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Country report

Gender equality



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Country report

Gender equality

How are EU rules transposed into
national law?

Germany

Ulrike Lembke

Reporting period 1 January 2017 – 31 December 2017

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1. Introduction

1.1 Basic structure of the national legal system

European gender equality and anti-discrimination directives were explicitly implemented by the 2006 General Equal Treatment Act and the 2006 Law on Equal Treatment of Soldiers, both federal statutes. Since then, no further explicit implementation by German legislation has taken place. But nearly all of the issues, concepts, prohibitions, rights and measures covered by the European directives are subject to legal regulation in one way or another under German law. They are covered by federal or state laws, collective and works agreements, self-regulatory norms and court rulings.

Legislative powers are distributed between the federal and state (*Land*) level in Germany. Concerning key issues of the gender equality directives, most legislative powers still reside at the federal level. But state competences have increased over the years concerning the civil service and work in the public sector. Moreover, the multitude of social security schemes as well as many aspects of working life are not only shaped by federal and state law but also by collective and works agreements and the self-regulations of professional organisations. Courts are established on the regional, state and federal level. Concerning discrimination in the field of employment, the labour courts are competent except for discrimination within the civil service (which falls under the ambit of the administrative courts). The civil courts decide on claims concerning the provision of goods and services under civil law, while the administrative courts are competent for claims against public authorities. Moreover, there are specialised courts for social and tax law. Court decisions in violation of the principle of constitutional equality can be subject to an annulment by the Federal Constitutional Court. Without taking non-statutory agreements and regulations as well as court decisions into consideration, the legal framework on gender equality can neither be presented nor evaluated.

1.2 List of main legislation transposing and implementing Directives

Legislation explicitly implementing Directives

- General Equal Treatment Act of 14 August 2006, Official Journal 2006, p. 1897;
- Law on Equal Treatment of Soldiers of 14 August 2006, Official Journal 2006, p. 1897, 1904;
- SEPA accompanying Act of 3 April 2013, Official Journal 2013, p. 610.

Legislation with relevance for key issues of the Directives

- Statute on the equal participation of women and men in leading positions of private companies and in the civil service of 24 April 2015, Official Journal 2015, p. 642;
- Federal Equality Statute of 24 April 2015, Official Journal 2015, p. 642;
- Statute on Bodies within Federal Control of 24 April 2015, Official Journal 2015, p. 642;
- Pay Transparency Act of 30 June 2017, Official Journal 2017, p. 2152;
- Part-Time and Fixed-Term Employment Act of 21 December 2000, Official Journal 2000, p. 1966;
- Maternity Protection Act of 23 May 2017, Official Journal 2017, p. 1228;
- Federal Law on Parental Allowances and Parental Leave of 5 December 2006, Official Journal 2006, p. 2748;
- Statute on the Better Reconciliation of Family, Home Care and Work of 23 December 2014 (amending the 2008 Law on Home Care Leave and the 2012 Law on Family Home Care Leave), Official Journal 2014, p. 2462;
- Statute on the Regulation of a General Minimum Wage of 11 August 2014, Official Journal 2014, p. 1348;
- Act on Occupational Pension Schemes of 19 December 1974, Official Journal 1974, p. 3610;

- Law on the Improvement of Services of the Statutory Pension Insurance Schemes of 23 June 2014, Official Journal 2014, 787;
- Protection Against Violence Act of 11 December 2001, Official Journal 2001, p. 3513;
- Statute on the Establishment and Operation of a State-Wide Telephone Helpline 'Violence Against Women' of 7 March 2012, Official Journal 2012, p. 448;
- Law on Transsexuals of 10 September 1980, Official Journal 1980, p. 1654;
- Law on Amendments to the Civil Status Act of 7 May 2013, Official Journal 2013, p. 1122.

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes. Article 3(3) of the German Constitution prohibits any treatment in a disadvantageous or privileging manner on the grounds of sex, descent, race, language, origin, religion and religious or political opinion as well as any disadvantages due to disability. Due to the Federal Constitutional Court, the prohibition of discrimination on the grounds of sex covers the prohibition of discrimination on the grounds of gender identity as well.¹

2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

Yes. Article 3(2) of the German Constitution explicitly provides for equality between men and women. Moreover, the state is obliged to further the effective implementation of this principle of equality and to eliminate existing disadvantages. In its landmark decision on the recognition and formal registration of a third gender identity, the Federal Constitutional Court emphasized that the added value of Article 3(2) in comparison to the general prohibition of sex/gender discrimination in Article 3(3) was just this obligation of effective implementation.²

2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

Without doubt, the Constitution is binding for the state and its authorities. To which extent and in which ways the prohibition of sex discrimination applies to civil and labour law cases and is thus (indirectly) binding on other citizens is subject to some legal dispute. This is especially important concerning the question of whether the social partners are thereby bound in negotiating, shaping and entering into collective agreements.

2.2 Equal treatment legislation

2.2.1 Does your country have specific equal treatment legislation?

Yes, the General Equal Treatment Act, the Law on Equal Treatment of Soldiers, the Federal Equality Statute and several equality statutes of the states.

All these laws explicitly prohibit sex/gender discrimination. The Federal Equality Statute also focuses on temporary measures, reconciliation, and women with disabilities. Under the Law on Equal Treatment of Soldiers, the prohibition of sex/gender discrimination is restricted to harassment and sexual harassment, but the law covers all other discrimination grounds enumerated in the EU directives with the exception of age and some extended justifications concerning disability. The General Equal Treatment Act, implementing the Directives, covers a broad prohibition of sex/gender discrimination as well as other discrimination grounds, namely race, ethnic origin, religion, belief, disability, age, and sexual orientation.

¹ Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html.

² Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html.

3. Implementation of central concepts

3.1 Sex/gender/transgender/intersex

3.1.1 Are the terms gender/sex defined in your national legislation?

No. However, it might be important to know that there is only one term (*Geschlecht*) for sex and gender employed in the German (legal) language.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

No. But the Law on Transsexuals of 10 September 1980 covers the requirements and consequences of gender reassignment and the legal recognition of the new gender status. There are two dimensions: changing the first name and changing the gender status of a person. Section 5 of the Law on Transsexuals prohibits the search for and the publication of the former first name of a transgender person. Section 10 states that after gender reassignment resulting in a change in the gender status, all gender-dependent rights and duties of the transgender person depend on the new gender. Section 11 clarifies that the legal relationships between transgender persons and their parents as well as their children remain unaffected by gender reassignment. When the Federal Constitutional Court decided that several sections of the Law on Transsexuals, especially those covering the requirements for gender reassignment, are incompatible with the Constitution, the court based its decisions on the fundamental right of personality and dignity, not on the principle of gender equality.³

Thus, the court did not recognize gender identity as a question of gender equality. This view was contested by legal authors whose conception of gender equality covers non-discrimination because of sex/gender as well as gender identity (transgender and intersex persons) and sexual orientation.⁴ The Federal Labour Court decided that the discrimination of a transgender person constitutes prohibited discrimination either on the grounds of sexual orientation or — in accordance with European directives — on the grounds of sex/gender.⁵ As the remaining sections of the Law on Transsexuals neither form a consistent law nor cover important fields such as education, healthcare, data protection, marriage, parenthood or an explicit prohibition of discrimination, a completely new legal framework might be necessary.⁶

In a landmark decision in 2017, the Federal Constitutional Court clarified that the prohibition of sex/gender discrimination covers discrimination on the grounds of gender identity.⁷ The case was brought to court by a person neither identifying as male nor female. After amendments entering into force on 1 November 2013,⁸ the Civil Status Act stated that if a child can be assigned neither the female nor the male gender, that child's civil status shall be documented in the birth register without indicating the child's gender.⁹

³ Federal Constitutional Court, judgments of 11 January 2011, 1 BvR 3295/07, and of 6 December 2005, 1 BvL 3/03.

⁴ Adamietz, L. (2011), *Geschlecht als Erwartung. Das Geschlechtsdiskriminierungsverbot als Recht gegen Diskriminierung wegen der sexuellen Orientierung und der Geschlechtsidentität* (Gender as Expectation. The prohibition of gender discrimination as a legal means against discrimination on the grounds of sexual orientation and gender identity), Baden-Baden: Nomos.

⁵ Federal Labour Court, judgment of 17 December 2015, 8 AZR 421/14.

⁶ A thorough analysis of the problems and a draft law with explanatory remarks was presented by Adamietz, L. & Bager, K. (2016), *Regelungs- und Reformbedarf für transgeschlechtliche Menschen* (Regulatory requirements and the necessity of reform for transgender persons), BMFSFJ: Berlin.

⁷ Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16.

⁸ Many lawyers and legal scholars have been preparing the ground for this legal change, e.g. see the legal opinions on intersex, gender identity and non-discrimination written for the German Ethics Council in 2011 and 2012, <http://www.ethikrat.org/sachverstaendigenbefragung-intersexualitaet>.

⁹ Accompanying research demonstrated that this 'non-registration' did not work too well in practice, see Althoff, N., Schabram, G., Follmar-Otto, P. (2016), *Gutachten Geschlechtervielfalt im Recht* (Expertise on sex/gender diversity in law), BMFSFJ: Berlin.

Persons born before 2013 could ask for the correction of their registered birth gender when they were of neither male nor female gender identity. The claimant applied for the correction of his*her gender registration but did not want to be registered as 'nothing', then claimed for a positive gender registration with a third sex/gender.

The Federal Constitutional Court decided that the constitutional right of personality and dignity protects, among other things, the gender identity of a person, covering the gender identity of those who cannot be permanently assigned either the male or female gender. But then it went beyond its reasoning on gender identity developed in several transgender cases and stated that the constitutional prohibition of sex/gender discrimination also protects persons who do not permanently identify themselves as male or female. The court decided that the birth register must allow for a positive third gender entry other than male or female by 31 December 2018 at the latest. This third option shall end discrimination against persons identifying themselves as neither male nor female without diminishing any rights of persons identifying themselves as either female or male or any measures to tackle gender discrimination, e.g. by a gender quota or other special measures.

Now, the constitutional prohibition of sex discrimination covers the prohibition of discrimination on the grounds of sex, gender (stereotypes) and gender identity.

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes. Section 3(1)(1) of the General Equal Treatment Act states that direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on the grounds of (inter alia) sex/gender. It is to be noted that the Act does not continuously employ the term discrimination but *Benachteiligung* (putting at a disadvantage) without intending to weaken the protection as compared to the directives.¹⁰

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

Yes. Section 3(1)(2) of the General Equal Treatment Act states that direct discrimination on the grounds of sex shall also be taken to occur in relation to employment (access to employment, employment and working conditions, pay, vocational training, employment organisations etc.) in event of the less favourable treatment of a woman on account of pregnancy or maternity.¹¹ The provision is a direct implementation of Article 2(2)(c) of Directive 2006/54. Unfortunately, the prohibition of pregnancy and maternity discrimination is explicitly restricted to the area of employment and therefore incompatible with Article 4(1)(a) of Directive 2004/113.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination?

No. After the implementation of the Test-Achats ruling, intersectional and some kinds of indirect discrimination and sexual harassment remain as the major problems. Direct sex discrimination rarely occurs because it is easy to discover.¹² What is still missing under the

¹⁰ Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, pp. 25f, suggest to use the correct term, 'discrimination'.

¹¹ Confirmed by Federal Labour Court, judgment of 24 February 2016, 7 AZR 253/14.

¹² See for direct discrimination on grounds of maternity (protection): Federal Labour Court, judgment of 2 August 2006, 10 AZR 425/05, and judgment of 24 February 1999, 10 AZR 258/98. Interesting enough, the Federal Labour Court, judgment of 18 September 2014, 8 AZR 753/13, held that memos about parenthood written by a future employer on the application documents of only female applicants may constitute direct sex discrimination.

General Equal Treatment Act, is the prohibition of discrimination in cases without identifiable victim (ECJ in *Feryn*). One of the reasons might be that the system of legal protection is strictly based on individual rights (see 11.4.2).

3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes. Section 3(2) of the General Equal Treatment Act states that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on the grounds of (inter alia) sex/gender, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. The provision is a direct implementation of Article 2(1)(c) of Directive 2006/54 with one exception: the Act does not continuously employ the term discrimination but *Benachteiligung* (putting at a disadvantage) without intending to weaken the protection as compared to the directives. However, the protection is actually weakened by Section 20(1) of the General Equal Treatment Act stipulating that differential treatment based on sex is permitted in the provision of goods and services if there is an objective reason for this while the requirement of proportionality is missing.

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination?

Generally yes, but the Federal Labour Court has clearly restricted the usability of statistical data as prima facie evidence.¹³ In contrast to the State Labour Court of Berlin and Brandenburg in the same anti-discrimination law suit, the Federal Labour Court remained unimpressed by the fact that 69 % of the employees of the defendant party were female, while all executive board members, the highest managers and the district managers were male. It stated that a discriminatory 'glass ceiling' could only be assumed when there is proof of the existence of a sufficient pool of female employees eligible for the promotion in question and, moreover, when the exclusive maleness of leading positions is not the sole result of societal reconciliation problems for which the employer cannot be held accountable.¹⁴

The Labour Court of Stuttgart, on the other hand, decided without further consideration that there is prima facie evidence indicating gender discrimination when the percentage of men among all applicants is significantly higher than the percentage of men among the applicants subsequently hired.¹⁵ In 2014, the Federal Labour Court rejected the use of official statistics on significant differences in the employment of mothers (25 % full time) and fathers (95 % full time) for proving sex discrimination of a female job applicant caring for a seven-year old child with the argument that these statistics cover discrimination in existing employment but not the question of discrimination when *applying for* full-time employment.¹⁶

¹³ Federal Labour Court, judgment of 22 July 2010, 8 AZR 1012/08, overruling the State Labour Court of Berlin and Brandenburg, judgment of 26 November 2008, 15 Sa 517/08.

¹⁴ Combined with the lack of a right of access to the employer's files or an employer's obligation to publish employees' salaries and fringe benefits, claimants may very rarely enjoy the advantages of a statutory shift of the burden of proof.

¹⁵ Labour Court of Stuttgart, judgment of 26 April 2007, 15 Ca 11133/06.

¹⁶ Federal Labour Court, judgment of 18 September 2014, 8 AZR 753/13. In the same decision, the court made important remarks about direct and indirect sex discrimination and suggested the possibility to identify direct discrimination without any statistics. Most of the media reported that the court had rejected the use of statistics on the employment rates of mothers and fathers.

3.3.3 Is in your view the objective justification test applied correctly by national courts?

Mainly, yes. But when the (gendered) body and/or public safety are concerned, courts tend to jump to conclusions. Access to service in the police force was denied for a Female to Male transgender person by the Administrative Court of Frankfurt¹⁷ and for women who are under 163 cm tall by the Administrative Court of Düsseldorf,¹⁸ both invoking the efficiency of police forces and public safety. The first case raises questions of discrimination on the grounds of disability because the rationale of the denial was the fact that the claimant cannot produce endogenous hormones. In the second case, the court failed to explain why public safety is at risk by employing a female police officer who is 161 cm tall, especially when considering that in other German states the minimum height for female police staff is 160 cm.

