler, Bertzbach, *AGG*, § 24 para. 66ff.

Given the case law of the ECJ,⁴⁰² 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.⁴⁰³

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.⁴⁰⁴

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.⁴⁰⁵

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.⁴⁰⁶ 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.

⁴⁰² Cf. ECJ, ECR 1997, I-2195, *Draehmpaehl*, para. 37.

⁴⁰³ It may be argued that the same extends to Section 15.3 AGG as to collective agreements.

⁴⁰⁴ For comments on civil law, cf. Armbrüster, in B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 7 para. 199ff.

⁴⁰⁵ 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).

⁴⁰⁶ 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*)⁴⁰⁷ 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) Political, economic and social context for the designated body

Since its creation, the ADS has gained widespread acceptance and has become a well-respected voice in debates on discrimination issues.

As in other European countries, there is a lively political debate about questions of equality and diversity and the many fields of society in which these questions arise. A political debate that is widely supportive of equality of people of different sexual orientation had led to the introduction of 'marriage for all'; as of 2017, marriage is open to homosexual couples under German law.

An intense debate focuses on the consequences of the refugee crisis, which has particular relevance for Germany, given the comparatively high number of refugees that Germany has admitted. On the one hand, there are voices for integration and non-discrimination, epitomised in the now famous *Willkommenskultur* (culture of welcome) and on the other hand, there has been the rise of Alternative für Deutschland (AFD), a xenophobic party that is now strongly represented in the German Bundestag. Although these debates have not affected the institutional standing of the equality body as such, they are important for the political environment in which the body operates, not the least given its activities to promote the idea of non-discrimination on the ground of race and ethnic origin.

- c) Institutional architecture

The mandate of the ADS is devoted to non-discrimination and its resources are devoted to this task.

- d) Status of the designated body/bodies – general independence

- i) Status of the body

The Federal Anti-Discrimination Agency (ADS) 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. Funding is provided through the Ministry of Family Affairs, but the financial resources (about EUR 4 400 000) are administered independently by the ADS. It can

⁴⁰⁷ Website: http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html.

recruit and manage staff. It is legally accountable to the ministry, although the ministry cannot give political directives concerning the operations of the ADS.

ii) Independence of the body

The head of the ADS is independent and subject only 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 terms of the directives.

e) Grounds covered by the designated body/bodies

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. The agency's thematic activity focuses on a particular characteristic each year (age in 2012, disability in 2013, ethnic origin and race in 2014, sex in 2015, religion and belief in 2016 and sexual orientation in 2017). Any special activities of the ADS (e.g. commissioned studies) are devoted to the characteristic that is that year's theme. However, the ADS has no policy to concentrate its overall activities on any of these grounds specifically. The same is true for questions of intersectional discrimination. Some activities are driven by the need to react to current political affairs, such as the refugee crisis. Overall, the ADS has developed a differentiated pattern of attention to the different grounds, the emphasis depending in each year on the chosen focus.

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 (see section 7(f) below).

f) Competences of the designated body/bodies – and their independent and effective exercise

i) Independent assistance to victims

- Independence

In Germany, the designated body has the competence to provide independent assistance to victims. According to Section 27.2 AGG, the agency shall give independent assistance to persons addressing themselves to the agency in asserting their rights to protection against discrimination. Such assistance may, among other things, involve providing information concerning claims and possible legal action based on legal provisions; providing protection against discrimination; arranging for advice to be provided by another authority; and endeavouring to achieve an out-of-court settlement between the parties involved.

Thus the agency has the competencies demanded in the directives and exercises them independently.

- Effectiveness

There are no publicly available data to assess with sufficient validity the effectiveness of the advisory work. There are no indications, however, that there are deficiencies in this respect that would impair the operation of the body.

- Resources

There are no publicly available data, either, to assess whether the resources – within the constraints of the overall budget – are sufficient for this advisory work. There are no indications, however, that there are deficiencies in this respect that would impair the operation of the body.

ii) Independent surveys and reports

- Independence

In Germany, the designated body does have the competence to conduct independent surveys, produce scientific studies and publish independent reports (Section 27.3 AGG). The ADS and the competent Federal Government Commissioner and Parliamentary Commissioner of the German Bundestag jointly submit reports to the German Bundestag every four years concerning cases of discrimination on any of the grounds covered by the AGG and make recommendations regarding the elimination and the prevention of such discrimination. They may jointly carry out academic studies into such discrimination (Section 27.4 AGG).

Thus the agency has the competencies demanded in the directives and does exercise them independently.

- Effectiveness

The agency exercises this competence effectively. Over the years, the ADS has commissioned many substantial studies that indicate this.

- Resources

There are no publicly available data to assess whether the resources – within the constraints of the overall budget – are sufficient for this work. Given the amount of substantial studies, there are no indications that the resources are not sufficient for meaningful work in this area.

iii) Independent recommendations

- Independence

In Germany, the designated body has the competence to issue independent recommendations on discrimination issues, including but not limited to, recommendations in the report to the Bundestag (Articles 27.3 and 27.4, AGG).

The ADS exercises this competence independently. There are no indications that the recommendations it formulates are the product of political directives. Given the fact that the ADS wields only soft powers in this area, the main effects have been to contribute to the public and political debate.

- Effectiveness

In that context, the ADS has worked effectively, given that it has no ability to force public authorities to follow its recommendations.

- Resources

There are no publicly available data to assess whether the resources – within the constraints of the overall budget – are sufficient for formulating recommendations. There is no indication, however, that the ADS does not devote enough resources to this task.

iv) Other competences

Its further competencies include publicity work (Section 27.3 AGG) and taking action for the prevention of discrimination (Section 27.3 AGG).

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).

v) Positive duties

Section 5 AGG provides (notwithstanding other legally regulated grounds of justification) that unequal treatment shall only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on any of the grounds (for other measures concerning positive duties, see chapter 5 above)

The ADS has no particular competence concerning the implementation (monitoring, evaluating or supervising) of positive duties established by law.

g) Legal standing of the designated body/bodies

In Germany, the designated body does not have legal standing to bring discrimination complaints on behalf of identified or non-identified victim(s) and cannot intervene in legal cases concerning discrimination.

The agency has no legal standing in cases of discrimination and cannot *ex officio* 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. The agency has no competence to intervene in court proceedings.

h) Quasi-judicial competences

In Germany, the body is not a quasi-judicial institution. 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.⁴⁰⁸ However, there is no legal duty for the submission of such statements.⁴⁰⁹ Other public agencies have a duty to cooperate with the agency (Section 28.2 AGG). The agency can make recommendations.

⁴⁰⁸ Section 28.1 AGG.

⁴⁰⁹ Ernst, in Däubler/Bertzach, AGG, 3rd ed. (2013), Section 28.1.

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.⁴¹⁰ 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.

i) Registration by the body/bodies of complaints and decisions

In Germany, the body does register the number of inquiries received, complaints of discrimination made, and decisions (by ground, field, type of discrimination, etc.). Between 2013 and 2016, the Federal Anti-Discrimination Agency received a total of 9 099 inquiries on possible discriminatory situations regarding one or multiple discriminatory features. In 6 474 cases, the inquirers were suspected of being disadvantaged because of one or more of the discriminatory grounds mentioned in Section 1 AGG. Conversely, this means that in 2 625 cases the described facts did not relate to any of the grounds protected by the AGG.⁴¹¹

These data are only partially and not systematically available to the public, depending on occasional needs e.g. they are available in the context of thematic studies.⁴¹²

j) Planning

The agency has not developed a strategic plan. It has an annual work plan that is not published. It does not publish annual reports. Every four years a report for the Bundestag is published.

k) Stakeholder engagement

An advisory council is assigned to the agency for the purposes of promoting dialogue with social groups and organisations whose goal is protection against discrimination. The advisory council advises the Federal Anti-Discrimination Agency on the submission of reports and recommendations to the German Bundestag and may put forward its own suggestions to that end and with regard to academic studies. The advisory council comprises representatives of social groups and organisations, as well as experts on discrimination issues.