The Administrative Court of Schleswig-Holstein generally considered minimum body height requirements for federal police officers to constitute unjustified indirect sex discrimination.¹⁹ To promote gender equality and to avoid disadvantages for a far higher number of female compared with male applicants, the former government of North Rhine-Westphalia had introduced different minimum body height requirements for female (163 cm) and male (168 cm) applicants for the police forces. In September 2017, the State Administrative Court of North Rhine-Westphalia decided that different requirements for male and female applicants are incompatible with constitutional law.²⁰ The main formal²¹ argument was that Parliament (and not the government) had to decide about requirements for the civil service that went beyond qualifications, aptitude and professional performance as established by the Constitution. Although the court explicitly stated that it did not have to decide upon the argument that different minimum body height requirements had been introduced to avoid indirect discrimination against female applicants, its decision was concluded with the *obiter dictum* that the promotion of women or gender equality must never put into question the constitutional principle of qualification. It has to be noted that the State Administrative Court of North Rhine-Westphalia has a long history of abolishing gender quotas and other temporary measures to further gender equality. Whether the State Parliament of North Rhine-Westphalia will employ a more advanced understanding of indirect discrimination and temporary measures and take the respective judgments of the ECJ (*Kalliri*) into proper consideration, remains to be seen.

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination?

The Federal Constitutional Court explicitly recognised the European concept of indirect gender discrimination as also applying under German constitutional law: The German courts did a very good job in tackling indirect sex discrimination embodied in the discrimination of part-time workers, especially before the Part-Time and Fixed-Term Employment Act entered into force.²² But in other fields many German courts still face difficulties when applying the concept of indirect discrimination. This is especially the case when indirect discrimination is linked to the gender-related division of labour and care work, and when discrimination is rooted in job classification systems of collective agreements due to a specific understanding of the autonomy of collective bargaining (freedom of coalition) under the German Constitution. Moreover, courts tend to ask for a

¹⁷ Administrative Court of Frankfurt, judgment of 3 December 2007, 9 E 5697/06.

¹⁸ Administrative Court of Düsseldorf, judgment of 2 October 2007, 2 K 2070/07.

¹⁹ Administrative Court of Schleswig-Holstein, judgment of 26 March 2015, 12 A 120/14.

²⁰ State Administrative Court of North Rhine-Westphalia, judgment of 21 September 2017, 6 A 916/16.

²¹ More than one administrative judge involved in lower-instance proceedings in North Rhine-Westphalia had informed the media that 'the promotion of women is not above everything' and that highly qualified men were being discriminated against while less qualified women were given the jobs.

²² E.g. Federal Constitutional Court, judgment of 27 November 1997, 1 BvL 12/91, with reference to *Bilka* and *Barber*. The same might be true for tackling indirect discrimination embodied in protective regulations: The most famous decision was delivered by the Federal Constitutional Court, judgment of 28 January 1992, 1 BvR 1025/82, declaring the law prohibiting night work for women null and void.

special discriminatory context or discriminatory intention and show problems in identifying comparable groups and in dealing with statistical data.²³

3.4 Multiple discrimination and intersectional discrimination

3.4.1 Is multiple discrimination and/or intersectional discrimination explicitly addressed in national legislation?

Yes. Unequal treatment on several grounds is explicitly addressed by Section 4 of the General Equal Treatment Act which requires that the justification extends to all these grounds as well.

3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

Although multiple and intersectional discrimination has to be considered the rule and not the exception, there have only been a few court cases in Germany.²⁴ The main reason for this is that the courts do not realize that they are dealing with multiple/intersectional discrimination and that the claimants will not focus on this question but tend to focus on the ground of discrimination which will enable them to win the case. Broad discussions about the Muslim headscarf and its alleged anti-emancipatory implications did not encourage the courts to raise the question of whether the ban on the Muslim headscarf in the civil service and in teaching in schools would rather constitute direct discrimination on the grounds of religion intertwined with indirect discrimination on the grounds of gender and racial prejudice.²⁵ When young men of an alleged foreign ethnic origin are denied access to clubs and discotheques, some courts have identified intersectional discrimination on the grounds of gender and racial prejudice²⁶ while some solely focus on the racist implications.²⁷ Even the courts assuming intersectional discrimination neither explained the specific gendered racism in these cases nor did they further develop the consequences of their assumption, especially concerning justification and damages.

3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Yes. Section 5 of the General Equal Treatment Act states that unequal treatment shall only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on the grounds of (inter alia) sex/gender. This applies to the field of employment as well as to the provision of goods and services.

According to Article 3(2)(2) of the Federal Constitution, public entities are even under an obligation to further women's equality in actual practice. As a consequence, the federal level and the federal states have enacted laws to further equality between the sexes. Most of them oblige public institutions to enact plans to increase women's representation in all levels of employment, and to hire or promote women instead of equally qualified men,

²³ See Sacksofsky, U. (2010), *Mittelbare Diskriminierung und das Allgemeine Gleichbehandlungsgesetz* (Indirect discrimination and the General Equal Treatment Act), Berlin, pp. 21ff.

²⁴ See Baer, S., Bittner, M., Götsche, A. L. (2010), *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse* (Multidimensional discrimination—conceptions, theories and legal analysis), www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Mehrdimensionale_Diskriminierung_jur_Analyse.pdf.

²⁵ The Federal Labour Court, judgment of 12 August 2010, 2 AZR 593/09, stated without any further reasoning that there was no gender discrimination involved. The Federal Constitutional Court, judgment of 27 January 2015, 1 BvR 471/10, 1181/10, mentioned that Muslim women were particularly affected and that this fact would raise questions concerning the constitutional right to gender equality.

²⁶ E.g. Higher Regional Court of Stuttgart, judgment of 12 December 2011, 10 U 106/11; District Court of Oldenburg, judgment of 23 July 2008, E2 C 2126/07.

²⁷ E.g. District Court of Bremen, judgment of 20 January 2011, 25 C 278/10; District Court of Hannover, judgment of 14 August 2013, 462 C 10744/12.

unless there are exceptional reasons to decide in favour of the male candidate. In the author's view, these general regulations are in compliance with Article 157(4) TFEU, but their compatibility with CEDAW and their efficiency in practice is questionable. Many states have started to amend their equality laws and statutes on the civil service in recent months, especially by introducing gender quotas with the requirement of *substantially* equal qualification for the civil service.²⁸

3.5.2 Are there specific difficulties in your country in relation to positive action?

The positive action measures of choice are gender quotas although they produce quite contrasting effects or no effects at all, e.g. the concept of quotas within the civil service to hire or promote women instead of equally qualified men generally fail in practice due to the sophisticated systems of qualification assessment leading to the result that there are nearly never two persons with equal qualifications, let alone a man and a woman.²⁹ This is the reason why some German states amended their equality and civil-service laws to introduce the requirement of *substantially* equal qualification as sufficient in civil service.

The 2016 Statute on the Modernization of the Civil Service Law of North Rhine-Westphalia determined that female civil servants were to be given preference in promotion under the provision of a substantially equal qualification, aptitude and professional performance based upon an equivalent overall evaluation in the applicant's latest assessment report, unless a male applicant experiences specific hardships, and the further conditions of a lower proportion of female civil servants in the higher position applied for than in the corresponding lower positions and not yet having reached 50 %. Shortly thereafter, the State Administrative Court of North Rhine-Westphalia decided that this provision was incompatible with the Constitution.³⁰ The court accepted the regulation that female civil servants are to be given preference in promotion under the provision of a substantially equal qualification, aptitude and professional performance, unless a male applicant experiences specific hardships. But the court rejected the idea that a substantially equal qualification could be established by an equivalent overall evaluation.

The court's decision took place shortly before the state's parliamentary elections. Repeatedly, the ruling was incorrectly reported as a decision upon the general incompatibility of positive action measures with the Constitution not only by the media but by political parties as well. Conservative parties as well as right-wing populists furthered resentments against the 'unjustified preferential treatment of unqualified women' as a very successful topic in the state election campaign. The immediate withdrawal of the new quota regulation became one of the most important electoral promises. On 19 September 2017, the Parliament of North Rhine-Westphalia withdrew the innovative gender quota regulation thereby pre-empting (and thus excluding) a decision by the State Constitutional Court on the topic.³¹ In contrast to the former misinterpretation of the court's decision, the Parliament did not abolish any quota regulation but fell back on the well-known and fairly ineffective former regulation. With this, the civil service of North Rhine-Westphalia is not only back to the underrepresentation of women in leading positions and will stay there, but positions against gender equality within the civil service (and in many other places) have been proven to work out well in state election campaigns.

²⁸ E.g. North Rhine-Westphalia, Mecklenburg Pomerania and Lower Saxony; see the statements of the German Women Lawyers' Association, available under <https://www.djb.de/verein/Kom-u-AS/K5/2016.html>.

²⁹ This is the finding of a recent legal expertise study: Papier, H.-J., Heidebach, M. (2014), *Rechtsgutachten zur Frage der Zulässigkeit von Zielquoten für Frauen in Führungspositionen im öffentlichen Dienst sowie zur Verankerung von Sanktionen bei Nichteinhaltung* (Legal expertise on the legitimacy of fixed target women quotas for leading positions in the civil service and the implementation of sanctions in the case of non-compliance), https://www.mik.nrw.de/fileadmin/user_upload/Redakteure/Dokumente/Themen_und_Aufgaben/Moderne_Verwaltung/1407ga_zielquoteoedie.pdf.

³⁰ State Administrative Court of North Rhine-Westphalia, judgment of 21 February 2017, 6 B 1109/16.

³¹ Statute on Amendments to the Civil Service Law of North Rhine-Westphalia of 19 September 2017, <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument?Id=XMMGVb1729|764|765>.

The use of resentments against positive action measures or gender equality in general as a means of political debate or electoral campaigning is alarming. Anti-equality, anti-feminism and anti-gender politics are building bridges from right-wing populist political positions into the very midst of society.³² Another strong indicator of fundamental misunderstandings of gender equality law is the fact that all new state equality statutes or recent amendments to state and federal equality statutes introduce a formally gender-neutral approach to positive action measures in covering men and women alike 'when they are underrepresented.' More hidden, the statutes require the structural discrimination of the underrepresented sex as a condition for the application of positive action measures. These regulations may be one of the reasons for the widespread and aggressive contestations of positive action measures before state courts over the last few months.

Fortunately, the State Constitutional Court of Mecklenburg-Western Pomerania used the opportunity to explain the idea of structural discrimination and the suitable means to tackle this kind of discrimination when ruling upon the restriction of the right to vote and to stand for election as the equal opportunity commissioner to female employees only.³³ The court held that Article 3(2) of the German Basic Law explicitly allows for disadvantages generally suffered by women, especially in working life, to be compensated. The lack of the reconciliation of working and family life, the problem of sexual harassment at the workplace, the small number of women in leading positions—all these were signs of the structural discrimination of women in the opinion of the court. As long as this structural discrimination was not effectively tackled, the legislator was authorized by the Constitution to use any means that are appropriate and necessary to end this discrimination. Only weeks later, the State Labour Court of Schleswig-Holstein agreed.³⁴ Both courts showed that to attain gender equality as a goal, one cannot always use formal gender equality (formal equal treatment of the sexes) as a means. Quite the opposite: The use of affirmative action or special measures is an essential tool to achieve substantial equality.

Another problem is that women in leading positions—whether they were actually appointed by employing gender quotas or not—are stigmatized as 'quota women', calling into question their competence and qualifications. As a consequence, many (of the few) female leaders and many promising young women reject gender quotas. Some politicians and some law professors alike employ an understanding of gender quotas as discrimination of men, violation of academic freedom, or both. Moreover, positive action measures by private employers run a high risk of constituting prohibited gender discrimination in the opinion of the courts.³⁵

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

With the law on the equal participation of women and men in leading positions of private companies and in the civil service, adopted on 6 March 2015, the legislator introduced a statutory 30 % gender quota for supervisory boards of the one hundred most important private companies in Germany, to be realised by 2016. In case of non-compliance, the election is void and the seat designated for a member of the under-represented gender remains vacant. Moreover, the Law covers the obligation of many important companies to publish target gender quotas for boards and the highest management level. Critics point out the narrow scope of application and doubt the effectiveness of the sanctions, thereby demanding statutory gender quotas on executive boards and at higher management levels as well and preferring effective sanctions such as the invalidity of the resolutions of the

³² See <https://www.qwi-boell.de/de/2016/09/28/antifeminismus-scharnier-zwischen-rechtem-rand-und-mitte>, with many further references.

³³ State Constitutional Court of Mecklenburg-Western Pomerania, judgment of 10 October 2017, LVerfG 7/16, available under www.landesverfassungsgericht-mv.de.

³⁴ State Labour Court of Schleswig-Holstein, judgment of 2 November 2017, 2 Sa 262 d/17.

³⁵ E.g. Labour Court of Berlin, judgment of 5 June 2014, 42 Ca 1530/14 (female only with migration background for media traineeship), press release: <https://www.berlin.de/gerichte/arbeitsgericht/presse/archiv/20140605.0930.397734.html>.

respective board or corporate tax disadvantages.³⁶ The provisions of the law do not live up to previous drafts presented by the Greens and the Social Democratic Party.

The binding statutory 30 % gender quota for advisory boards covers no more than 108 companies in Germany. On average, these 108 companies today fulfil their legal obligations of 30 % female supervisory board members. While the obligation to set themselves target gender quotas covers 2 500 to 3 500 private companies, there are unfortunately no effective sanctions in the case of setting zero quotas or none at all. It is not surprising that 75 % of all MDax-listed companies set themselves a 0 % gender quota regarding their executive boards for the first period until 30 June 2017.³⁷ In March 2017, the Federal Minister for Family, Senior Citizens, Women and Youth expressed her disappointment with the broad failure of private companies to set sufficient target quotas (beyond 0 %) and announced that serious consideration was being given to amendments to the existing legal obligations such as an expansion of the statutory 30 % gender quota.³⁸ It remains to be seen whether and how the newly elected minister will deal with this problem.

By the end of 2017, only 24.6 % of the supervisory board members and 8.1 % of the executive board members of the 200 largest companies in Germany were female.³⁹ While the percentage of female supervisory board member has slightly increased, there has been no progress concerning executive boards. In March 2017, there were more male executive board members with the name of Thomas and Michael than the total number of female executive board members.⁴⁰ By the end of 2017, 68.5 % of the 200 largest companies in Germany had no female members on their executive boards.⁴¹

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies?