Depending on the project, the agency engages with civil society associations, employers, public bodies, local government or trade unions. It has, for example, for instance produced a map of organisations providing independent advice, has conducted a study on anonymous employment applications in collaboration with employers and has initiated a 'coalition against discrimination', engaging German Länder and local government.

The agency engages in various ways with stakeholders, there is no discernible deficit in this respect.

⁴¹⁰ Section 27.2 Nr. 3 AGG.

⁴¹¹ See the report to the German Bundestag, *Bundestagsdrucksache* 18/1360, p. 41.

⁴¹² 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.

l) Accessibility

The Federal Anti-Discrimination Agency offers complainants an e-contact form on its webpage. Moreover, the agency can be contacted by phone, letter or fax. A complainant may also arrange a meeting with the agency's counselling staff for a personal conversation.

As a rule, the website of the Federal Anti-Discrimination Agency is barrier-free. In addition to the publications entitled 'Guide to the General Act on Equal Treatment. Explanations and Examples' and to the General Act on Equal Treatment itself, the agency has made available versions of documents that are optimised for screen readers. There is no discernible deficit as to accessibility.

m) Roma and Travellers

The body has not yet developed any special programme with regard to Sinti and Roma in Germany.⁴¹³ 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, the 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 was founded with a special focus on, although not limited to, the international Roma day in 2016. The association carried out many activities, including public discussions, art campaigns etc.⁴¹⁴ On international Roma day 2017, the head of the ADS warned against the dangers of stereotyping.⁴¹⁵ In 2017, the agency organised a public discussion on police and antiziganism.⁴¹⁶

In 2014 the agency published a study regarding the opinions and attitudes of the German people towards Sinti and Roma.⁴¹⁷ The study concluded that various forms of distance and rejection towards Sinti and Roma exist in Germany.

⁴¹³ 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) 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) 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).

⁴¹⁴ <http://www.romaday.org/Buendnis>.

⁴¹⁵ Federal Anti-Discrimination Agency (2017), 'Discrimination against Sinti and Roma' (7 April, 2017), http://www.antidiskriminierungsstelle.de/SharedDocs/Pressemitteilungen/DE/2017/20170407_PM_Romaday.html.

⁴¹⁶ http://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2017/20171017_Veransaltung_Polizei_und_Antiziganismus.html.

⁴¹⁷ 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.

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.⁴¹⁸ 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.⁴¹⁹ 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.⁴²⁰ The common rules to solve clashes of legal rules apply.⁴²¹

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.

⁴¹⁸ On the activities of the agency, see http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html.

⁴¹⁹ 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 against racism and xenophobia, amongst other things: <http://www.buendnis-toleranz.de>. For other examples of initiatives against discrimination including social partners see chapter 10 below. The programme *Demokratie leben* (Live democracy) supports a variety of initiatives to combat racism and other patterns of discrimination, see <https://www.demokratie-leben.de/en/federal-programme/about-live-democracy.html>.

⁴²⁰ Cf. Bundestagsdrucksache 16/1780, p. 47; Armbrüster, in B. Rudolf and M. Mahlmann, *Gleichbehandlungsrecht*, § 9 para. 202ff.

⁴²¹ 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.⁴²² The coalition government of Germany has expressed its intention to include. A new action plan was released in 2017, which also included homophobia and transphobia.⁴²³

⁴²² 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.

⁴²³ Vgl. BT Drs. 18/7936. Cf. the 2017 action plan: <https://www.bmfsfj.de/blob/116798/5fc38044a1dd8edec34de568ad59e2b9/nationaler-aktionsplan-rassismus-data.pdf>. LGBT organizations have made the criticism that the plan contains no specific measures and remains without sufficiently tangible obligations.

10 CURRENT BEST PRACTICES

To take some examples from different actors and different spheres of life: The Federal Anti-Discrimination 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+).⁴²⁴

The Federal Anti-Discrimination Agency has published a booklet entitled: 'Religious Diversity in the Workplace - Fundamentals and Practice Examples', listing examples of campaigns by public employers.⁴²⁵ For instance, the Berlin state authority has launched the Berlin needs you! education campaign. Various information materials and handouts for schools and companies were created on how training opportunities for young people can be improved. Religion is not an explicit topic in these materials, but they use illustrations of young people with visible religious affiliations—primarily, these are illustrations of girls and young women wearing a headscarf.

Various German cities initiated, programmes to integrate refugees into the labour market, such as the good practice example of the City of Wuppertal, which was applied by several neighbouring cities.⁴²⁶

Various universities in Germany have taken steps for an active diversity management.⁴²⁷

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.⁴²⁸ The Federal Agency and a publisher have launched in cooperation with educational experts a competition for innovative school projects designed to fight discrimination.⁴²⁹ 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.⁴³⁰

⁴²⁴ http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/Literatur_Altersjahr/Broschuere-Good-Practice-Altersvielfalt-20121126.html

⁴²⁵ http://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2017/nl_03_2017/nl_03_studien_und_veroeffentlichungen_1.html.

⁴²⁶ <https://www.bertelsmann-stiftung.de/de/mediathek/medien/mid/arbeitsmarktintegration-von-gefluechteten-praxis-beispiel-aus-wuppertal/>.

⁴²⁷ Cf. for some examples, 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/Kurzmeldungen/DE/2013/nl_05_2013/nl_05_publicationen_04.html.

⁴²⁸ Cf.: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/Dokumente_ohne_anzeige_in_Publikationen/Albert-Schweitzer_Schule_Jugendwettbewerb.html?nn=6575434.

⁴²⁹ Fair@ school - Schulen gegen Diskriminierung, <http://www.fair-at-school.de/page/>.

⁴³⁰ 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.

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.⁴³¹ Other problematic issues have been identified in this report, but the main points are:⁴³²

- 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 ruled⁴³³ – 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).

⁴³¹ 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.

⁴³² 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.

⁴³³ 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.⁴³⁴ 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 light of the by-now extensive experience of the law – this has broadly 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.⁴³⁵ There are some empirical studies about the particular experiences of discrimination of migrants and refugees confirming the existence of discrimination on a significant scale.⁴³⁶ 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

⁴³⁴ 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.

⁴³⁵ 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. 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. First results of another study are available under, Antidiskriminierungsstelle des Bundes, *Diskriminierungserfahrungen in Deutschland*, "Diskriminierungserfahrungen in Deutschland" – Ergebnisse einer Repräsentativ- und einer Betroffenenbefragung, 2017: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Diskriminierungserfahrungen_in_Deutschland.html.

⁴³⁶ Vgl. z.B. Antidiskriminierungsstelle des Bundes, *Diskriminierungsrisiken für Geflüchtete in Deutschland Eine Bestandsaufnahme der Antidiskriminierungsstelle des Bundes*, 2016, https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Diskriminierungsrisiken_fuer_Gefuechtete_in_Deutschland.html. 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 oschuere_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.⁴³⁷ 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.⁴³⁸

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 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 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, and the electoral success of xenophobic political parties despite the strong reaction by civil society, Government and political actors give reasons to believe that persistent efforts may be of great importance in this respect.

⁴³⁷ See: C. McCrudden (ed.), *Anti-discrimination law*, 2nd ed. (2004), Ashgate, Aldershot; S. Fredman (2011), *Discrimination law*, 2nd 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.

⁴³⁸ 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 2017

There are some legislative developments to be reported, most notably the reform of marriage laws (see section 12.1 below).

The jurisprudence of the courts has confirmed some important interpretations of legal provisions relevant for discrimination, as detailed above and in the section on case law. An interesting case that may be worth highlighting given its subject matter is described below.⁴³⁹

The case concerns a woman who was pursuing the second part of legal education in Germany after her university degree in law. During this time, the trainee (*Referendar/Referendarin*) is employed as a public employee and serves various legal functions including in courts, prosecution and administration. In this role, she takes on certain official functions, including for instance the questioning of parties to court proceedings under the supervision of a judge. The complainant wears a headscarf due to her Muslim belief. The administration ordered that she must not carry out any functions in which she visibly displays her religious belief to parties of the proceedings, such as when fulfilling judicial duties in court proceedings. The exclusion would not have negative consequences for the evaluation of her performance but would be compensated for by other achievements. The complainant asked for a temporary injunction to allow her to fully participate in the trainee programme. The exclusion from parts of it would, she argued, violate her rights to personal identity, freedom of religion, freedom of profession and discriminate against her.

The Federal German Constitutional Court did not grant a temporary injunction. Such a temporary injunction, if granted, is not based on the constitutional merits of the case but on the possible negative consequences of granting or not granting the injunction. It argued that the possible violations of the fundamental rights of the complainant were limited. Granting her the possibility to fulfil judicial functions wearing a headscarf would, in contrast, endanger state neutrality and the freedom of religion of the parties to the court proceedings.

The case concerns an important question of the admissibility of religious symbols worn by members of the legal professions in legal proceedings widely discussed in the media. The case also concerns the issue of a temporary injunction. A final decision about the constitutionality of the ban of headscarves will follow later. The court emphasised, however, the importance of the religious neutrality of the state, especially of the judiciary and the freedom of parties not to be confronted with religious manifestations of members of the judiciary. This raises the question whether the court will follow a stricter line of argument than in its recent case law on the permissibility of teachers wearing headscarves.⁴⁴⁰ The case, and others like it, is thus symptomatic of the on-going renegotiation of the presence of religious symbols in the public sphere.

12.1 Legislative amendments

On 30 June 2017, the German Parliament, the Bundestag, passed a law that introduces the possibility of same-sex marriage. To achieve this end, the German Civil Code (*Bürgerliches Gesetzbuch*) has been amended. The regulation on marriage will include a clause that clarifies that marriage is concluded for life between persons of different or of same sex (Section 1353, paragraph 1, sentence 1 Civil Code as amended by the bill, Bt. Drs. 18/6665; 18/12989). People who have entered into same-sex registered partnerships can opt to change their partnership into a marriage. Such partnerships can be continued

⁴³⁹ Order, German Federal Constitutional Court (*Bundesverfassungsgericht*), 27 June, 2017, 2 BvR 1333/17.

⁴⁴⁰ A second instance administrative court has by now overturned a lower instance decision allowing the wearing of a headscarf in the court room, cf. Bavarian Administrative Court (*Bayerischer Verwaltungsgeschichtshof*), 7 March 2018, AZ: 3 BV 16.2040.

but cannot be entered into in the future. The marriage of same-sex partners gives them access to all rights connected to this legal institution, including adoption.

The bill passed by the Bundestag establishes full equality for same-sex partners by legalising same-sex marriage and grants people irrespective of sexual orientation equal legal rights. This includes the – so far controversial – right to full adoption. Stepchild adoption has already been legalised. The main question is whether a complaint will be filed with the German Federal Constitutional Court (*Bundesverfassungsgericht*). This is a possibility given political opposition to the bill by various parties. Whether the court would regard the bill as reconcilable with the protection of marriage (Article 6) in the German Basic Law (*Grundgesetz*) is legally an open question. Traditionally, the German Federal Constitutional Court has interpreted the guarantee of marriage as relating to partners of different sexes. It is unclear whether the court would be prepared to change this interpretation. There is, however, an intense debate about this issue in legal doctrine with many voices in favour of a redefinition of the constitutional provision on marriage that would pave the way to the constitutional admissibility of same-sex marriages. However, no initiative to start a constitutional review was launched in 2017.

A new law was passed that concerns (among other things), hate speech on the internet, to enable the forced removal of such content from social media platforms. It is relevant for the political background of the culture of discrimination as it influences the attitudes that contribute to the causes of discrimination.⁴⁴¹

12.2 Case law

Numerous decisions by German courts in 2017 referred to the directives as well as to German law covering the same grounds.

General

Name of the court: Federal Labour Court (Bundesarbeitsgericht, BAG)

Date of decision: 18 May 2017

Reference number: 8 AZR 74/16

Address of the webpage: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=19544>

Brief summary: The parties argue whether the defendant is responsible for disadvantages, harassment and reprimands within the meaning of the AGG as well as 'mobbing'. The claimant seeks immaterial and material damages under Sections 15.1 and 15.2 AGG. The claimant argues that she was the object of criticism and other hostile behaviour at her workplace, partly based on her disability. The decisive question to be considered concerns time limits, in particular those specified in Section 15.4 of the AGG. The court found that the limitation period of two months specified in Section 15.4 of the AGG is compatible with the requirements of EU law, even under the condition that it is combined with the relevant time limit of Section 61b of the Labour Court Act (*Arbeitsgerichtsgesetz*, ArbGG) of three months for claiming compensation under Section 15.2 AGG. The limitation period respects both the EU law principles of equivalence and effectiveness. Furthermore, Section 15.4 of the AGG does not infringe the prohibition in Article 8.2 of Directive 2000/78/EC of lowering the general level of protection already guaranteed by the Member States.

In cases where the claim for compensation for a prohibited discrimination according to the AGG is based on the form of harassment in the sense of Section 3.3 AGG, the period of Section 15.4 AGG begins to run with the completion of the last incident described by the claimant. The court stated that this is the case because of the 'typically process-related

⁴⁴¹ *Netzwerkdurchsetzungsgesetz* of 01.09.2017 (BGBl. I, 3352), entered into force on 01.10.2017.

nature of the harassment', and it handed the case back for further consideration and decision to the lower court.

Name of the court: Hamburg Higher Labour Court (Landesarbeitsgericht Hamburg, LArbG Hamburg)

Date of decision: 09 August 2017

Reference number: 3 Sa 50/16

Address of the webpage: <http://www.landesrecht-hamburg.de/jportal/portal/page/bsharprod.psml?showdoccase=1&doc.id=JURE170034401&st=ent>

Brief summary: The claimant had initiated different lawsuits because of alleged discrimination on the grounds of age, sex and Russian origin in the process of making employment applications. The case concerns in the context of an appeal against a decision of a lower court the capacity of the claimant to conduct proceedings in her own name and the influence of the number of lawsuits that the claimant filed on the evaluation of this capacity by the court.