Some political parties have adopted gender quotas in political candidate lists: the Greens and the Left (50 %), the Social Democratic Party (40 %), and the Christian Democratic Union (30 %). But with the elections in September 2017, the percentage of female members of the Federal Parliament (Bundestag) dropped to a mere 30.9 % (from 36.5 % during the preceding legislative period), which is the lowest percentage within the past 20 years.⁴² Only political parties that committed themselves to sufficient gender quotas through their statutes reached an adequate percentage (42 % to 58 %), while only 22.5 % of the MPs of the Liberal Party, 10.6 % of the MPs of the right-wing Alternative for Germany and 20 % of the MPs of the (governing!) Christian Democratic Union and Christian Social Union (CDU/CSU) parliamentary faction are female.⁴³

Between 21.8 % to 40.7 % of the State Parliament members are female.⁴⁴ In the local councils they are no more than 25 %. More than 90 % of all mayors in Germany are male. During the 1980s, the idea of gender quotas in political candidate lists was avidly discussed

³⁶ See German Women Lawyers' Association, Statement of 7 October 2014, <https://www.djb.de/verein/Kommu-AS/K1/st14-17/>, and the Berlin declaration by seventeen women's organizations, available under <https://www.djb.de/st-pm/pm/pm18-04/>.

³⁷ See <http://www.spiegel.de/karriere/frauenquote-in-mdax-unternehmen-keine-weiblichen-vorstaende-a-1135060.html>.

³⁸ See <http://www.spiegel.de/karriere/manuela-schwesig-droht-firmen-mit-harter-quote-fuer-frauen-in-fuehrungsjobs-a-1137809.html>.

³⁹ German Institute for Economic Research (DIW), Women Executives Barometer 2018, available under https://www.diw.de/sixcms/detail.php?id=diw_01.c.574761.en.

⁴⁰ Allbright Foundation (2017), Ein ewiger Thomas-Kreislauf?, <https://static1.squarespace.com/static/56e04212e707ebf17e7d7cd2/t/58e131722e69cfd46ac09d45/1491153295243/Allbright-Bericht-2017-Ausdruck.pdf>.

⁴¹ German Institute for Economic Research (DIW), Women Executives Barometer 2018, available under https://www.diw.de/sixcms/detail.php?id=diw_01.c.574761.en.

⁴² See <https://www.bpb.de/gesellschaft/gender/frauen-in-deutschland/49418/frauenanteil-im-deutschen-bundestag>.

⁴³ See <https://www.welt.de/politik/deutschland/article169078778/Diese-Fraktionen-haben-den-geringsten-Frauenanteil.html>.

⁴⁴ See <http://kuerschners.com/verlag/aktuelles/thema/news/frauenanteil-in-parlamenten.html>.

but a male-dominated jurisprudence rejected any concept of a binding quota in public affairs.⁴⁵ In 2014, a joint initiative by women's organisations demanded statutory 50 % gender quotas in political candidate lists following the French example of *parité* legislation.⁴⁶ In November 2016, a civil society alliance had brought an action before the Bavarian Constitutional Court claiming that the Bavarian election laws violate the constitutional principle of gender equality.⁴⁷

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes. Section 3(3) of the General Equal Treatment Act and Section 3(3) of the Law on Equal Treatment of Soldiers contains definitions of harassment which are literally the same as in Article 2(1)(c) of Directive 2006/54 with only one exception: both national laws do not continuously employ the term discrimination but *Benachteiligung* (putting at a disadvantage) without intending to weaken the protection as compared to the directives.

3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?)

The definition of harassment in Section 3(3) of the General Equal Treatment Act covers all areas of employment, as well as social security, social benefits, education and access to and the supply of goods and services. This seems to go beyond the requirements of the directives covering the areas of social protection and education but further clarification and especially concrete statutory entitlements are lacking. With respect to the provision of goods and services, the General Equal Treatment Act still does not fulfil the requirements of Directive 2004/113/EC by containing several exceptions. However, all published court decisions deal with harassment in the workplace and not beyond. The potential of the prohibition of harassment on the grounds of sex to fight sexist hate speech in digital space has not been explored yet—neither in case law nor in legal literature.⁴⁸

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes. Section 3(4) of the General Equal Treatment Act and Section 3(4) of the Law on Equal Treatment of Soldiers contains definitions of sexual harassment which are literally the same as in Article 2(1)(d) of Directive 2006/54 with only one exception: both national laws do not continuously employ the term discrimination but *Benachteiligung* (putting at a disadvantage) without intending to weaken the protection as compared to the directives.

3.6.4 Please specify the scope of the prohibition on sexual harassment (e.g. does it cover employment and access to goods and services; is it broader?)

In violation of Article 4(3) of Directive 2004/113, the prohibition of sexual harassment under Section 3(4) of the General Equal Treatment Act is restricted to the area of employment. According to the prevailing opinion of legal commentaries, this restriction is not applicable in the civil service and has to be eliminated for the private sector, education and the provision of goods and services by a directive-consistent interpretation. There is no case law to support this opinion. Moreover, legislation concerning education falls under

⁴⁵ See Foljanty, L. (2012), 'Demokratie und Partizipation' (Democracy and participation), in: *Feministische Rechtswissenschaft*, pp. 287-309 (298ff), with further references.

⁴⁶ An overview with many actors is provided in the journal of the German Women Lawyers Association: https://www.uni-kassel.de/fb07/fileadmin/datas/fb07/5-Institute/IWR/Laskowski/djbZ_3_2014_Editorial_Fokus.pdf.

⁴⁷ See <https://www.aktionsbuendnis-parite.de/>, accessed on 6 March 2018. The Bavarian Constitutional Court was chosen because the Bavarian constitution covers popular actions.

⁴⁸ Suggestions as how to develop this potential are made by Lembke, U. (2016), 'Ein antidiskriminierungsrechtlicher Ansatz für Maßnahmen gegen Cyber Harassment' (An anti-discrimination law approach for measures against cyber harassment), in: *Kritische Justiz*, pp. 385-406.

the competence of the states and rules concerning the conduct on campus are subject to academic self-administration. Although (female) students are disproportionately affected by sexual harassment, their legal protection is fragmentary, inconsistent and often based upon the goodwill of the individual university's presidency or administration.⁴⁹

- 3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination?

Section 3(3) and 3(4) of the General Equal Treatment Act define harassment and sexual harassment as discrimination (*Benachteiligungen*). Section 16(2) of the Act states that the rejection or toleration of discriminatory conduct by an affected employee may not be used as the basis for a decision affecting this employee.

3.7 Instruction to discriminate

- 3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

Yes. Section 3(5) of the General Equal Treatment Act states that an instruction to discriminate against a person on the grounds of (inter alia) sex/gender shall be deemed to be prohibited discrimination (*Benachteiligung*), especially in the fields of employment when a person instructs an employee to discriminate against another employee.

- 3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate?

The concept is included in the respective statute but there is only one court decision. This decision mentioning Section 3(5) of the General Equal Treatment Act is interesting as it states that an instruction to discriminate can be embedded in the norms of a general agreement.⁵⁰

3.8 Other forms of discrimination

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

Section 7(1) of the General Equal Treatment Act states that in the field of employment, the prohibition of discrimination shall also apply where the person committing the act of discrimination only assumes the existence of any of the grounds covered by the law. The General Equal Treatment Act was enacted before the *Coleman* case and has not been amended since.

The General Equal Treatment Act offers no effective protection against discrimination by colleagues and third parties (such as customers) at the workplace (see 4.2.5).

⁴⁹ A comprehensive survey and analysis of different regulations on federal, state and university level, and proposals for the future based upon best practices are provided by Kocher, E., Porsche, S. (2015), *Sexuelle Belästigung im Hochschulkontext – Schutzlücken und Empfehlungen* (Sexual harassment in the higher education context – protection gaps and recommendations), http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Sexuelle_Belaestigung_im_Hochschulkontext.html?nn=6575434.

⁵⁰ Higher Administrative Court of Lüneburg, judgment of 25 February 2014, 5 LA 204/13.

4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)

4.1 Equal pay

4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?

Yes. The prohibition of discrimination with regard to pay is covered by Section 2(1)(2) of the General Equal Treatment Act, which prohibits any discrimination on the grounds of sex in relation to employment and working conditions, including pay, in particular in contracts between individuals and in collective agreements. This general prohibition of discrimination does not imply an entitlement to equal pay. The courts have generally stated that there is no legal rule providing for the same pay for the same work, neither under the Act nor in German law in general.⁵¹ The principle of equal pay is part of the gender equality principle in Article 3(2) and (3) of the German Constitution which binds the state as an employer as well as the parties to collective labour agreements.⁵²

The unequal treatment of workers in general provisions, especially the arbitrary establishment of groups of workers,⁵³ is prohibited under the unwritten general principle of equal treatment in labour law.⁵⁴ According to Section 75(1) of the Works Constitution Act, the employer and the works council shall respect the principles of law and equality and the prohibition of sex discrimination.⁵⁵ Section 4(1) of the Part-Time and Fixed-Term Employment Act grants equal treatment to part-time workers compared to full-time workers as well as the application of the *pro-rata-temporis* principle to the remuneration⁵⁶ of part-time work.

On 6 July 2017, the Pay Transparency Act entered into force.⁵⁷ Former drafts had been discussed and amended on many occasions to water down the means for the effective enforcement of equal pay. Still, the Act contains an explicit prohibition of direct and indirect pay discrimination on the grounds of sex/gender (including pregnancy and motherhood). It tries to provide a definition of the 'same work' and 'work of equal value' covering the kind of work, training requirements, working conditions and the key requirements of the actual work in question. The prohibition of pay discrimination is repeated under the heading 'pay equality' (although there is still no obligation to pay the same remuneration for the same work under German law, but rather the prohibition of pay discrimination on the grounds of sex which is different). Agreements violating the prohibition of pay discrimination on the grounds of sex/gender are invalid. The Act explicitly prohibits victimisation connected to the exercising of rights under this law.

4.1.2 Is the concept of pay defined in national legislation?

Yes. Under Section 5(1) of the Pay Transparency Act, 'pay' covers all basic or minimum wages or salaries and all other remuneration in cash or in kind, directly or indirectly granted on the basis of an employment relationship. People in employment relationships include employees, civil servants, judges, the military, trainees and employees working at home.

⁵¹ Federal Labour Court, judgment of 25 January 2012, 4 AZR 147/10; State Labour Court of Hamburg, judgment of 1 March 2011, 2 Sa 56/10.

⁵² Federal Labour Court, judgment of 15 January 1955, 1 AZR 305/54.

⁵³ Federal Labour Court, judgment of 21 June 2000, 5 AZR 806/98; Federal Labour Court, judgment of 17 November 1998, 1 AZR 147/98.

⁵⁴ See Hinrichs, O. in: Däubler, W. and Bertzbach, M. (eds.) (2008), *Allgemeines Gleichbehandlungsgesetz. Handkommentar*, Section 2 para. 198, 2nd ed., Baden-Baden.

⁵⁵ Including equal pay, see Berg, P. in: Däubler, W. (ed.) (2010), *Betriebsverfassungsgesetz. Kommentar*, Section 75 para. 46, 12th ed., Frankfurt aM.

⁵⁶ State Labour Court of Baden-Württemberg, judgment of 29 January 2016, 17 Sa 84/15: including time credits.

⁵⁷ Pay Transparency Act of 30 June 2017, Official Journal 2017, p. 2152, <https://www.gesetze-im-internet.de/entgelttranspg/BJNR215210017.html>.

Before the Pay Transparency Act's entry into force, the term 'pay' was not defined in national legislation. But the General Equal Treatment Act was interpreted in an extensive way to cover all benefits granted by the employer.⁵⁸ It therefore included salaries and all other contributions of a financial value, such as one-off payments, premiums, benefits in kind or paid leave. This seemed to comply with the definition of Article 157(2) TFEU before clarification by the Pay Transparency Act.

4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54?

Not entirely. The General Equal Treatment Act could not implement the provisions of Directive 2006/54/EC due to the date of its entry into force, but the Federal Government claimed that the broad scope of the Act covered all provisions in the Directives. At least possible justifications for different treatment do not include a lower rate of remuneration for the same or equivalent work on the grounds of sex/gender on account of special (protective) regulations applying to sex/gender under Section 8(2) of the Act. Unfortunately, most wages and job classification systems in Germany are determined by collective agreements under the Act on Collective Bargaining which contains no provisions on equal pay. And even collective agreements with public services and social institutions still contain gender-discriminatory classification systems.⁵⁹

The 2017 Pay Transparency Act contains an explicit prohibition of direct and indirect pay discrimination on the grounds of sex/gender (including pregnancy and motherhood). Employers are obliged to develop a non-discriminatory payment system. Although agreements violating the prohibition of pay discrimination on the grounds of sex/gender are invalid, this does not mean that discriminatory structures in collective bargaining and job classifications are tackled. On the contrary, employers bound by collective agreements are privileged. When a collective agreement applies, the employer is not obliged to explain the criteria and procedures of his*her wage-setting, but can simply refer to the agreement for an explanation and justification despite the fact that most sophisticated and often still gender-discriminatory job classifications established by collective agreements are one of the obstacles to equal pay.

4.1.4 Is a comparator required in national law as regards equal pay?

Theoretically, yes. Following the wording of Section 3(1) of the General Equal Treatment Act, the claimant in an equal pay case needs to point to another person who is, has been or would be treated more favourably in a comparable situation, i.e. to an actual, historical or hypothetical comparator. But, in practice, equal pay cases are not decided with regard to the sex and income of comparable employees⁶⁰ but with regard to most sophisticated job classifications set up by collective agreements which are not challenged by the courts.

Under Sections 10-16 of the Statute on Pay Transparency, employees (and civil servants, judges and the military) are entitled to obtain information on the gross remuneration of their fellow employees doing the same work or work of equal value and up to two remuneration components. The employee exercising this right has to identify the comparable same work or work of equal value and the comparison group of employees of the opposite sex has to contain at least six persons.

⁵⁸ Established case law, e.g. Federal Labour Court, judgment of 11 December 2007, 3 AZR 249/06; State Labour Court of Rhineland-Palatine, judgment of 14 August 2014, 5 Sa 511/13.

⁵⁹ See H. Pfarr (2004), 'Entgeltgleichheit in kollektiven Entgeltsystemen' (Equal pay in collective payment systems) in: H. Oetker et al. (ed.) *Festschrift 50 Jahre Bundesarbeitsgericht* pp. 779 ff., Munich, and R. Winter (2012), 'Section 1' in: W. Däubler (ed.) *Tarifvertragsgesetz: mit Arbeitnehmer-Entsendegesetz. Kommentar* para. 401, 3rd ed., Baden-Baden. The trade union *Ver.di* had used the refurbishment of the general collective agreement for white-collar workers with the public services to check its wage groups in a process of gender mainstreaming to end the overrating of typical male work compared to typical female work—and failed; the website covering this process—<http://entgeltgleichheit.verdi.de/>--was switched off after 2012.

⁶⁰ For an exceptional case of direct pay discrimination until the end of 2012, see State Labour Court of Rhineland-Palatine, judgment of 13 January 2016, 4 Sa 616/14.