An exclusion of accountability (*Steuerungsfähigkeit*) can be indicated if a claimant brings a large number of hopeless proceedings for alleged discrimination and thus brings legal and attorney's fees against her at a level that threatens her economic existence in the long term, the court argued in its decision. The court stated that, if there are significant doubts about that person's ability to represent herself, the lack of willingness of that person to participate in the determination of her ability to stand trial may lead, according to the burden of proof, to the conclusion that the claimant's inability to act must be assumed by the court. The court, therefore, dismissed the action.

Name of the court: Rhineland-Palatinate Higher Labour Court (Landesarbeitsgericht Rheinland-Pfalz, LArbG Rheinland-Pfalz)

Date of decision: 29 November 2017

Reference number: 5 Sa 381/17

Address of the webpage:

<http://landesrecht.rlp.de/jportal/portal/t/bsr/page/bsrlpprod.psml;jsessionid=FC637B0BD5C235CDDF7D4AB03F7EFD84.jp21?doc.hl=1&doc.id=JURE180001916&documentnumber=7&numberofresults=7259&doctype=juris-r&showdoccase=1&doc.part=L¶mfromHL=true#focuspoint>

Brief summary: It must not be regarded as evidence of a prohibited discrimination, if the defendant doubts the capacity of the claimant to conduct legal proceedings in her own name, citing a judgment in a different lawsuit (the judgment of the LAG Hamburg of 9 August 2017 (3 Sa 50/16, reported above)) dealing with this matter. Contesting the capacity of a claimant is a legal right of the defendant during a lawsuit. The court, therefore, dismissed the action.

Age

Name of the court: Federal Labour Court (Bundesarbeitsgericht, BAG)

Date of decision: 26 January 2017

Reference number: 8 AZR 73/16

Address of the webpage:

<https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2017-1&nr=19259&pos=12&anz=56>

Brief summary: The defendant published a job advertisement in which a 'fully qualified lawyer (m/f)' with 'first work experience' or a 'career entrant' with a corresponding 'focus of interest' was sought for extensive legal advisory services in commercial law. After being turned down for the position, the claimant – who was born in 1953 and practised law before the application – demanded compensation pursuant to Section 15.2 AGG on the ground of age discrimination.

The court ruled that a job description containing the terms 'first work experience' ('*erste Berufserfahrungen*') and 'career entrants' ("*Berufsanfänger*") is not automatically an indication of the assumption of a case of age discrimination.

The Federal Labour Court confirms its more recent jurisprudence on Section 15.1, 15.2 AGG, pursuant to which the objective suitability of a candidate is no longer a precondition for the possibility that there has been discrimination; rather, the mere application for the job suffices as a precondition of discrimination. However, the BAG saw no sufficient indications of any age-discrimination. Although a job advert which contains the phrases 'first work experience' and 'career entrant' can be an indication of indirect age discrimination, it is not per se sufficient to establish the presumption pursuant to Section 22 AGG (reversal of burden of proof) of the existence of a causal connection between the decision not to employ the claimant and grounds for the discrimination pursuant to Section 7.1 AGG. The interpretation of the overall job advert is decisive. In the opinion of the BAG, in the present case, the terms 'first work experience' and 'career entrant' are references to professional expertise and not primarily to age. The claimant had not presented any other arguments that might have suggested age discrimination.

Name of the court: Federal Administrative Court (Bundesverwaltungsgericht, BVerwG)

Date of decision: 06 April 2017

Reference number: 2 C 11.16; 2 C 12.16

Address of the webpage: <https://www.bverwg.de/060417U2C11.16.0>

Brief summary: The case concerns the legal consequences of regulations of salaries of civil servants which made the gradual increase of remuneration dependent on age. These regulations represent, according to standing case law, discrimination on the ground of age. The Federal Administrative Court clarified the amount of compensation civil servants can claim in such cases. It ruled that a civil servant, even after the delivery of the judgment of the European Court of Justice in the case of Hennigs and Mai (C-297/10, C-298/10) in September 2011 clarifying the EU law in this respect, may demand from the employer a payment of EUR 100 per month if his salary continues to comply with legal regulations, which made the amount of remuneration dependent solely on age, in breach of EU law. The amount of EUR 100 is independent of the duration of the period the discriminatory pay laws were in force. It cannot be increased because of the long time period the discriminatory pay law was in force. It cannot be reduced even with part-time work.

Name of the court: Freiburg Administrative Court (Verwaltungsgericht Freiburg, VG Freiburg)

Date of decision: 21 November 2017

Reference number: 3 K 4215/16

Address of the webpage: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=22949

Brief summary: The case concerns the legal regulation of access to the police service. The court ruled that the maximum age limit (reaching the age of 31) of Section 11.1 no. 1 LVOPol (Police Career Structures Regulation - Baden Wuerttemberg) for entering the intermediate police service is compatible with higher-ranking law and no discrimination because of age can be found given the physical requirements of police service and the need to balance employment time and pension entitlements in the public service.

Name of the court: Federal Labour Court (Bundesarbeitsgericht, BAG)

Date of decision: 14 November 2017

Reference number: 3 AZR 781/16

Address of the webpage: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=19739>

Brief summary: In the case at hand, the pension commitment provided that a spouse's pension amounts to 60 % of the pension of the deceased pensioner. However, the widow should only be entitled to the spouse's pension if the deceased had not yet reached 65 years old at the time of marriage, which corresponded to the fixed age limit for the

beginning of entitlements under the pension scheme. The action was directed against the validity of this late marriage clause on the grounds that it infringed the prohibition of age discrimination. At the time the marriage was concluded, the pensioner (the deceased beneficiary) was already about 80 years old.

The court notes that the AGG is applicable to the case, since it is based on a possible disadvantageous treatment of the deceased former employee and not of the surviving dependents. Although the provision in question contains discrimination on the ground of age, it is objectively justified under Section 10 of the AGG, the court argued, since it is justified by an objective, legitimate aim and is proportionate. The regulation serves the purpose of creating a pension system with controlled risks, which justifies taking the regular pension age as a cut-off date.

By abandoning its previous case law, the BAG now agrees with the view held by the European Court of Justice (ECJ of 24.11.2016 – C-443/15, *Parris*) that survivor benefits fall under Section 10 sentence 3 no. 4 AGG (admissible age limits in the case of occupational social security schemes), although the wording refers only to old-age and disability benefits. This is the case, if the amount of the survivor's pension is based on the amount of the old-age or disability pension and thus its 'annex' (i.e. an extra subordinate part).

Name of the court: Munich Higher Labour Court (Landesarbeitsgericht München, LArbG München)

Date of decision: 24 February 2017

Reference number: 7 Sa 444/16

Address of the webpage: <http://gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2017-N-138064?hl=true&AspxAutoDetectCookieSupport=1>

Brief summary: In the case, the deceased husband of the claimant concluded an agreement with the defendant, the former employer of the husband, which regulates for the widow's/widower's pension that if the spouse is more than 10 years younger than the deceased, the widow's/widower's pension is reduced by 5 % for each full year of age difference beyond 10 years. The claimant was 72-years-old, her husband was 15 years older and died at the age of 84, hence her widow's pension was cut accordingly. The court ruled that the reduction is ineffective, because it is an age-discriminatory measure against the former employee of the defendant (the deceased husband), which is not justified by a legitimate aim within the meaning of Section 10 AGG. The imposition of such a reduction on the basis of an age difference of 10 years or more between the spouses is arbitrary and has no justifying reason.

Name of the court: Baden-Wuerttemberg Higher Labour Court (Landesarbeitsgericht Baden-Württemberg, LArbG Baden-Württemberg)

Date of decision: 09 March 2017

Reference number: 17 Sa 7/17

Address of the webpage: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=22440

Brief summary: The exclusion of a survivor's pension through a late benefit clause excluding spouses from benefits if the marriage was concluded when the insured spouse was aged 62 or over does not lead to an immediate disadvantage for the employee.

A late-term clause that is linked to the employee's age defined as the standard retirement age for the occupational pension is permissible.

Name of the court: Hannover Administrative Court (Verwaltungsgericht Hannover, VG Hannover)

Date of decision: 07 July 2017

Reference number: 13 A 2870/15, 13 A 2876/15, 13 A 2270/15, 13 A 4188/15

Address of the webpage: Not available

Brief summary: Background of the litigation is that the salary of civil servants until 2016 was based on so-called seniority steps and thus also on their age. By its judgment of 8 September 2011,⁴⁴² the CJEU had considered remuneration oriented on age as being contrary to EU law. The state of Lower Saxony changed its salary law at the end of 2016 and replaced the previous steps - retroactively from September 2011 onwards - with levels of experience that are independent of age. The claimants consider the new legislation also to be discriminatory because salary increases simply on the basis of continuity of service and have filed claims for compensation or damages amounting to EUR 100 or EUR 300 per month, in some cases from as early as August 2006. The negotiated lawsuits are selected 'model cases'. In total, more than 1 000 city officials have filed corresponding claims with the City of Hannover. As a result, the city faces a payment claim of several million euros.

In four judgments of 07 July 2017, the Chamber of the Hannover Administrative Court dismissed actions brought by municipal civil servants. The chamber concludes that, with effect from September 2011, the state of Lower Saxony with its new remuneration law has retroactively eliminated the breach of the prohibition of discrimination under European Union law, thereby removing the basis for compensation claims. The civil servants of Hannover are not entitled to any compensation payments due to age-discriminatory salaries.

The court ruled that it is not problematic that even under the new remuneration law, the civil service salary increases simply on the basis of continuity of service. It is within the discretion of the legislator to honour the experience acquired during the years of service. Although age discrimination is to be assumed for the period prior to September 2011, claims fail because of the two-month material limitation period provided for in the AGG, which began with the decision of the CJEU of 8 September 2011. This deadline was missed here.

The court has admitted the appeal to the Lower Saxony Administrative Court because of the fundamental importance of the cases.

Name of the court: Federal Administrative Court (Bundesverwaltungsgericht, BVerwG)

Date of decision: 16 November 2017

Reference number: 2 C 11.17

Address of the webpage: <https://www.bverwg.de/de/161117U2C13.17.0>

Brief summary: In the case of age-discriminatory salaries of civil servants according to Sections 27 and 28 BBesG a.F. (Civil Servants Remuneration Act (*Bundesbesoldungsgesetz*, *BBesG*) – old version), violating the prohibition of discrimination on the ground of age, the monthly payment forms the legally relevant act of discrimination, not the initial administrative act determining the salary. This is important to determine the exact point in time of the discrimination, relevant (among others) for the beginning of possible compensation claims.

Name of the court: Federal Administrative Court (Bundesverwaltungsgericht, BVerwG)

Date of decision: 14 December 2017

Reference number: 2 C 15.17

Address of the webpage: <http://www.bverwg.de/141217U2C15.17.0>

Brief summary: The claimant is a teacher and an official of the Land North Rhine-Westphalia. He claims compensation due to age-discriminatory pay legislation regarding Sections 27 and 28 BBesG a.F. (Civil Servants Remuneration Act (*Bundesbesoldungsgesetz*, *BBesG*) – old version). The court overruled the verdict of the lower court and denied the claim partly because the claimant had not met the deadline for submitting a claim. Furthermore, the court held that the assumption of a retroactive effect for claims encompassing the entire calendar year is excluded.

⁴⁴² Judgments of the ECJ C-297/10 (*Hennigs*), C- 298/10 (*Mai*).

Name of the court: Federal Labour Court (Bundesarbeitsgericht, BAG)

Date of decision: 26 January 2017

Reference number: 8 AZR 848/13

Address of the webpage: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=19303>

Brief summary: The claimant applied to an insurance company in 2009 for a trainee position and was turned down. He regards himself as disadvantaged because of his age and gender. The defendant has invoked the legal defence of abuse of rights against the claim. In the framework of preliminary reference of the BAG (decision of 18.6.2015 - 8 AZR 848/13 (A)), the CJEU had recognised in 2016 that the legal defence of abuse of rights could be opposed to a claim for compensation, but had strict requirements (CJEU, judgment of 28.7.2016 - C-423/15). On this basis, the BAG now - unlike in its initial order for reference to the CJEU - decided that the factual requirements of Section 242 BGB (Civil Code) are not fulfilled. In particular, it is not sufficient that the claimant has filed various compensation claims since 2009. This is so because the time relevant for determining whether there is an abuse of rights is 'usually' the date of the application (which was 2009 and thus before the time the additional compensations claims were filed).

After the remittal to the Regional Court, the parties will have the opportunity to make further submissions.

Name of the court: North Rhine-Westphalia Administrative Appeals Court (Oberverwaltungsgericht Nordrhein-Westfalen, OVG NRW)

Date of decision: 05 December 2017

Reference number: 6 A 544/17

Address of the webpage:

https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2017/6_A_544_17_Beschluss_20171205.html

Brief summary: The court ruled that the maximum age-limit in civil service law for employment applies if an employee who was formerly employed on a private contract basis obtains the status of a civil servant regulated by public law. In addition, the legal age limit of 42 years for entering the civil service according to Section 15a.1 LBG NRW a.F. – old version (= Section 14.3 LBGB NRW n.F. - new version -, State Law for Officials of North Rhine-Westphalia (*Landesbeamtengesetz, LBG NRW*)) violates neither the Basic Law (GG) nor EU law, in particular because of the legitimate aim to assure a proper relation of time of employment and entitlements to pensions under civil service law.

Disability

Name of the court: Berlin-Brandenburg Higher Labour Court (Landesarbeitsgericht Berlin-Brandenburg, LArbG Berlin-Brandenburg)

Date of decision: 18 January 2017

Reference number: 20 Sa 956/16

Address of the webpage: Not available

Brief summary: If an employer decides to transfer information to employees regarding their respective work environment, including news from the employer about the enterprise via monitors positioned at the work place of the employees, the employer has particular obligations. According to Section 81.4 SGB IX (Social Code IX) in conjunction with Article 5 of Directive 2000/78/EC and Article 27.1.2 i) in conjunction with Article 2(3) and (4) of the UNCRPD, to ensure that content that is only provided orally through this information programme is made accessible to persons with impaired hearing. For the purposes of this responsibility, it does not matter whether the use of the information programme is voluntary, or in the case of individual transmission monitors, the tone is controlled by employees or supervisors. The information made available to the other employees must be available to the employee with impaired hearing as well. If the employer fails to meet this obligation, it may result in claims for compensation for the employee with impaired

hearing under Section 15.2 AGG because of lack of reasonable accommodation as a form of discrimination, Article 7 AGG.

Name of the court: Federal Labour Court (Bundesarbeitsgericht, BAG)

Date of decision: 26 January 2017

Reference number: 8 AZR 736/15

Address of the webpage: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2017&anz=7&pos=2&nr=19283&linked=urt>

Brief summary: The parties to the lawsuit argue whether the claimant can claim damages for being discriminated against because of his severe disability.