4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

Definitions of 'work of equal value' are also lacking in the General Equal Treatment Act, although the classification and evaluation of work is one of the main obstacles to equal pay. For a definition of 'work of equal value', the Federal Labour Court, in its rare decisions on the topic, focused on the requirements for work performance such as the necessary previous knowledge,⁶¹ skills and abilities, the variety of professional duties⁶² and educational qualifications.⁶³ The practice of the social partners and generally accepted standards may contribute to these criteria but the Federal Labour Court deplored the fundamental lack of objective criteria.⁶⁴ In its judgments the court demonstrated its own difficulties with the non-discriminatory definition of equal pay for work of equal value.⁶⁵

Under Section 4(2) of the Pay Transparency Act, female and male employees are performing work of equal value when, on the basis of a set of factors, they can be considered to be in a comparable situation. These factors include, among others, the nature of work, the training requirements and the working conditions. Only the actual requirements that are essential to the respective activity are to be taken into consideration, independent of the employees performing the activity and their performance. Different groups of employees covered by the law (employees, judges, the military, trainees etc.) are never in a comparable situation.

4.1.6 Does national (case) law address wage transparency in any way?

Many employment contracts contain confidentiality clauses. The State Labour Court of Mecklenburg-Pomerania has decided that such clauses violate the Constitution and are incompatible with the general principle of equal treatment in labour law.⁶⁶

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country?

Yes. On 6 July 2017, the Pay Transparency Act entered into force.⁶⁷ Generally, it covers an individual right to obtain information on the gross remuneration for equal work or work of equal value as well as pay audits and reporting duties on equal pay. Unfortunately, reporting duties are restricted to undertakings with more than 500 employees and there are no effective sanctions in the case of non-compliance. Pay audits⁶⁸ are not mandatory. And the right to information is restricted to undertakings with more than 200 employees although the majority of women work in smaller enterprises.

The Pay Transparency Act does not break with the understanding that there is no principle of equal pay for equivalent work but only a prohibition of pay discrimination. The subsequent barriers for access to justice remain such as the asserted need for comparable employees (see above) or the problems concerning the burden of proof. The privilege for

⁶¹ Federal Labour Court, judgment of 26 January 2005, 4 AZR 171/03.

⁶² Federal Labour Court, judgment of 23 August 1995, 5 AZR 942/93.

⁶³ Federal Labour Court, judgment of 10 December 1997, 4 AZR 264/96.

⁶⁴ See Federal Labour Court, judgment of 23 August 1995, 5 AZR 942/93.

⁶⁵ For example, Federal Labour Court, judgment of 26 January 2005, 4 AZR 171/03 — this ruling is highly questionable concerning its ideas of the burden of proof and of blanket justifications for the devaluation of mostly 'female' work, and Federal Labour Court, judgment of 19 April 2012, 6 AZR 578/10, on the (alleged) incomparability of (female) secretarial services and (male) technical services within the armed forces.

⁶⁶ State Labour Court of Mecklenburg-Pomerania, judgment of 21 October 2009, 2 Sa 237/09.

⁶⁷ Pay Transparency Act of 30 June 2017, Official Journal 2017, p. 2152, <https://www.gesetze-im-internet.de/entgtranspg/BJNR215210017.html>.

⁶⁸ Pay audits are voluntary operational audit procedures for companies with at least 500 employees, through which they may regularly review their remuneration regulations and the various remuneration components paid as well as their application for compliance with the equal pay requirement within the meaning of the Pay Transparency Act.

remuneration systems under collective agreements is an obstacle to the analysis and removal of structural pay discrimination. Moreover, transparency is a condition and is no substitute for anti-discrimination law enforcement: without collective or class actions, more rights for works councils and binding obligations, the principle of equal pay will not be strengthened by insulated transparency measures.⁶⁹

There is serious doubt that pay transparency can indeed bring about any change in court decisions. In 2017, a female freelancer working in the position of a senior editor on a full-time basis with defined duties for a public service broadcaster receiving a fixed monthly remuneration and then discovering that her male colleagues doing the same or equivalent work were being paid significantly more than herself, took legal action. The Labour Court of Berlin decided that she had not been discriminated against on the grounds of sex.⁷⁰ The court stated that Article 157 TFEU would not require equal pay for equal work but prohibits sex discrimination. The court could not identify any discrimination on the grounds of sex, but rather justified differentiations due to seniority and the different contract arrangements for freelancers and permanent employees. Unequal pay for the same or equivalent work could not in itself indicate discrimination. As there was no discrimination, the court rejected the claimant's request for information about the pay structure and the salaries of further male colleagues performing equivalent work.

The defendant employer had confirmed that male colleagues doing equivalent work were paid a higher salary than the claimant, but denied discrimination. The pay difference was explained by different collective agreements for freelancers and permanent employees, on the one hand, and differences in seniority (the period of employment for the same employer) between the claimant and other (male) freelancers, on the other. During the public hearing, the judge explained that higher remuneration would mainly depend upon negotiating skills, supposedly more pronounced in men, and contractual freedom and that maternity and childcare periods would often lead to shorter periods of employment by women, less seniority and, thus, lower wages without any discrimination being involved.

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

The General Equal Treatment Act does not explicitly cover justifications for pay differences, and under its Section 8(2), discriminatory pay differences cannot be justified by gender-based protection regulations. Concerning the possibility of indirect discrimination, a broad range of justifications is accepted by the courts, especially job classification systems in collective agreements.

Under Section 3(2) of the Pay Transparency Act, direct pay discrimination on the grounds of sex, including pregnancy and maternity, cannot be justified. Under Section 3(3) concerning indirect pay discrimination on the grounds of sex, criteria relating to the labour market⁷¹, performance and work results may justify different pay, provided that the principle of proportionality has been observed. This does not provide for a more in-depth understanding of the ECJ's rulings (especially *Barber*) or the principle of equal pay. Criteria relating to the labour market may only justify pay discrimination under very special circumstances. In addition, differences in performance and work results either exclude the

⁶⁹ See German Women Lawyers' Association, <https://www.djb.de/verein/Kom-u-AS/K1/st17-05/> and <https://www.djb.de/verein/Kom-u-AS/K1/pm18-11/>.

⁷⁰ Labour Court of Berlin, judgment of 1 February 2017, 56 Ca 5356/15, <http://www.iww.de/quellenmaterial/id/191974>.

⁷¹ As prime example for an objectively justified economic reason for the difference in remuneration between two equivalent activities legal commentaries mention an objective lack of candidates for an activity and the need to provide the desired candidate with an incentive through a higher salary. Other criteria may include: the formal vocational training of the employee, a special quality of the work performed, incentives to attract workers with skills rarely available on the labour market, remuneration for experience acquired depending on the length of the period of employment, the need to employ as few part-time workers as possible if there are company requirements to do so, or the employer's interest in good working relations with works councils or trade unions.

⁷¹ See German Women Lawyers' Association, <https://www.djb.de/verein/Kom-u-AS/K1/st17-05/>.

condition of work of equal value or cannot be taken into consideration because the calculation of basic pay depends upon the requirements that are essential to the respective activity and not upon the employee's individual performance. In conflict with the ECJ rulings (especially *Barber*), the statutory justifications do not differentiate between the different components of the remuneration.⁷²

4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice?

The gender pay gap remains at more than 20 % in Germany, and this situation has not changed since 1995. Most wages and job classification systems in Germany are determined by collective agreements, and the applicable legislation covers no binding obligation for the assessment thereof in light of gender equality. In 2009, the Federal Labour Court decided that the evaluation of work and the establishment of pay systems are crucial parts of the autonomy of collective bargaining and that the state may not interfere with these decisions of the social partners even if the system of pay seems to be arbitrary or unjust.⁷³ In 2011, the court granted the social partners a wide margin of appreciation due to their autonomy of collective bargaining and thus rejected a thorough examination of (allegedly) indirect gender-discriminatory provisions of a particular collective agreement.⁷⁴ These judgments promoted the false idea that gender equality and equal pay could be subject to unlimited bargaining by male-dominated social partners.⁷⁵ Although most trade unions in Germany regard themselves as being bound by the principles of gender equality, including equal pay, and engage in their promotion, the segregation of the labour market and gender stereotypes are persistent in Germany. The gender pay gap can still be partly explained by indirectly discriminating provisions in collective agreements.⁷⁶

Under the Pay Transparency Act, employers are obliged to design their remuneration systems in such a way that excludes any pay discrimination on the grounds of sex. But at the same time, employers bound by collective agreements are privileged. And the main problem of the Act is that it does not cover any further consequences in case of a violation of the prohibition of pay discrimination on the grounds of sex/gender. The employee has to take legal action under the General Equal Treatment Act individually, irrespective of whether the pay discrimination is based upon an individual agreement or a discriminatory system, as there is no possibility of collective or class actions regarding equal pay such as the right of associations to start legal proceedings. The restriction to individual claims to tackle structural problems (such as discriminatory classifications and pay structures, gender-segregated labour markets, mostly female part-time work or gender stereotypes in the evaluation of 'female' work) and sex discrimination⁷⁷ has been identified, time and again, as one of the main obstacles to achieving gender equality.

⁷² See German Women Lawyers' Association, <https://www.djb.de/verein/Kom-u-AS/K1/st17-05/>.

⁷³ Federal Labour Court, judgment of 17 December 2009, 6 AZR 665/08.

⁷⁴ Federal Labour Court, judgment of 19 January 2011, 3 AZR 29/09.

⁷⁵ The autonomy of collective bargaining does not do away with the prohibition of gender discrimination and collective agreements have to be examined in this regard by the courts, see Feldhoff, K. (2007), 'Section 7', in: Rust, U. et al. (eds.) *Allgemeines Gleichbehandlungsgesetz. Kommentar*, Berlin, para. 107, and Schiek, D. (2010), 'Introduction', in: Däubler, W. (ed.) *Betriebsverfassungsgesetz. Kommentar*, 12th ed., Frankfurt/Main, para. 390 et seq. The courts do not agree, e.g. Federal Labour Court, judgment of 25 February 2009, 4 AZR 40/08, not even mentioning different payments for the female applicant and her male co-workers but consequently using the male form when referring to the applicant and thus obstructing any understanding of the case.

⁷⁶ See Kocher, E. (2007), 'Gleichstellungspolitik und Individualansprüche' (Equality policy and individual claims) *Kritische Justiz*, Baden-Baden: Nomos, pp. 22-34.

⁷⁷ Demanding the introduction of collective or class action measures in anti-discrimination law are Berghahn, S., Klapp, M., Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, pp. 141ff, 159ff; Fuchs, G., Konstatzky, S., Liebscher, D., Berghahn, S. (2009), 'Rechtsmobilisierung für Lohngleichheit' (Mobilization of the law for pay equality) *Kritische Justiz*, Baden-Baden: Nomos, pp. 253-270, <http://www.kj.nomos.de/archiv/2009-42/heft-3-220-333/>; Lembke, U. (2018), *Kollektive Rechtsmobilisierung gegen digitale Gewalt* (Collective Mobilization of the law against digital violence), E-Paper, <https://www.gwi-boell.de/de/2018/01/09/kollektive-rechtsmobilisierung-gegen-digitale-gewalt>.

There are, as yet, no studies available on whether and how the statute on general minimum wages which entered into force on 1 January 2015 might influence the gender pay gap in Germany. The Federal Statistics Agency considers it possible that minimum wages reduced the gender pay gap from 22 % in 2014 to 21 % in 2015.⁷⁸ The minimum wage was raised to EUR 8.84 per hour on 1 January 2017.⁷⁹

4.2 Access to work and working conditions

4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law?

Yes. Section 6 of the General Equal Treatment Act defines its personal scope concerning working life. The protection covers all persons in dependent employment (salaried employees and workers, including part-time workers, ancillary work and employees in minor work contracts, probationary or temporary⁸⁰ employment) as well as persons employed for the purposes of their vocational training, persons of similar status on account of their dependent economic status ('quasi-subordinate'), including those engaged in home work and those equal in law to home workers, and persons applying for an employment relationship⁸¹ or whose employment relationship has ended. Volunteers might be covered by interpreting the section in the light of European Union law.⁸² So-called 'one-Euro jobbers'⁸³ are not covered. According to Section 6(3) of the General Equal Treatment Act, self-employed persons and freelancers and members of certain bodies of an enterprise (especially managing directors and executive board members) are covered insofar as the conditions for access to gainful employment and promotion are affected.

4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Yes. The material scope of application of the General Equal Treatment Act under Section 2(1) is identical to the scope of Article 14(1)(a)-(d) of Directive 2006/54/EC.

In July 2016, the ECJ decided that a situation in which a person who in making an application for a post does not seek to obtain that post but seeks only the formal status of applicant with the sole purpose of seeking compensation does not fall within the definition of 'access to employment, to self-employment or to occupation', within the meaning of Article 14(1) of the recast Directive 2006/54, and may, if the requisite conditions under EU law are met, be considered to be an abuse of rights.⁸⁴

4.2.3 Has the exception on occupational activities been implemented into national law?

Yes. Section 8 of the General Equal Treatment Act is a direct implementation of Article 14(2) of Recast Directive 2006/54 with the sole difference that the exception refers to all grounds and not to sex only. There are no official assessments available on this topic. The courts have decided that the (female) sex/gender may constitute a genuine and

⁷⁸ See https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2016/03/PD16_097_621pdf.pdf?_bl__ob=publicationFile.

⁷⁹ See <http://www.tagesschau.de/wirtschaft/mindestlohn-erhoehung-101.html>.

⁸⁰ However, the protection for temporary agency workers under the AGG is incomplete and ineffective in practice, see Rösch, A. (2009), *Gleichbehandlung zum Nachteil des Leiharbeitnehmers?* (Equal Treatment to the Detriment of the Temporary Worker?) Hamburg.

⁸¹ The Federal Labour Court, judgment of 18 June 2015, 8 AZR 848/13 (A), initiated a preliminary ruling procedure concerning the question whether applicants are covered who do not wish to be employed but to claim compensation for discrimination. The procedure is pending before the ECJ, C-423/15.

⁸² Wendeling-Schröder, U. & Stein, A. (2008), *Allgemeines Gleichbehandlungsgesetz. Kommentar* (Commentary on the General Equal Treatment Act), Section 6 paragraph 8, Munich.

⁸³ Those who top up their unemployment assistance by working for one Euro per hour.

⁸⁴ ECJ decision of 28 July 2016, ECLI:EU:C:2016:604 – *Kratzer*.

determining occupational requirement for equal opportunity commissioners⁸⁵ and official guardians.⁸⁶

4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law?

Mostly, yes. Although formally not based on Article 28(1) of the Recast Directive 2006/54, the Maternity Protection Act (see 5.1 and 5.2) offers broad protection.

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

Concerning working conditions or the discriminatory termination of self-employment contracts, self-employed persons can only invoke protection under Section 19 of the General Equal Treatment Act which is restricted to so-called 'mass contracts', which are typically concluded irrespective of the identity of the other contracting party, or where the identity of that person is of little importance. As a consequence, a self-employed person may never receive protection against discriminatory working conditions or the discriminatory termination of his or her contract because the identity of the contracting parties is regularly of some importance. Self-employed persons can only enjoy the full protection of the General Equal Treatment Act if they are in fact 'quasi-subordinates'.⁸⁷

The General Equal Treatment Act offers no effective protection against discrimination, especially in the form of (sexual) harassment, by supervisors or superiors not being employers, by colleagues and by third parties such as business partners, customers or clients.⁸⁸ The only person liable is the employer and only in case of fault. The employer can easily escape legal responsibility for the discrimination by other colleagues with the argument that this was not his or her fault. And although third parties are indeed mentioned in Section 12(4) of the General Equal Treatment Act, the scope of this regulation is highly debated and there is no case law yet. In the view of the author, the requirement of fault in order for the employer to be liable should be withdrawn to achieve compatibility with the directives, and the responsibility of the employer concerning third parties should be clarified by legislative amendments.

⁸⁵ State Administrative Court of Berlin and Brandenburg, judgment of 11 December 2015, OVG 4 N 42/14; Administrative Court of Berlin, judgment of 8 May 2014, 5 K 420/12; Federal Labour Court, judgment of 18 March 2010, 8 AZR 77/09.

⁸⁶ State Labour Court of Lower Saxony, judgment of 19 April 2012, 4 SaGa 1732/11.

⁸⁷ See Bauer, J. H. et al. (2011), *Allgemeines Gleichbehandlungsgesetz. Kommentar* (Commentary on the General Equal Treatment Act), Section 2 paragraph 16, 3rd ed Munich.

⁸⁸ Comprehensively: Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, pp. 107ff, with many references.

5. Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)

5.1 Pregnancy and maternity protection

5.1.1 Does national law define a pregnant worker?

Yes. Under its Section 1, the new Maternity Protection Act of 23 May 2017⁸⁹ covers any person who is pregnant or has given birth recently or is breastfeeding and who is employed or working as an intern/trainee or as a public volunteer or in a sheltered workshop for persons with disabilities or in a special ecclesiastical service or who is home-working or a quasi-subordinate worker as well as students and pupils when they are under the obligation to attend a lecture, examination or an internship, thus going beyond the strict notion of a worker. In special regulations, civil servants, judges and the military are guaranteed the same protection level as any other pregnant or breastfeeding employee.

As transgender persons can claim legal recognition of their new gender status without surgery, 'pregnant men' may occur (although there are going to be fierce discussions about the question of whether they, after giving birth, can be recognized as mothers or fathers on the birth certificate). Moreover, since intersex*-children are no longer to be appointed one of two genders after birth, persons without a female or male gender status may become pregnant in the future. The law itself speaks of pregnant and breastfeeding 'persons'.

5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?

Yes. The new Maternity Protection Act focuses on two fields of protection: unhealthy working time and dangerous working conditions.

Under Sections 3 to 8 of the new Maternity Protection Act, night work (as well as night training or night studies) is prohibited between 10 pm and 6 am independent of the working sector's special needs and may be allowed with the consent of the pregnant or breastfeeding employee between 8 pm and 10 pm. Working during the postnatal protection period of eight weeks is prohibited. Sunday work is prohibited as well but may be allowed under special regulations and with the consent of the pregnant or breastfeeding employee. Further extensions of the regular working times are prohibited for pregnant or breastfeeding employees. Pregnant and breastfeeding employees and civil servants also enjoy special protection, such as additional breaks or the possibility to sit down. Additional breaks for breastfeeding workers are defined as working time. The employer must grant a dispensation to the pregnant or breastfeeding employee for the purpose of medical examinations concerning pregnancy or maternity and of examinations or other activities by a midwife.

During their pregnancy, employees may not perform work that is dangerous to their own health or that of the unborn child under Sections 9 to 12 of the new Maternity Protection Act, and the same protection is granted to civil servants under the Maternity Protection Order. The employer is obliged to perform a risk assessment of the work that it requires and the workplaces in order to determine whether or not they are potentially dangerous for pregnant or breastfeeding workers. The Act contains detailed catalogues of dangerous work or working conditions and thus unifies and clarifies various regulations on safety at work from European law, national statutes and general regulations and sub-legislative directives.

⁸⁹ Statute on the Protection of Mothers at work, in training and in higher education (Maternity Protection Act) of 23 May 2017, Official Journal 2017, p. 1228, https://www.gesetze-im-internet.de/muschq_2018/BJNR122810017.html.

In a paradigmatic change, Section 13 of the new Maternity Protection Act provides for a hierarchical range of employers' duties to guarantee protection and safety for pregnant or breastfeeding employees. The first and primary task is the substantial reshaping of the work environment.⁹⁰ Only when the required level of safety cannot be reached by such a reshaping or when the reshaping would require a disproportionate effort can the employer require a change of the concrete workplace. And if safety can neither be guaranteed by reshaping the work environment nor by a change of workplace, the employer is not allowed to employ the pregnant or breastfeeding employee during the period of pregnancy or breastfeeding (generally covering the first year after the birth of the child). By qualifying the reshaping of the work environment as a priority and the prohibition of work as a last resort, pregnancy and breastfeeding might leave the status of special obstacles to a successful working life and may become part of a comprehensive concept of occupational safety (influenced by Union law requirements). A newly established Commission for Maternity Protection will further develop guidelines concerning risk assessment, technical safety, occupational medicines and hygiene.

This paradigmatic change was not easy to bring about. The legislative procedures took some time, more than one draft law was published, discussed, amended and discarded and the contents of the law have been changed considerably during this process. For example, the German Women Lawyers' Association had rightly criticised the first draft as it confirmed the discriminatory structures of maternity protection as alien to the world of employment and employment prohibitions as the method of choice instead of fostering the autonomy and inclusion of pregnant persons and re-structuring systems of health and safety at work.⁹¹ It remains to be seen how the paradigmatic legal change will be implemented and whether and how it will change working conditions and the inclusion of female employees in general. The Act was passed by Parliament in May 2017 but most of its regulations entered into force on 1 January 2018.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave?

Yes. Pregnant workers may not be dismissed during their pregnancy and four months after childbirth, except under exceptional circumstances not related to the pregnancy,⁹² miscarriage or giving birth and with the special approval of the supervising authority under Section 17 of the Maternity Protection Act. The new regulations cover the same protection against dismissal for women who have suffered a miscarriage after the 12th week of pregnancy.

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

Yes. Under Section 17(2) of the Maternity Protection Act, the employer is obliged to indicate substantiated grounds for the dismissal in writing.

5.2 Maternity leave

5.2.1 How long (in days or weeks) is maternity leave?

Section 3 of the new Maternity Protection Act grants pregnant employees fully paid leave for six weeks before, and eight weeks after childbirth. Section 3(2) provides for an extended postnatal protection period of twelve weeks in the case of a premature or multiple birth or disabilities of the newborn child.

⁹⁰ Although not discussed in the legislative process, there are some considerable links to the concept of reasonable accommodation.

⁹¹ German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K1/st16-05/>.

⁹² See Administrative Court of Darmstadt, judgment of 26 March 2012, 5 K 1830/11.DA.

5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

Yes. The prohibition of work in the eight or twelve weeks' postnatal protection period under Section 3(2) of the new Maternity Protection Act only has two exceptions: students or pupils can carry on with their studies or internships when they explicitly request this. They can withdraw their consent at any time. Furthermore, the mother of a child that has died during birth can return to work after two weeks of the postnatal protection period when she explicitly requests this and when there is no medical objection in a doctor's report. She can withdraw her consent at any time.

During the six weeks' prenatal protection period under Section 3(1) of the Maternity Protection Act, the pregnant worker is allowed to work voluntarily as long as she remains free to withdraw her consent at any time.

5.2.3 Is there a legal provision ensuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

Yes. The pregnant or breastfeeding employee is entitled to her former average pay during the time she is not allowed to perform her usual work because of her pregnancy or maternity (including employment prohibitions due to dangerous working times or dangerous working conditions as well as the time needed for medical examinations or for breastfeeding) under Sections 18 ('maternity protection remuneration') and 23 of the new Maternity Protection Act, and her holiday entitlement is completely preserved under Section 24.

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

Yes. During maternity leave, employees are entitled to maternity allowances to the amount of their last net income under Sections 19 and 20 of the new Maternity Protection Act. The employment relationship remains unaffected during this leave.

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

For dependent employees, maternity leave is fully paid: either from allowances awarded by the statutory health system and the employer's subsidies to the allowance or from allowances awarded from federal funds and the employer's subsidies to them.

Helping spouses and self-employed women are not covered by the Maternity Protection Act and not entitled to maternity allowances. Only self-employed women who are voluntarily insured under the statutory health insurance scheme (which is not the rule) including sickness benefits are entitled to maternity allowances to the amount of these sickness benefits (usually 70 % of their former income).⁹³ The Federal Constitutional Court has decided that this unequal treatment of self-employed persons is compatible with the constitutional principle of equality.⁹⁴ The new Maternity Protection Act does not terminate the unequal treatment of self-employed persons and therefore fails to meet the requirements of Directive 2010/41/EU.⁹⁵

Although quasi-subordinate workers are covered by the new Maternity Protection Act, they are explicitly not entitled to maternity allowances except when they are insured under a

⁹³ Concerning the problems involved see Social Court of Reutlingen, judgment of 24 June 2010, S 14 KR 3892/09.

⁹⁴ Federal Constitutional Court, judgment of 3 April 1987, 1 BvR 1240/86.

⁹⁵ See German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K1/st16-05/>.

statutory health insurance scheme and even then the allowance is no more than EUR 13 per day and EUR 210 in total. With regard to the criteria for a comparable need for social protection, these mothers (to be) should be equally covered.

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

Yes, but by all employers and these supplements are reimbursed. The statutory health insurances and the Federal Insurance Authority pay maternity allowances of up to EUR 13 per day or EUR 210 in total. The employers are obliged to pay the difference between EUR 13 per day and the last net income of the employee under Section 20 of the new Maternity Protection Act, but they are entitled to a full reimbursement of these payments which is financed by a general contribution by all employers under a complicated contribution procedure. In the past, the costs were shared between the statutory health insurance scheme and the concrete employer of the pregnant or breastfeeding worker until the Federal Constitutional Court declared that this regulation was unconstitutional due to its gender-discriminatory effects.⁹⁶

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation?

No. The Maternity Protection Act covers various kinds of employees (see above) without further requirements such as a minimum duration of employment relationship or the like.

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

Such a provision is not necessary. Due to the German concept of maternity leave, the question of 'returning to the same job' does not arise because the employment relationship remains totally unaffected. However, a transfer to a non-equivalent post after maternity leave would be direct discrimination under the General Equal Treatment Act and the pregnant worker would be awarded compensation.⁹⁷

Section 25 of the new Maternity Protection Act clarifies that after the postnatal protection period, the employee has the right to be employed in accordance with the conditions which have been contractually agreed upon.

5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes. The provisions of the 2007 Federal Law on Parental Allowance and Parental Leave (see below) apply directly and without special regulations to adoptive parents.

5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave?

Partly, see below (5.4.12ff).

⁹⁶ Federal Constitutional Court, judgment of 18 November 2003, 1 BvR 302/96. For further information see Krause, R. (2010), 'Schutzvorschriften und faktische Diskriminierung' (Protective Regulations and de facto Discrimination) in: Hohmann-Dennhardt, C. et al. (eds.), *Geschlechtergerechtigkeit. Festschrift für Heide Pfarr*, Baden-Baden: Nomos, pp. 392-404.

⁹⁷ Labour Court of Wiesbaden, judgment of 18 December 2008, 5 Ca 46/08.

5.4 Parental leave

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

In January 2007, the Federal Law on Parental Allowance and Parental Leave entered into force. The Law was amended in 2012 and 2014, but although it covers the core requirements of the directive, it does not provide for a direct reference to the EU acquis.

5.4.2 Is the national legislation applicable to both the public and the private sector?

Yes. And the regulations are mandatory: the entitlement to parental leave must not be restricted by collective agreements or individual labour contracts.

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

The scope of the Federal Law on Parental Allowance and Parental Leave concerning parental leave includes any dependent employment relationship: part-time work, fixed-term work, temporary work, marginal employment, apprenticeship and employees working at home. The scope of its regulations on parental allowances is much broader and also includes self-employed persons, freelancers, students, housewives and unemployed persons. Within the civil service, the regulations on parental leave apply directly to workers and accordingly to civil servants as well.

5.4.4 What is the total duration of parental leave?

The law provides for parental leave for up to three years.

5.4.5 Is the right of parental leave individual for each of the parents, a family entitlement or a combination of the two? How many months are reserved for each parent on a take-it or leave it basis?

The entitlement to parental leave is an individual right for each parent and cannot be transferred. Each parent can take parental leave for up to three years. The distribution of parental leave periods between the parents is only important for the entitlement to parental allowances.

5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)?

Parental leave can be taken 'full time', by continuing part-time work or by reducing full-time to part-time work. The parent is not allowed to work more than 30 hours a week during parental leave under Section 15(4)(1) of the Federal Statute on Parental Leave and Parental Allowances. Working during parental leave does not extend the maximum duration of three years. The law does not provide for a time credit system but flexibility is ensured by the possibility of taking up to 24 months of the parental leave between the third and eighth birthday of the child without requiring the consent of the employer and the aforementioned possibility of part-time work during parental leave. Every parent is free to divide his or her parental leave into three different periods. An approved extension of the first period does not count as a second period. Further divisions of parental leave, i.e. taking parental leave for some weeks during summer holidays, are to be approved by the employer.

- 5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done?

Under Section 16(1) of the Federal Statute on Parental Leave and Parental Allowances, the employer must be notified of the intention to take parental leave. The notice period is at least seven weeks before the beginning of the parental leave, and at least 13 weeks when the leave is taken between the third and eighth birthday of the child. The notice must contain the precise dates of the beginning and the end of the parental leave in the next two years. The parent is entitled to parental leave and does not need the consent of the employer. However, if the parent has taken parental leave for only one year and wishes to extend the leave for up to two or three years, then the employer's consent is needed. The required notice with precise dates is therefore a means of balancing the interests of the parent and the employer. Maternity and parental leave are statutorily recognised reasons to employ a substitute under a fixed-term contract.

- 5.4.8 Did the Government take measures to address the specific needs of adoptive parents?

Adoptive parents are entitled to parental leave like any other parent and the leave can be taken upon the child's entry into the household.

- 5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

No. The entitlement to parental leave requires no specific period of service. Employees under fixed-term contracts have a right to parental leave just as any other employed parent. However, fixed-term contracts are not extended by the period of parental leave and may therefore expire during the parental leave. Exceptions to this rule apply to fixed-term contracts for junior researchers at universities and for vocational training.

- 5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

Yes. The third period of parental leave can be refused by the employer due to urgent business reasons if it is taken between the third and eighth birthday of the child. Taking more than three periods of parental leave requires the consent of the employer.

- 5.4.11 Are there special arrangements for small firms?

Yes. In smaller enterprises, with less than 15 employees, the employer can refuse her/his consent to a reduction of working time during parental leave under Section 15 of the Federal Statute on Parental Leave and Parental Allowances.