The claimant, who has been recognised as a person with severe disabilities with a rate of 50 percent since September 2011, works as a courier at the defendant's express delivery and transport service with a weekly working time of 27.5 hours. In June 2013, the defendant distributed an hourly total of 66.5 hours to 14 part-time employees and concluded with them the corresponding amended contracts.

Apart from the claimant, who had repeatedly requested an increase in his number of working hours per week, and another employee, who had only moved to this delivery station in January 2013, all part-time employees were included in the contractual increase of working hours. In his claim, the claimant sought an increase in his weekly working hours with a corresponding amendment to the contract. In the Appeal Court, he has extended his claim and additionally made a claim for damages pursuant to Section 15.1 AGG to the amount of his lost remuneration. In support of his submission, he alleged that the defendant had put him at a disadvantage when awarding the hourly increases because of his severe disability.

The Labour Court dismissed the claim. On appeal by the claimant, the Higher Labour Court awarded the claimant damages in the amount of the lost earnings. The defendant's appeal was successful in the Federal Labour Court. The Higher Labour Court (LArbG) was not allowed to reverse the decision of the lower court on the grounds that there were indications of discrimination within the meaning of Section 22 AGG, which regulates the shift of the burden of proof. The necessary degree of probability of discrimination having occurred has been determined incorrectly by the lower court, the Federal Labour Court argued. The 'possibility' of unequal treatment being caused by a prohibited ground of discrimination assumed by the LArbG is insufficient in this respect. This is so because Section 22 AGG demands not only a *possibility* of unequal treatment being caused by a prohibited ground but a *preponderant probability* of a causal connection between unequal treatment and the ground of discrimination.

The case was remanded to the LArbG for a new trial and decision.

Name of the court: Hamm Higher Regional Court (Oberlandesgericht Hamm, OLG Hamm)

Date of decision: 03 March 2017

Reference number: 12 U 104/16

Address of the webpage:

https://www.justiz.nrw.de/nrwe/olgs/hamm/j2017/12_U_104_16_Urteil_20170303.html

Brief summary: The claimant is an association of people with disabilities and has the ability to sue under the Injunctions Law (*Unterlassungsklagengesetz*, UKlaG). The defendant is a transport service provider for public transport in Bochum and Gelsenkirchen and operates the tram and bus lines in those cities. In December 2014, the defendant announced in a press release, referring to an expert opinion of the Association of German Transport Companies (*Verband Deutscher Verkehrsunternehmen e.V.*), that for safety reasons they would no longer transport e-scooters in their vehicles. According to the report, there is an increased risk of slipping and tipping when taking such electric vehicles on buses. The claimant disagreed with the opinion and considered the defendant's notification

unlawful. He demanded that the defendant refrain from denying e-scooters from boarding their vehicles. The regional court in Dortmund dismissed the complaint.

The Higher Regional Court has confirmed the lower instance decision. According to the injunction law, the claimant could pursue claims under the Bus Passenger Rights Ordinance (*Bus-Fahrgastrechte-Verordnung*). However, the defendant's exclusion of carriage of e-scooters does not violate the provisions of this regulation. Article 9 of the Bus Passenger Rights Regulation is not relevant because the provision only regulates the transport of persons, but not things carried along. However, the defendant does not refuse to carry people. The defendant's refusal includes only the carriage of e-scooters.

With regard to the further claims for injunctive relief, according to the Higher Regional Court, the claimant has no legal standing. The prohibition of discrimination under civil law regulated in Section 19 AGG does not confer on the claimant any injunctive relief. The AGG is not a consumer protection law in the sense of the injunction law. The regulation protects all natural persons and not especially consumers. The press release, with which the exclusion of carriage was communicated, contained also no *Allgemeine Geschäftsbedingungen*/AGB (general business terms) that may lead to further legal considerations.

Name of the court: Higher Labour Court Rhineland-Palatinate (Landesarbeitsgericht Rheinland-Pfalz, LArbG Rheinland-Pfalz)

Date of decision: 09 March 2017

Reference number: 2 Sa 440/16

Address of the webpage:

http://www.landesrecht.rlp.de/jportal/portal/t/1d9x/page/bsrlpprod.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&fromdoctodoc=yes&doc.id=JURE170035589&doc.part=L&doc.price=0.0&doc.norm=all#focuspoint

Brief summary: The defendant operates several schools for training of non-medical practitioners in Germany. The claimant, who runs her own practice as a non-medical practitioner, has been working as a lecturer for the defendant. The claimant has sued the defendant for the payment of damages on the ground that the defendant terminated the work relationship because of an alleged hepatitis C disease, hence an assumed disability according to Section 1 AGG, among other things. Concerning this matter, the court granted damages based on Section 15.2 AGG. According to the clear wording of Sections 7.1 and 7.2 AGG, an unjustified disadvantage to an employee also exists if the person who commits the discrimination only assumes the existence of a discriminatory feature while committing the discrimination when in fact the feature does not exist.

Name of the court: Rhineland-Palatinate Finance Court (Finanzgericht Rheinland-Pfalz, FG Rheinland-Pfalz)

Date of decision: 21 March 2017

Reference number: 5 K 1594/14

Address of the webpage:

<http://www.landesrecht.rlp.de/jportal/portal/t/7qe/page/bsrlpprod.psml?pid=Dokumentanzeige&showdoccase=1&doc.id=STRE201770337&doc.part=L>

Brief summary: Compensation under the AGG, which is paid on the basis of a labour court settlement, is tax-exempt if it has to be paid for discrimination against a person with disabilities. The court decided against this background of tax law that if the issue of discrimination against a person with disabilities is an integral part of the labour court process, a compensation payment agreed in a settlement under the AGG will be regarded in favour of the person alleging discrimination in any case as being awarded for immaterial damage (and not for other reasons which would not be tax-exempt). This is even so, if it remained unclear in the legal proceedings whether discrimination of a disabled person actually took place.

Name of the court: Saxony-Anhalt Higher Labour Court (Landesarbeitsgericht Sachsen-Anhalt, LArbG Sachsen-Anhalt)

Date of decision: 07 June 2017

Reference number: 5 Sa 339/16

Address of the webpage: <http://www.landesrecht.sachsen-anhalt.de/jportal/portal/t/bug/page/bssahprod.psml?doc.hl=1&doc.id=JURE170034187&showdoccase=1&doc.part=L¶mfromHL=true>

Brief summary: The court ruled that the non-existence of a representative body for employees with severe disabilities in a company is not circumstantial evidence according to Section 22 AGG (reversal of burden of proof), which would suggest discrimination due to the severe disability of an employee.

Name of the court: Hamburg Labour Court (Arbeitsgericht Hamburg, ArbG Hamburg)

Date of decision: 27 June 2017

Reference number: 20 Ca 22/17

Address of the webpage: <http://www.landesrecht-hamburg.de/jportal/portal/page/bsharprod.psml?showdoccase=1&doc.id=JURE170034224&st=ent>

Brief summary: The court granted the claimant with severe disabilities compensation according to Section 15.2 AGG amounting to EUR 5 400 because of discrimination on the ground of disability. He had successfully completed a job interview and a three-day trial period with the defendant. However, a pre-formulated employment contract contained a clause stating that he would not be protected by the provisions for persons with severe disabilities (in the SGB IX – Social Code IX) at the time the contract was concluded. The court ruled that this puts applicants with disabilities in a less favourable position than applicants without disabilities. The former would be forced by the clause to conceal their severe disability or demand an amendment to the employment contract. In the case at hand, the claimant had not been recruited after having requested the relevant amendment and disclosed his severe disability.