- 5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

Not under the Federal Statute on Parental Leave and Parental Allowances. It does not provide for special conditions for the parents of children with a disability or a long-term illness, except that the parental leave can be prematurely terminated due to the severe illness or disability of the child if there are no urgent adverse operational reasons. For example, the parents may decide on a different division of parental leave, or to take special care leave under other regulations instead.

5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave?

Yes. From the moment of applying for parental leave (but not more than eight, respectively 14 weeks before the leave starts) up to the end of the parental leave, parents enjoy special protection against dismissal under Section 18 of the Federal Statute on Parental Leave and Parental Allowances: they may not be dismissed except under special circumstances such as a threat to the employing company's existence or its (partial) closure⁹⁸ and with the approval of the supervising authority. Dismissal at the end of the parental leave can become effective when the notice of termination is given at least three months before the dismissal is to become effective.

5.4.14 Do workers benefiting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

The Federal Statute on Parental Leave and Parental Allowances does not explicitly cover the right to return to the former job or to an equivalent post.⁹⁹ The German Women Lawyers Association points out that the lack of a right to return to work after parental leave violates Directive 2010/18.¹⁰⁰

5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

Parents do not lose any rights they acquired before the leave. However, the process of acquiring certain rights may be suspended during parental leave, e.g. by decreases in annual leave or annual bonuses or delays in the assignment to a higher wage group. According to the case law, this does not constitute indirect sex discrimination or the indirect discrimination is justified by the lack of working experience of parents who have taken parental leave.¹⁰¹ Childcare periods of federal civil servants for up to three years as well as parental leave count as periods of experience.

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

During parental leave the employment relationship is suspended.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

Yes. During parental leave, parents continue to be covered by their social security systems such as healthcare. Childcare periods for children under the age of three are taken into account for statutory entitlements to a pension and unemployment benefits.

5.4.18 Is parental leave remunerated by the employer?

No.

⁹⁸ Due to the Administrative Court of Oldenburg, judgment of 20 February 2012, 13 A 451/11, the restructuring of an employing company or parts thereof may be equated with a partial closure. This decision gives employers additional latitude to dismiss caring parents, especially in times of economic crisis.

⁹⁹ See Nassibi, G. et al. (2012), 'Geschlechtergleichstellung durch Arbeitszeitsouveränität' (Gender Equality and Working Time Sovereignty), *Zeitschrift des Deutschen Juristinnenbundes*, pp. 111-116.

¹⁰⁰ See <https://www.djb.de/Kom-u-AS/K4/st14-10/>, accessed 30 September 2015.

¹⁰¹ The following decisions concerned full-time parental leave: Federal Labour Court, judgment of 21 November 2013, 6 AZR 89/12, and judgment of 27 January 2011, 6 AZR 526/09; State Labour Court of Baden-Württemberg, judgment of 17 June 2009, 12 Sa 8/09; Labour Court of Heilbronn, judgment of 3 April 2007, 5 Ca 12/07.

5.4.19 Does the social security system in your country provide for an allowance during parental leave?

Parental leave is generally financed by state allowances to an amount equalling 67 % up to 100 % of the previous income, but not exceeding EUR 1 800 and no less than EUR 300,¹⁰² for up to 14 months after birth or entry into the household, provided that the other parent takes at least two months' leave. The law provides for siblings' bonuses (10 % of the parental allowance and at least EUR 75) and an additional allowance of EUR 300 per child in the case of multiple births. A parent working part time during parental leave can receive his or her parental allowance in payments of halved amounts while the number of months paid is doubled. Both parents working simultaneously part time between 25 and 30 hours per week whilst also taking parental leave for four months are entitled to additional parental allowances for these months ('partnership bonus').

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions?

To a rather significant extent, German legislation goes far beyond the provisions of the Directive: parental leave can be taken for up to three years by every parent, the entitlement to parental leave does not require any length of service, the employer is not allowed to postpone the parental leave, and parents are entitled to parental allowances for up to 14 months or more.

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

No.

5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave?

N/A.

5.6 Time off/care leave

5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident?

Yes. Emergency childcare leave is covered by Section 45 of Social Code No. 5. Employees are entitled to childcare leave to care for a sick child under the age of twelve or with disabilities for up to ten working days per year (single parents: up to 20 working days per year). Emergency childcare leave can be taken for every child individually but its maximum total duration may not exceed 25 working days per year (single parents: 50 days). The duration is to be extended for up to some months when one parent is caring for a terminally ill child. In rare cases, the leave is fully paid under the employment contract or the respective collective agreement, otherwise it is financed under the statutory health insurance scheme to the amount of 70 % of the income.

Under Section 2 of the Statute on Home Care Leave, employees are entitled to up to ten days of emergency home care leave to care for a close relative in urgent need of care. The employee has to inform the employer immediately and to present a medical report on the situation. Generally, the leave is financed under the statutory health insurance scheme to the amount of 70 % of the income.

¹⁰² The minimum allowances are not awarded to every parent, because parental allowances set-off unemployment assistance and social assistance, which means in practice that parents receiving unemployment or social assistance do not get any parental allowances.

5.7 Leave in relation to surrogacy

5.7.1 Is parental leave available in case of surrogacy?

No. Surrogacy is prohibited in Germany.

5.8 Leave sharing arrangements

5.8.1 Does national law provide a legal right to share (part of) maternity leave?

No. There is no legal right to share (part of) maternity leave under German law.

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent ?

No. The entitlement to parental leave for up to three years is an individual right for each parent and cannot be transferred. But parents working simultaneously part time between 25 and 30 hours per week while taking simultaneous parental leave for four months are entitled to *additional* parental allowances for these months.

5.9 Flexible working time arrangements

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

Yes. Employees may request a reduction of their working time under Section 8 of the Part-Time and Fixed-Term Employment Act. The law applies to the private and the public sector and to all employees except civil servants. The conditions for a reduction are that the employer employs more than 15 persons, there has been a period of service for more than six months and there are no opposing operational reasons. The latter exist when the reduction would cause a considerable impairment of the organisation, the working conditions or safety in the company, or disproportionate costs, or when this is stated by collective agreements. In practice, employers will face difficulties to prove that the organisational concept is strictly incompatible with the request for a reduction. Section 6 of the Part-Time and Fixed-Term Employment Act encourages employers to offer possibilities of part-time work and explicitly mentions workers in higher management positions. Possibilities of individually agreed job sharing are covered by Section 13 of the Act.

A recent study shows that the wish for the possibility to reduce working hours (which is hampered by operational reasons, fear of severe financial losses, lack of culture of male employees working part-time etc.) is grossly underrated by the biased design of actual surveys.¹⁰³

During parental leave, parents may request a reduction of their working time which can only be denied due to *urgent* opposing operational reasons under Section 15(7) of the Federal Statute on Parental Leave and Parental Allowances. Several forms of care leave (to care for minors or close relatives in need of care) can be taken by working part time under the 2015 Statute on the Better Reconciliation of Family, Home Care and Work.

Civil servants can request a reduction of at least one half of the regular working time without further conditions under Sections 72a-72d of the Federal Civil Service Act or under the states' civil service legislation unless there are opposing operational reasons. The request for part-time work due to family responsibilities (care for children under the age of 18 or dependent relatives) can only be refused due to *urgent* opposing operational

¹⁰³ Holst, E. & Bringmann, J. (2016), *Arbeitszeitrealitäten und Arbeitszeitwünsche in Deutschland* (Realities of working time and wishes regarding working time in Germany), DIW: Berlin.

reasons. A caring civil servant is entitled to a reduction of less than one half of the regular working time for a period of up to twelve years. During parental leave, civil servants are entitled to work part time for up to 30 hours per week.

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

No, there is no general legislation. Working patterns are subject to collective and works agreements. Associations of employers as well as employees have a vital interest in furthering a work-life balance by regulations in collective agreements. Moreover, working time (starting and closing hours, breaks, location and distribution, changes in weekly working time, holidays) is subject to genuine co-determination by the works councils under Section 87(1) (2, 3, 5) of the Works Constitution Act. Thus, 90 % of the collective and 13 % of the works agreements cover measures to further a work-life balance.¹⁰⁴ Some of the agreements deal with the details of taking parental leave only, some of them cover a wide range of measures from part-time work, teleworking, job sharing, flexi-time, work schedules, core times, 'reduced full time' (80 %), holiday balances, sabbaticals, in-house childcare, and all kinds of care leave, up to various models of working time accounts.

Operational conditions are the most important factors for the use or inability to use different options of arranging and adjusting working times – while parental leave and temporary leaves are generally accepted, reductions or increases of working time are far more difficult to realise, especially depending on sex/gender and the position within the organizational hierarchy.¹⁰⁵

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

Working from home or remotely is subject to collective and works agreements. There are no statutory rights.

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can "bank" hours to take time off in the future?

Flexible working arrangements are subject to collective and works agreements. There are no statutory rights. But Section 7d of Social Code No. 4 requires insolvency protection of working-life time accounts.

The Eighth Family Report presented by the Federal Government dealt with questions of family time policies, evaluating financial and structural support for parents as well as measures to promote flexible working times.¹⁰⁶ An OECD study shows the political efforts to promote the fair sharing of paid and unpaid work between parents as well as the existence of contradictory legal frameworks, persisting detrimental gender stereotypes,

¹⁰⁴ Klenner, C., Brehmer, W., Plegge, M., Bohulskyy, Y. (2013), *Förderung der Vereinbarkeit von Familie und Beruf in Tarifverträgen und Betriebsvereinbarungen in Deutschland* (Reconciliation of family and working life in collective and works agreements in Germany), www.boeckler.de/pdf/p_wsi_disp_184.pdf.

¹⁰⁵ Klenner, C. & Lott, Y. (2016), *Arbeitszeitooptionen im Lebensverlauf. Bedingungen und Barrieren ihrer Nutzung im Betrieb* (Working time options in the life course. Conditions and barriers for their realisation in the company), WSI: Düsseldorf.

¹⁰⁶ Eighth Family Report of 15 March 2012, presented by the Federal Government, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung2/Pdf-Anlagen/Achter-familienbericht.property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>. The findings and actions required are mainly confirmed by the Family Report 2014, presented by the Federal Ministry for Family, Senior Citizens, Women and Youth (2015), <https://www.bmfsfj.de/blob/93784/e1e3be71bd501521ba2c2a3da2dca8bc/familienreport-2014-data.pdf>. The Future Report Family 2030 suggests further amendments to family politics to fundamentally change the weekly working times of mothers and of fathers, see https://www.prognos.com/uploads/tx_atwpubdb/160928_Langfassung_Zukunftsreport_Familie_2030_final.pdf.

and the lack of action models.¹⁰⁷ The authors of a recent study have critically evaluated the operationally induced flexibility and the intensification of work in shorter periods, and have demanded measures to protect employees against both, and to tackle the 'gender time gap' and to develop new models of life-course-oriented working time organisation.¹⁰⁸ The full potentials of life-course-oriented working time policies and the possibilities for individually designed working times are still awaiting discovery.¹⁰⁹

¹⁰⁷ OECD (2016), *Dare to Share – Deutschlands Weg zur Partnerschaftlichkeit in Familie und Beruf*, OECD Publishing: Paris.

¹⁰⁸ Absenger, N., Ahlers, E., Bispinck, R., Kleinknecht, A., Klenner, C., Lott, Y., Pusch, T., Seifert, H. (2014), *Arbeitszeiten in Deutschland* (Working times in Germany), http://www.boeckler.de/pdf/p_wsi_report_19_2014.pdf.

¹⁰⁹ German Federation of Trade Unions (2012), *Arbeitszeiten in verschiedenen Lebensphasen gestalten* (Organising working time during various life stages). Kocher, E., Groskreutz, H., Nassibi, G., Paschke, C., Schulz, S., Welti, F., Wenckebach, J., Zimmer, B. (2013), *Das Recht auf eine selbstbestimmte Erwerbsbiografie* (The right to a self-determined employment biography), Baden-Baden: Nomos.

6. Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?

Not explicitly. Occupational social security schemes in Germany cover benefits for retirement, invalidity, or for surviving family members. The respective Act on Occupational Pension Schemes does not contain a prohibition on gender discrimination. But the constitutional principle of gender equality may be invoked and, moreover, not only the General Equal Treatment Act (especially equal pay) applies by way of subsidiarity, but since 2011 the courts also monitor the compliance of the Act on Occupational Pension Schemes with the respective Directives.¹¹⁰

The Federal Labour Court has considered entitlements to early retirement pensions that depended on the formerly different (earlier) retirement ages of women to be unlawful indirect discrimination.¹¹¹ And following the case law of the CJEU, the Federal Labour Court has developed effective protection against gender discrimination, and especially indirect discrimination of (mostly female) part-time workers. In particular, it held that the employer must not exclude part-time employees from occupational pension schemes, and it required the employer to conclude pension agreements that provide for different classes of workers according to their working hours.¹¹² The Federal Constitutional Court has considered lower pension schemes for part-time civil servants to amount to indirect sex discrimination and incompatible with the Constitution.¹¹³

In December 2016, the Federal Government presented a draft law on the expansion and strengthening of occupational pension schemes¹¹⁴ which did not include reflections on gender aspects such as the gender pension gap (57 %) or a gender-specific legislation impact assessment.¹¹⁵

6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 6 of Directive 2006/54?

There are several regulations with varying scopes. The personal scope of the Act on Occupational Pension Schemes is restricted to (former) employees with an employer which grants the pensions. Employees in the public sector are insured by the state pension agency (*Versorgungsanstalt des Bundes und der Länder*). Civil servants, including the military, are entitled to special pensions under federal and state law. Self-employed persons (and freelancers) cannot normally take part in occupational pension schemes. Some self-employed persons have private insurance, but most self-employed persons as well as nearly all members of the liberal professions are covered by one of the many professional pension funds (*berufsständische Versorgungswerke*) under self-regulation by their self-organized chambers and boards as well as some state framework regulation. A

¹¹⁰ See Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, p. 70f, with further references.

¹¹¹ Federal Labour Court, judgment of 15 February 2011, 9 AZR 750/09.

¹¹² Federal Labour Court, judgments of 4 March 1989, 3 AZR 490/87; of 23 January 1990, 3 AZR 58/88; of 20 November 1990, 3 AZR 613/89; and of 5 October 1993, 3 AZR 695/92.

¹¹³ Federal Constitutional Court, judgment of 18 June 2008, 2 BvL 6/07.

¹¹⁴ Available under <https://www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2016/12/2016-12-21-PM30-reform-der-betriebsrente.html>.

¹¹⁵ The draft was therefore heavily criticized by the German Women Lawyers' Association, <https://www.djb.de/verein/Kom-u-AS/K4/st17-06/>.

major problem for members of the liberal professions is that child-raising periods are not taken into account by every professional pension fund.¹¹⁶

6.3 Is the material scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 7 of Directive 2006/54?

The material scope of the Act on Occupational Pensions is more restricted and covers benefits for retirement, invalidity, or for surviving family members. Unemployment insurance is mandatory and statutory; the same applies to protection against industrial accidents and occupational diseases (although administrated by the trade associations), and sickness insurance is mandatory whether under private or statutory insurance schemes.