Name of the court: Ansbach Administrative Court (Verwaltungsgericht Ansbach, VG Ansbach)

Date of decision: 17 January 2017

Reference number: AN 1 K 16.00995

Address of the webpage: <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2017-N-102844?hl=true&AspxAutoDetectCookieSupport=1>

Brief summary: The claimant with severe disabilities filed for compensation pursuant to Section 15.2 AGG after she was not invited for a job interview. The court regarded her as obviously lacking professional aptitude for the vacancy. Furthermore, the court found that nonetheless the applicant did not lack a legal interest in bringing proceedings. In particular, the action is not abuse of rights. This could be the case if the claimant was obviously not seeking a job, but solely wanted to obtain compensation from the public authorities in the public sector pursuant to Section 15.2 AGG (also known as 'AGG-hopping'). The court stated that it cannot be assumed by the large number of proceedings brought by the claimant alone (a total of six legal actions) and hence regarded that as insufficient evidence for abuse of rights.⁴⁴³

Name of the court: Hesse Higher Labour Court (Landesarbeitsgericht Hessen, LArbG Hessen)

Date of decision: 07 August 2017

Reference number: 7 Sa 1471/16

Address of the webpage:

http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:8027464

⁴⁴³ For the question abuse of law by filing actions also see: BAG judgment of 11.08.2016, 8 AZR 4/15; LAG Saarland judgment of 11.01.2017, 2 Sa 6/16.

Brief summary: A disadvantage for a person with severe disabilities in the context of a selection decision of a public employer exists if the person with severe disabilities is not included in the selection process for employment. The disadvantage is already embodied in the denial of a chance to be employed. According to Section 82 sentence 3 SGB IX (Social Code IX), an invitation to a job interview is only superfluous if the person with severe disabilities obviously lacks the professional aptitude.

The same reasoning is relevant for questions of burden of proof. The presumption that the applicant was disadvantaged because of his disability is already justified if an employer of the public service has not invited the severely disabled applicant to a job interview contrary to the obligation under Section 82 sentence 2 SGB IX to do so. In order to rebut that presumption, the public employer must demonstrate that the invitation to the interview has not been made for reasons that are not related to the disability or to the professional working skills of the candidate.

In doing so, the public employer cannot rely solely on the final grade achieved in a university degree, if the severely disabled applicant has already gained work experience at relevant qualification centres, ruled the court.

Name of the court: Federal Labour Court (Bundesarbeitsgericht, BAG)

Date of decision: 21 November 2017

Reference number: 9 AZR 141/17

Address of the webpage: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=19773>

Brief summary: The parties argue about the date of termination of the claimant's early retirement, the obligation of the defendant to pay adequate compensation, the omission of future discrimination of the applicant due to her severe disability and damages. The court ruled that an early retirement contract between the claimant and the employer in which the duration of payment of the benefits from this contract is linked to the right of people with severe disabilities to receive early retirement pensions directly discriminates against severely disabled employees in comparison to other employees. The court gave the following reasoning. People with severe disabilities can claim a state pension at an earlier age than other persons, in the case of the claimant at the age of 60 and 8 months in comparison to the age of 63 of other persons. This, however, is not to the financial advantage of persons with severe disabilities. The reason for this is that the contractual early retirement scheme is financially more advantageous than the state pension scheme but ends according to the contractual early retirement scheme under scrutiny in the case of persons with severe disabilities earlier than for other employees. This is so given the entitlement to a state pension at an earlier age of persons with severe disabilities in comparison with other persons (60 and 8 months in the case of persons with severe disabilities instead of 63 for other persons). This entitlement of persons with severe disabilities to a state pension ends their entitlement to the financially more attractive contractual early retirement scheme earlier than the entitlement to the contractual early retirement scheme of other persons. The court ruled that this unequal treatment of people with disabilities and without disabilities forms direct discrimination against persons with disabilities.

Race and ethnic origin

Name of the court: Federal Court (Bundesgerichtshof, BGH)

Date of decision: 01 June 2017

Reference number: I ZR 272/15

Address of the webpage: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=79072&pos=0&anz=1>

Brief summary: In the case the claimant is an Italian citizen who was born and resides in Germany. In 2013, he earned a Bachelor of Law degree from a university in Armenia. The defendant is a registered association. It grants scholarships as part of the aim of its

statutes. The claimant contacted the defendant by e-mail in December 2013, shortly before his 35th birthday, in which he mentioned scholarships under the defendant's *Bucerius Jura Programm*. This programme was concerned with the promotion of legal research or study projects abroad. The defendant replied by e-mail in January 2014, pointing out that applicants must have passed the First State Law Examination to qualify for the programme. The claimant replied on the same day that the 'five-year degree' he had acquired was comparable to the Second State Law Examination, since he was able to work in the third country as a judge and as a lawyer. He pointed out that the conditions for participation in this programme are discrimination on grounds of ethnic or social origin and contrary to the AGG. The claimant has filed an action for damages and compensation against the defendant. The Land Court has dismissed this action. The Federal Court had to decide on the appeal.

In this regard the Federal Court has formulated a preliminary reference to the CJEU, asking two questions:

1. Does the granting of scholarships by a registered association, which are intended to promote research or study projects abroad, fall under the term 'education' within the meaning of Article 3 (1) (g) of Directive 2000/43/EC?
2. If Question 1 is answered in the affirmative: By awarding the scholarships referred to in Question 1, under the condition that a candidate has acquired the First State Examination (in law) in Germany, does this constitute indirect discrimination against a candidate within the meaning of Article 2 (2) (b) of Directive 2000/43 /EC, if the candidate, although a citizen of the European Union has acquired a comparable degree in a non-European Union State and the choice of that place of examination is not related to the ethnic origin of the candidate, but because of his domicile and fluency in the German language, he had the possibility to take the First State Examination after a domestic German law degree? Does it make any difference that the aim of the scholarship programme, without referring to discriminatory features, is to promote the knowledge of foreign legal systems, international experience and language skills to graduates of law schools in Germany by promoting a research or study project abroad?

Name of the court: Hamburg-Barmbek Local Court (Amtsgericht Hamburg-Barmbek, AG Hamburg-Barmbek)

Date of decision: 03 February 2017

Reference number: 811bC 273/15

Address of the webpage: Not available

Brief summary: The defendant advertised her flats on an internet portal. The claimant, who has a Turkish-sounding name, asked the defendant via email for flat viewings. All of her applications have been unsuccessful. As a result, witness A sent out further expressions of interest for these flats on the same day, using (invented) German and Turkish sounding names in each case. All Turkish sounding names received a cancellation, while all German sounding names received an invitation to the flat viewings. The details in the expressions of interest were identical (only: 'viewing requested').

The Local Court upheld the claim and ordered the defendant to pay compensation of three months' rent pursuant to Section 15.2 AGG. The claimant has provided sufficient evidence (Section 22 AGG) for discrimination on the ground of ethnic origin. The individual 'testing procedure' of witness A was admissible. The applicant's disadvantage lies in the fact that she was not invited to view the flats and was thus denied the opportunity to conclude a lease. The court regarded it as irrelevant that overall the defendant let not only to German, but also Turkish and Pakistani tenants. The case has been appealed against. The claimant has been supported by a local anti-discrimination organisation.