6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54?

As the national legislator did not implement the directive with regard to occupational social security schemes, no.

6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?

Yes. The law no longer permits different retirement ages for men and women. But indirect sex discrimination remains a major problem. The Federal Labour Court has held that a failure to take periods of bringing up children into consideration for the purpose of occupational pensions constitutes neither direct nor indirect discrimination on the grounds of sex and does not violate European or national constitutional law.¹¹⁷ The condition of a 15-year period of service for the same employer to be entitled to occupational pensions was not considered to constitute indirect sex discrimination either.¹¹⁸ The Federal Labour Court explicitly rejects the addition of (interrupted) periods of service for the same employer.¹¹⁹

6.6 Is sex used as an actuarial factor in occupational social security schemes?

Partly, yes. Since 2005, unisex tariffs are mandatory under the Act on Occupational Pension Schemes. But in many professional pension funds, sex was previously an important factor in calculating the pension amounts to the detriment of women and it was not before 2007 that the last fund terminated this practice.¹²⁰ The recognition of child-raising periods is still a problem. Some of the professional pension funds offer non-contributory membership for up to three years, but no solutions for part-time work after childbirth, which is the norm in the liberal professions. Members of the liberal professions can apply for benefits from the statutory pension funds for children born after 1991 when their professional pension fund does not pay for child-raising periods. However, lower courts have excluded the raising of adopted children from the beneficiary regulations of professional pension

¹¹⁶ The Federal Constitutional Court, judgment of 5 April 2005, 1 BvR 774/02, decided that professional pension funds for lawyers have to offer non-contributory membership during child-raising periods for up to three years to meet the requirements of the gender equality principle under the German Constitution.

¹¹⁷ Federal Labour Court, judgment of 20 April 2010, 3 AZR 370/08.

¹¹⁸ Federal Labour Court, judgment of 12 February 2013, 3 AZR 100/11.

¹¹⁹ Confirmed by the Federal Labour Court, judgment of 9 October 2012, 3 AZR 477/10.

¹²⁰ After the intervention of the respective state Ministry, see Administrative Court of Hannover, judgment of 3 December 2008, 5 A 873/08, which directly applied Directive 79/7/EEC due to its lack of timely implementation. The invalidity of the respective by-law by the direct application of Article 4 of Directive 97/7 was confirmed by the State Administrative Court of Lower Saxony, judgment of 23 October 2009, 8 LC 12/09, and judgment of 12 June 2014, 8 LC 130/12.

funds.¹²¹ And some German courts still doubt that national and European anti-discrimination law can be applied to professional pension funds at all.¹²²

In 2008, the Federal Labour Court determined that actuarial deductions for male employees claiming early occupational pensions were incompatible with Article 141 EC Treaty.¹²³ Lawyers are still discussing the question whether the *Test-Achats* ruling should be applied to occupational pension schemes.¹²⁴ In 2013, the Higher Regional Court of Celle decided that the state pension agency (covering around four million employees in the public sector) is obliged to employ gender-neutral actuarial factors under constitutional and European equality law.¹²⁵ The Higher Regional Court of Cologne disagreed.¹²⁶

6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes?

No.

¹²¹ Administrative Court of Frankfurt, judgment of 23 October 2008, 12 K 1948/08F, although applying the German Constitution, the ECHR and Directive 79/7/EEC. In the author's opinion, the Court was mistaken in assuming that this was a question of family protection only and not of gender equality as well.

¹²² The Federal Administrative Court, judgment of 25 July 2007, 6 C 27/06, as well as the State Administrative Court of Rhineland Palatinate, judgment of 26 May 2010, 6 A 10320/10.

¹²³ Federal Labour Court, judgment 19 August 2008, 3 AZR 530/06.

¹²⁴ E.g. Beyer, A. & Britz, T. (2013), 'Zur Umsetzung und zu den Folgen des Unisex-Urteils des EuGH' (Implementation and Consequences of the Test-Achats Ruling) *Versicherungsrecht* No. 28, pp. 1219-1227; Labour Court of Munich, judgment of 21 May 2013, 22 Ca 15307/12.

¹²⁵ Higher Regional Court of Celle, judgment of 24 October 2013, 10 UF 195/12.

¹²⁶ Higher Regional Court of Cologne, judgment of 6 January 2015, 12 UF 91/14.

7. Statutory schemes of social security (Directive 79/7)

7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?

Not really. Although Section 2 of the General Equal Treatment Act mentions social security and protection, the provisions of the Social Code restricting the prohibition of gender discrimination to vocational counselling, education and training are exhaustive. Courts are expected to employ the constitutional principle of gender equality.

7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 2 of Directive 79/7?

The national law is diverse and most self-employed persons are covered by self-regulation. Many independent professions and self-employed persons are covered by professional schemes such as lawyers, architects, writers, journalists, artists etc.

Under the Social Codes, statutory social security schemes apply to all employees and persons in vocational training. Civil servants are insured under special conditions complicated by reforms of the distribution of legislative powers in Germany. Most self-employed persons (and freelancers) are not covered by the statutory social security systems but can voluntarily become members (which is expensive). Some groups of the self-employed are covered under special legislation. Since 2013, so-called mini-jobs with an income of up to EUR 450 per month have been subject to mandatory pension scheme contributions (with the possibility of an exemption) which will not prevent poverty in old age.

7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 3 par. 1 and 2 of Directive 79/7?

The material scope of national law is broader (but lacks an explicit prohibition of sex/gender discrimination). The statutory social security scheme covers retirement and invalidity, healthcare, work accidents, unemployment, integration measures and social assistance, and, going beyond the directive, statutory care insurance.

7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7?

This is hard to say, since there is no explicit implementation of the Directive. The mandatory pension age is 67 for all persons born after 1 January 1964. The equalisation of the pensionable age for men and women started in 1996 after the *Barber* judgment and the transitional period ended in 2012. The regulations on survivor benefits are gender-neutral with the exception of very old cases (the death of a spouse before 1986).

The amendments to Social Code No. 6 and the Act on the Old-Age Protection for Farmers in 2014 covered the recognition of childcare periods by the statutory pension schemes and by the professional insurance funds and introduced the option of an early entry into retirement at the age of 63 without deductions. The requirements of the latter are disproportionately met by well-paid male employees who did not interrupt their working life for childcare periods.

7.5 Is sex used as an actuarial factor in statutory social security schemes?

Generally not. But concerning pensions for civil servants, the respective administration uses gender-specific mortality tables to identify the average life expectancy of men and

women and calculates (among other things) on this basis. The Federal Administrative Court doubts that this method of 'pure statistical gender equality' is compatible with the Union law principle of equal pay and expressed its interest in a clarifying decision of the CJEU.¹²⁷

7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes?

No, although the classification of the widespread professional pension schemes under self-regulation is doubtful. Most liberal professions, self-employed persons and freelancers are organized in self-governed and self-regulated bodies (mostly chambers) including self-governed, self-regulated and self-financed professional pension schemes ('berufsständische Versorgungswerke'). The states offer a very modest legal framework and supervision for these professional pension schemes.

¹²⁷ Federal Administrative Court, judgment of 5 September 2013, 2 C 47/11.

8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 Has Directive 2010/41/EU been explicitly implemented in national law?

No. The Federal Government and the Federal Council were averse to the contents of the Directive and questioned its need as well as the competence of the European Union concerning social security law.¹²⁸ In 2012, the German Government stated that German legislation was already in accordance with the requirements of the Directive and therefore rejected any further request for transposition.¹²⁹ Self-employed persons are only covered by Section 6(3) of the General Equal Treatment Act transposing Article 3(1)(a) of Directives 2000/78 and 2002/73. Thus, the Government's opinion cannot be confirmed.

8.2 What is the personal scope related to self-employment in national legislation?

Under German law, self-employed persons are persons who pursue a gainful activity without instructions by others and for their own account. The differentiation between dependent and 'quasi-subordinate' employees protected under Section 6(1) and self-employed persons or freelancers protected under Section 6(3) of the General Equal Treatment Act can be difficult in individual cases and has been the subject of rather heterogeneous case law.¹³⁰ The main criteria are: a decisive influence on working conditions, the authority to give instructions, competence to delegate the performance of duties, contractual obligations to one or more employers or clients and the comparable need for social protection.

8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.

There are hundreds of professions in the field of self-employment and many of them are organised in associations with the right of self-regulation and their own social security systems, especially professional pension funds. Thus, self-employed persons are covered by various and very different federal and state laws, as well as professional regulations. In 2001, life partners were recognized in the federal laws on statutory social security systems and special federal laws concerning farmers. But it was not before the 2009 Federal Constitutional Court decision on survivors' pensions¹³¹ that more states and all professional pension funds amended their regulations and practices to grant survivors' pensions to registered life partners as well as spouses.¹³²

8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted, or broader than specified in Article 4 Directive 2010/41/EU?

There is no specific legislation transposing Directive 2010/41/EU in Germany and therefore nearly no national legislation relating to equal treatment in self-employment. Concerning

¹²⁸ See Parliamentary Documents 16/13830 of 20 July 2009, p. 149, <http://dipbt.bundestag.de/dip21/btd/16/138/1613830.pdf>.

¹²⁹ Answer of Parliamentary State Secretary H. Kues to a request by the Social Democratic Party on 11 May 2012, Parliamentary Documents 17/9615, p. 53, <http://dipbt.bundestag.de/dip21/btd/17/096/1709615.pdf>.

¹³⁰ Examples given by Willemsen, H.J. & Müntefering, M. (2008), 'Begriff und Rechtsstellung arbeitnehmerähnlicher Personen' (Concept and legal status of quasi-subordinate workers) *Neue Zeitschrift für Arbeitsrecht*, pp. 193-201.

¹³¹ Federal Constitutional Court, judgment of 7 July 2009, 1 BvR 1164/07. The judgment was based on the constitutional principle of equality.

¹³² Some pension funds needed encouragement by the courts, see for example the State Administrative Court of North Rhine-Westphalia, judgment of 23 September 2010, 17 A 674/08.

access and promotion, managing directors, members of company boards and freelancers can invoke the regulations of the General Equal Treatment Act. Other self-employed persons can refer to the constitutional principle of equality, which has limited influence in civil-law cases.

8.5 Has your State taken advantage of the power to take positive action?

In 1994, the state of North Rhine-Westphalia established master's foundation awards for young entrepreneurs in the craft and trade sector with an application deadline of two years after the master's examination in general and five years for female entrepreneurs. In 2002, the Federal Administrative Court accepted the extended deadline as a means of positive action.¹³³ In August 2014, the Federal Ministry of Economics and the Federal Ministry for Family, Seniors, Women and Youth presented an initiative for the empowerment and support of female business start-ups and entrepreneurs.¹³⁴ Although it is controversial whether the advancement of women might be a condition for awarding public contracts, some states have set respective regulations for contracts of a certain volume and larger contractors.

8.6 Does your country have a system for social protection of self-employed workers?

Yes, but the social protection for self-employed persons shows highly differentiated structures. There are special provisions for some groups of self-employed persons, e.g. in crafts and commerce. There are independent social security systems for farmers and their assisting family members as well as for self-employed artists and publicists.

All members of professions with the right to form associations for self-regulation, especially the liberal professions, are covered by one of the many professional pension funds (*berufsständische Versorgungswerke*) in Germany. Every one of these professions has its own pension fund in every German state and is authorised on the legal basis of its own state law. Only very few of these many special laws deal with questions of gender equality. Nearly all of these systems cover invalidity, old-age or survivors' benefits, some sickness and long-term care, some work accidents, all under very different requirements and financing systems.

Some groups of self-employed persons have the option of voluntary unemployment insurance within the statutory system but the contributions have been multiplied since 2006 (from under EUR 18 to around EUR 90 per month). Moreover, this option can only be used by former employees who have contributed to the statutory unemployment system for at least 12 months during the last 24 months.

The agricultural social security system covers helping spouses or life partners,¹³⁵ in craft and commerce the social security status of helping spouses and life partners has to be defined with binding effect for the social security funds, and the regulations concerning professional pension funds vary significantly.

¹³³ Federal Administrative Court, judgment of 18 July 2002, 3 C 54/01. See Hinrichs, O. & Zimmer, R. (2013) in: Däubler, W. & Bertzbach, M. (eds.) *Allgemeines Gleichbehandlungsgesetz. Handkommentar* (Commentary on the General Equal Treatment Act) Section 5 Paragraph 38, 3rd ed. Baden-Baden, on positive action through awarding subsidies.

¹³⁴ See <http://www.bmwi.de/BMWi/Redaktion/PDF/F/frauen-gruenden-gruenderinnen-und-unternehmerinnen-in-deutschland-staerken,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>.

¹³⁵ The Federal Social Court, judgment of 12 February 1998, B 10/4 LW 9/96 R, decided that the co-insurance of spouses in the agricultural sector is in compliance with European directives 79/7 and 86/613.

8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?

No. Only self-employed artists and publicists as well as helping family members in the agricultural sector are entitled to maternity allowances under special regulations.

8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons?

Only to a very small extent. Under Section 17(1) of the Act on Occupational Pension Schemes, persons who are not employees can invoke the regulations of the Act when they were guaranteed benefits for retirement, invalidity, or for surviving family members on the occasion or as a result of their self-employed work for an enterprise. This happens very rarely in practice, generally for some sales representatives or managing directors.

8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54?

No.

8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?

Self-employed persons are covered by Section 6(3) of the General Equal Treatment Act which transposes Article 3(1)(a) of Directives 2000/78 and 2002/73. Consequently, the prohibition of gender-based discrimination against self-employed persons is restricted to access to self-employed activities and promotion. It is strongly contested whether self-employed persons may invoke Section 19 of the General Equal Treatment Act (transposing requirements of Directive 2004/113) against discrimination concerning working conditions or the discriminatory termination of self-employment contracts.¹³⁶ Up until now, the courts have not confirmed this possibility.

¹³⁶ See Thüsing, G. (2007), *Arbeitsrechtlicher Diskriminierungsschutz*, Paragraph 94, Munich.

9. Goods and services (Directive 2004/113)

9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?

Yes, under Sections 2(1)(8) and 19 of the General Equal Treatment Act.

9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113?

The material scope of the General Equal Treatment Act concerning goods and services is significantly restricted in comparison to the directive.

The national provisions are restricted to contracts concluded under civil law. For the provision of goods and services under public law, the principle of equality contained in the German Constitution applies. This means that in this area harassment and sexual harassment are not considered to be discrimination¹³⁷ and the special rules on support by anti-discrimination organisations do not apply.