Name of the court: Frankfurt/Main Land Court (Landgericht Frankfurt/Main, LG Frankfurt/Main)

Date of decision: 16 November 2017

Reference number: 2-24 O 37/17

Address of the webpage:

http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7985830

Brief summary: In the case at hand the claimant booked online a flight from Frankfurt to Bangkok with a Kuwaiti airline and a five-hour stopover in Kuwait City. Later, the claimant presented the defendant, Kuwait's state own airline, with proof of his Israeli citizenship, according to which his flight was cancelled.

The Land Court stated that it was unable to rule on Kuwaiti law, and that German law covered discrimination only on the basis of race, ethnicity or religion and not on the basis of citizenship.

Name of the court: Federal Labour Court (Bundesarbeitsgericht, BAG)

Date of decision: 29 June 2017

Reference number: 8 AZR 402/15

Address of the webpage: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=19581>

Brief summary: In the case a company advertised for employment on short-term basis in an office for the time period 18 March – 17 May 2013. The job advertisement violated the General Act on Equal Treatment (AGG) as it stated that 'German as mother tongue' was required for applicants. The applicant and later claimant, whose mother tongue is Russian, applied for the job in February 2013 and, at first, did not get any response from the company. Only after asking the company for further information several months later in September 2013, was the applicant informed that his application had not been successful. The applicant claimed damages at the beginning of November 2013.

The Federal Labour Court ruled that the job advertisement constitutes indirect discrimination based on ethnic origin and that the applicant was entitled to damages. In particular, the Federal Labour Court held that the applicant asserted her claims in time as the two months period of Section 15.4 of the General Act on Equal Treatment (AGG) did not commence before the applicant received the response from the company in September 2013. The Federal Labour Court emphasised that a 'rejection of an application' within the meaning of Section 15.4 AGG did not require a 'formal letter' from the company. However, a 'rejection of an application' in terms of Section 15.4 AGG requires an explicit or implied statement from the company that can be interpreted by the applicant in the way that his application was not successful. If a company does not react at all, the requirements for such a 'rejection' are not fulfilled.

Religion and belief

Name of the court: Osnabrück Administrative Court (Verwaltungsgericht Osnabrück, VG Osnabrück)

Date of decision: 18 January 2017

Reference number: 3 A 24/16

Address of the webpage:

<http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=MWRE170004805&st=null&showdoccase=1>

Brief summary: In the case the applicant filed an action for compensation based on Section 15 AGG because the defendant, the *Land*, withdrew a job offer for the Lower Saxon school service after finding out that the applicant wanted to wear a headscarf during class. The court stated that the withdrawal of the job offer is not discrimination regarding religion. The decision was specifically made on the grounds of the case law of the Federal Constitutional Court (BVerfG of 24.09.2003 (2 BvR 1436/02)), according to which the ban

on wearing religious symbols in the teaching service demands a legal basis by which the various interests and fundamental rights positions are weighed against each other. The court regarded Section 51.3.1 of the School Act of Lower Saxony (§ 51 Abs. 3 S. 1 NSchG) regulating the duties of teachers as such a legal basis.

The Administrative Court did not consider whether the School Act also complies with the newer ruling of the Federal Constitutional Court of 27.01.2015 (1 BvR 471/10 and 1 BvR 1181/10), declaring an abstract ban on headscarves being worn by teachers as unconstitutional, as the withdrawal of the job offer was made prior to the last ruling.

Name of the court: Federal Constitutional Court (Bundesverfassungsgericht, BVerfG)

Date of decision: 27 June 2017

Reference number: 2 BvR 1333/17

Address of the webpage:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/06/rk20170627_2bvr133317.html

Brief summary: The claimant is a young German of Moroccan origin who has been working as a trainee lawyer in the state of Hesse since January 2017. The justice ministry of the state had forbidden her from wearing a headscarf during her training when being engaged in court hearings or representing the state attorney.

The Administrative Court of Frankfurt had initially ruled in favour of the woman, before the ruling was overturned in Hesse. The court ruled that the maxims of secularism and state objectivity in judicial procedures outweighed the claimant's right to religious freedom. Trainee lawyers who appear as representatives of state authority and are perceived as such must also respect the state's commitment to neutrality.

The Federal Constitutional Court did not grant a temporary injunction regarding the headscarf ban because it regarded this ban as only a temporary and location-specific infringement of religious freedom. The majority of the claimant's training was not affected by the ban. The court further argued that the state should not have 'any direct influence' in favour of a specific faith or worldview. All of those participating in court proceedings have the right to a neutral judge.

Name of the court: Berlin-Brandenburg Land Labour Court (Landesarbeitsgericht Berlin-Brandenburg, LArbG Berlin-Brandenburg)

Date of decision: 09 February 2017

Reference number: 14 Sa 1038/16

Address of the webpage: Not available

Brief summary: The claimant, who wears a Muslim headscarf, had applied for a job as a primary school teacher at the State of Berlin. Her application was rejected after she stated that she intended to wear the headscarf in the classroom. The State Land Labour Court Berlin-Brandenburg granted the claimant compensation (amounting to two months' salary for the position - EUR 8 680), as it regarded the rejection of the application in connection with the Muslim headscarf as discrimination in the sense of Section 7 AGG on the ground of religion.

Sexual orientation

Name of the court: Federal Court (Bundesgerichtshof, BGH)

Date of decision: 26 April 2017

Reference number: IV ZR 126/16

Address of the webpage: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=78202&pos=0&anz=1>

Brief summary: A retirement pension scheme from 1991 provided for surviving dependents' benefits only in the form of widows' pensions. The claimant is a policyholder and later established a same-sex registered partnership on the basis of the Life Partnership

Act (*Lebenspartnerschaftsgesetz*, LPartG) of 16 February 2001. The claimant claimed that such a provision forms discrimination on the ground of sexual orientation violating the equality guarantee of Article 3 Basic Law. The Federal Court ruled that a policy adjustment according to the legal principle of the ceasing of the basis of the transaction (*Wegfall der Geschäftsgrundlage, clausula rebus sic stantibus*) can come into consideration given the newly established possibility of entering into a registered partnership after the contract in relation to the pension scheme was concluded. The precondition for the application of the legal principle of the ceasing of the basis of transaction is that there are events that sufficiently change the circumstances under which the contract was concluded. The court decided that the introduction of registered partnerships can be understood as such events altering sufficiently the basis of the contract in relation to the retirement pension scheme. This may lead to an entitlement to the benefits of the retirement pension scheme for the claimant. Therefore, the BGH remanded the case to the court of appeal for a new trial and decision.

Roma and Travellers

No cases brought by Roma and Travellers within the scope of the AGG or the directives were reported in 2017.

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 2018

Title of legislation (including amending legislation)	Title of the law: Basic Law Abbreviation: GG Date of adoption: 23.05.1949 Latest amendments: 13.07.2017 Entry into force: 23.05.1949 Web link: http://www.gesetze-im-internet.de/gg 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)
Title of legislation (including amending legislation)	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: http://www.gesetze-im-internet.de/agg 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
Title of legislation (including amending legislation)	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: http://www.gesetze-im-internet.de/soldgg 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
Title of legislation (including amending legislation)	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: http://www.gesetze-im-internet.de/bgg Grounds covered: Disability
	Public law

	Material scope: Barrier free access
	Principal content: Prohibition of discrimination, obligation to provide barrier free access; specialised body
Title of legislation (including amending legislation)	Title of the law: Social Code IX Abbreviation: SGB IX Date of adoption: 19.06.2001 Latest amendments: 17.07.2017 Entry into force: 23.06.2001 Web link: http://www.gesetze-im-internet.de/sgb_9 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 2018

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	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

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the 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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