Second, the national law falls short of the requirements of Directive 2004/113/EC by containing several exceptions. Under Section 19(1)(1) of the General Equal Treatment Act, the application is restricted to so-called 'mass contracts' which are concluded in great numbers, under comparable conditions and typically irrespective of the identity of the other contracting party or where the identity is of minor importance. In the opinion of the author, which is also reflected in legal literature,¹³⁸ these three cumulative requirements are not consistent with the requirements of the Directive and thus illegitimately reduce the material scope of the Act. Moreover, a landlord who rents out up to 50 apartments does not fall under the provision, and nor do contracts that will bring the parties into relationships of trust or into close spatial contact, e.g. both parties being housed on the same piece of land.

Third, in violation of Directive 2004/113/EC, the prohibition of sexual harassment under Section 3(4) of the General Equal Treatment Act is restricted to the area of employment.¹³⁹

9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education

The General Equal Treatment Act does not cover media and advertising, and although Section 2(1)(7) of the Act mentions education, the Act does not cover concrete claims in this field, probably due to the fact that state law on this topic is various but exhaustive.

9.4 Have differences in treatment in the provision of the goods and services been justified in national law?

Under Section 20(1) of the General Equal Treatment Act, differential treatment based on sex is permitted in the provision of goods and services if there is an objective reason for this. This formulation is wider than the one permitted under the Directive, which requires a legitimate aim and the proportionality of the measure. According to academic writing,

¹³⁷ This conclusion is not compulsory, see Baer, S. (1995), *Würde oder Gleichheit* (Equality or Dignity), Baden-Baden, on the concept of sexual harassment as sex discrimination prohibited by the Constitution.

¹³⁸ Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, p. 116.

¹³⁹ According to the prevailing opinion of legal commentaries, this restriction is not applicable in the civil service and has to be eliminated for the provision of goods and services by directive-consistent interpretation.

these restrictions must be read into German law although legislative amendments would be preferable.¹⁴⁰

Examples of 'objective reasons' given in the General Equal Treatment Act are the prevention of danger or harm to others, or the need to protect privacy or personal security. There is no case law, which is even more surprising when taking into account that gender marketing is on a new all-time high: especially children are confronted with two separate markets for clothes for boys and for girls, toys for boys and for girls, books for boys and for girls, food for boys and for girls etc.¹⁴¹ In December 2017, the Federal Antidiscrimination Authority presented a comprehensive study on the economic and legal aspects of Gender Pricing.¹⁴²

9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits?

Not until 2013.

9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country?

In 2013, amendments to the SEPA accompanying Act implementing this *Test-Achats* ruling by 21 December 2012 entered into force with the consequence of increasing insurance rates for both sexes.

9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services?

Under Section 20(1) of the General Equal Treatment Act, the granting of special advantages is allowed where there is no interest in enforcing equal treatment. To the author's knowledge, Germany has not adopted any positive action measures.

9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services?

Although costs related to pregnancy and maternity may never result in different premiums and bonuses under Section 20(2)(1) of the General Equal Treatment Act, private health insurances terminate the membership of pregnant women¹⁴³ or exclude benefits for pregnancy and childbirth from the beginning.¹⁴⁴

Moreover, breastfeeding mothers report time and again that they are denied certain services, e.g. in restaurants, when they bring their infants with them, and that they are harassed for (even the most discreet) breastfeeding in public until they decide to stay at home.

¹⁴⁰ Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, p. 121, http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG_Evaluation.html.

¹⁴¹ See for example <http://ich-mach-mir-die-welt.de/goldener-zaunpfahl-fuer-absurdes-gendermarketing/>.

¹⁴² An der Heiden, I., Wersig, M. (2017), *Preis differenzierung nach Geschlecht in Deutschland. Forschungsbericht* (Price differentiation by gender in Germany. Research paper), available under www.antidiskriminierungsstelle.de.

¹⁴³ The Higher Regional Court of Hamm, judgment of 12 January 2011, 20 U 102/10, I-20 U 102/10, awarded compensations to the amount of EUR 2 000 for non-pecuniary harm.

¹⁴⁴ The District Court of Hannover, judgment of 26 August 2008, 534 C 5012/08, rejected a pregnant applicant's claim for compensation.

10. Violence against women and domestic violence in relation to the Istanbul Convention

10.1 Has your country ratified the Istanbul Convention?

Yes. Germany ratified the Istanbul Convention on 12 October 2017 and the Convention entered into force as German law on the federal level on 1 February 2018.

Under the German Constitution, the full conformity of German law with the IC had to be reached *before* ratification, which slowed down the process considerably. An extremely controversial topic in Germany had been the question of whether the implementation of Article 36 of the IC requires substantial amendments to the definitions of rape and sexual assault within the Criminal Code. The Federal Ministry of Justice had denied the necessity, federal judges had campaigned against amendments and politicians from all parties had been worried about Germans' sex life. It was not before the sexual harassment and assault of many women in Cologne on New Year's Eve 2015/16 that politicians turned in favour of urgent amendments to the Penal Code, partly overdue, very often with racist tendencies. On 7 July 2016, the Federal Parliament adopted several amendments to the criminal law implementing the 'no means no' principle. The law entered into force in November 2016. Sexual harassment became a criminal offence and sexual actions without the consent of the other person are punishable without further requirements while the use of force aggravates the punishment.¹⁴⁵

In 2012, a statute¹⁴⁶ set up state-wide round the clock telephone helplines free of charge to provide advice and information in relation to all forms of violence covered by the scope of the IC, offered by female specialised staff, confidentially, easily accessible and multilingual, and flanked by a website.¹⁴⁷

Discussions about a federal law on the funding of women's shelters and other support structures for victims of gender-based violence such as counselling centres, which are funded by a mixture of donations, payments and subsidies without statutory entitlements and thus, are chronically underfinanced, did not lead to any parliamentary activities. In 2012, the Federal Government displayed its lack of intention to improve the funding of women's shelters.¹⁴⁸ Although political parties which might form the new government announced their intention to improve the funding of shelters and support structures, the main structural and (purportedly) legal obstacles are not addressed. In addition, there is still no indication that a new government may discard the erroneous idea that shelter and support for victims of gender-based violence would be a voluntary and not mandatory state task.

In December 2016, the Federal Parliament adopted several amendments to the criminal law on stalking.¹⁴⁹ Stalking is no longer subject to private prosecution, but is to be prosecuted by the authorities. The violation of judicial settlements of the matter constitutes a criminal offence as well. Severe harm to the personal life of the victim is no longer required, but the general qualification to cause these consequences suffices.

¹⁴⁵ Statute on amendments of the Penal Code – Improvement of the protection of sexual self-determination, available under

<http://www.bmiv.de/SharedDocs/Gesetzgebungsverfahren/DE/SchutzSexuelleSelbstbestimmung.html>.

¹⁴⁶ Statute on the Establishment and Operation of a State-Wide Telephone Helpline 'Violence Against Women' of 7 March 2012, Official Journal I, p. 448.

¹⁴⁷ <https://www.hilfetelefon.de/aktuelles.html>, accessed 4 June 2015.

¹⁴⁸ See Federal Government commenting the Expertise on the Situation of Women's Shelters, Specialised Counselling, and Other Support Measures for Women Victims of Violence and Their Children of 16 August 2012, <http://www.bmfsfj.de/BMFSFJ/Service/publikationen,did=190482.html>, accessed 5 June 2015.

¹⁴⁹ See http://www.bmiv.de/SharedDocs/Artikel/DE/2016/12162016_Stalking.html.

11. Enforcement and compliance aspects (horizontal provisions of all directives)

11.1 Victimisation

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

Yes. Section 16 of the General Equal Treatment Act prohibits victimisation in labour relationships and gives the victim of discrimination or any person who supported him/her a right of action against the employer. This rule also applies to the discrimination of civil servants.

11.2 Burden of proof

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

Yes. In civil and labour cases, there is a shift of the burden of proof under Section 22 of the General Equal Treatment Act: If the claimant proves facts permitting the conclusion that there was discrimination, the defendant has to submit evidence to the contrary. The decision will be taken to the disadvantage of the party whose set of facts cannot be corroborated by the court. However, practical problems are the lack of information rights and the courts' reluctance to the use of statistical data as *prima facie* evidence.¹⁵⁰ It remains to be seen whether the Pay Transparency Act will diminish problems of proof in pay discrimination cases and thus further gender equality in working life.

11.3 Remedies and Sanctions

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

The remedies and sanctions under Sections 15 and 21 of the General Equal Treatment Act differ according to the field of law. The compatibility of several restrictions with the directives and the CJEU case law is at least doubtful.

In labour and civil cases, the victim has a right to damages and compensation. In labour law cases the victim of gender discrimination has a right to compensation even if he/she would not have received the benefit in question (especially hiring or promotion) in a discrimination-free procedure. This compensation amounts to a maximum of three months' salary and can be deemed dissuasive, especially because they are to be paid to every victim who has brought a case. Under Section 12 of the Act, the employer is obliged to take all necessary measures to end the discrimination perpetrated by other employees and third parties such as customers.¹⁵¹ Discrimination by the (prospective) employer does not constitute an entitlement to the conclusion of an individual labour contract under Section 15(6). In civil-law cases, the victim can bring a claim for the cessation of the discrimination and non-repetition but not for reinstatement or the fulfilment of the denied contract.

Under Sections 15(1)(2) and 21(2)(2) of the Act, the employer as well as the person providing goods or services are obliged to pay material damages only when they can be held responsible for the discrimination by personal fault—which is not compatible with the

¹⁵⁰ Federal Labour Court, judgment of 22 July 2010, 8 AZR 1012/08, overruling the State Labour Court of Berlin and Brandenburg, judgment of 26 November 2008, 15 Sa 517/08.

¹⁵¹ There is no case law on the latter.

case law of the CJEU.¹⁵² Moreover, in labour law cases, the perpetrator of the discrimination not being the employer can exonerate himself/herself by showing that he/she did not act negligently or intentionally under general rules of German civil law. In the case of discrimination caused by collective agreements, the employer is only responsible if he/she acted with gross negligence or intentionally under Section 15(3) of the General Equal Treatment Act — whose compatibility with the directives is more than doubtful.¹⁵³

In the employment relationships of civil servants, all claimants have the right to a discrimination-free repetition of the (hiring or promotion) procedure, and there is even a right of the best candidate to be chosen under the Constitution. The effectiveness of this remedy depends on timely information, otherwise the victim can merely claim compensation.

New case law covers special damages concerning the reconciliation of work and family life. On 20 October 2016, the Federal Court of Justice decided that parents who could not return to work after their parental leave due to the lack of sufficient and appropriate public childcare can claim damages for loss of earnings from the local responsible authority.¹⁵⁴ Since August 2013, children under the age of three are entitled to public childcare under Section 24(2) of the Social Code No. 8. The local authorities are obliged to offer sufficient and appropriate public childcare by nurseries, kindergartens or so called day-care mothers.¹⁵⁵ The Federal Court of Justice decided that the entitlement to public day care should not only favour the children cared for but their parents, especially those wanting to return to work, as well, and that therefore a culpable violation of the obligation to offer public childcare would lead to liability of the local responsible authority for damages for the suffered loss of earnings by any parent.

A possible sanction under labour law is that (sexually) harassing employees may face dismissal by their employer. But lawyers are concerned by the possibility of exoneration by pleading that the (sexual) harassment was a 'momentary failure' – a legal argument introduced by a 2014 Federal Labour Court decision¹⁵⁶ and many times referred to since.¹⁵⁷ On the occasion of the severe sexual harassment of a male temporary worker by a male member of the permanent staff, the Federal Labour Court made a landmark decision upon sexual harassment at the workplace in general.¹⁵⁸ The court confirmed that sexual harassment does not require sexual intentions and that the intentional touching of primary or secondary sexual organs constitutes a severe sexual harassment, irrespective of the sexual orientation or preferences of the perpetrator. The court explained that sexual harassment at the workplace is very often an expression of hierarchies and the exercise of power rather than sexually-determined pleasure. Further, the court confirmed that one severe assault is sufficient to constitute sexual harassment and that the consequence may be dismissal without notice under certain circumstances.

Criminal sanctions and administrative fines are not available in cases of gender discrimination, with the exception of bodily sexual harassment as covered by the Penal

¹⁵² Federal Administrative Court, judgment of 30 October 2014, 2 C 6/13, confirmed the requirement of the personal fault of the employer under Section 15(1)(2) of the General Equal Treatment Act. Thus, the court did not follow the Labour Court of Cologne, judgment of 28 November 2013, 15 Ca 3879/13, holding that this requirement is inapplicable due to its incompatibility with European law.

¹⁵³ Labour Court of Cologne, judgment of 28 November 2013, 15 Ca 3879/13, restricted its application to cases of indirect discrimination and association-level collective agreements.

¹⁵⁴ Federal Court of Justice, judgment of 20 October 2016, III ZR 278/15. The action was brought before the court by three mothers.

¹⁵⁵ Comprehensively on the new entitlement and its enforcement see the contributions by Schettler, A., Meiner-Teubner, C. and Möller, V. 'Ausbau der Kinderbetreuung für Unter-Dreijährige' *Zeitschrift des Deutschen Juristenbundes* 4/2016, pp.155ff, 161ff, 167ff, 171f.

¹⁵⁶ Federal Labour Court, judgment of 20 November 2014, 2 AZR 755/13.

¹⁵⁷ Schrader, P. & Thoms, T. (2017), 'Sexuelle Belästigung – Denn sie wissen nicht, was sie tun?' *Arbeitsrecht Aktuell*, pp. 31ff, 60ff, referring to respective court decisions.

¹⁵⁸ Federal Labour Court of 29 June 2017, 2 AZR 302/16, <https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2017-6-29&nr=19424&pos=0&anz=19>.

Code as amended in November 2016. However, there is little willingness to see any of the 2016 amendments of criminal law on sexual assault and sexual harassment put into practice.¹⁵⁹

If the offender is not identified, victims of gender-based violence can make a claim for compensation against the state under certain conditions under the Victim Compensation Act. Unfortunately, one of the conditions is that the assault must have been of a physical nature although the consequences compensated can include severe psychological harm or suffering. This restriction is incompatible with the requirements of the Istanbul Convention. And this restriction means that victims of certain kinds of stalking or victims of hate speech including rape and death threats, of revenge porn or of cyber harassment may never receive any compensation irrespective of the severity and duration of their suffering.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

The main problem is that remedies and sanctions are often not enforceable due to the illegitimate restrictions mentioned above. Also, the amounts of compensation for personal harm granted are very modest.¹⁶⁰

11.4 Access to courts

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

Access to the courts is ensured for individuals who claim to have been the victim of gender discrimination. Anti-discrimination interest organisations do not have standing in court, but may only support individual claimants. Thus, the realisation of gender equality through the courts remains exclusively in the hands of individual claimants.

In cases of discrimination within the context of employment and access to goods and services provided under civil law, the labour courts and the civil courts (the 'ordinary courts') are competent. In some of the German states, actions concerning discrimination in access to goods and services cannot be brought to court before the failure of a prior mediation procedure. Administrative courts are competent to decide claims against a public authority.

In civil and labour cases, the claim has to be brought within two months¹⁶¹; in administrative and social-law cases, the time period is one month. These very short time limits for realising that one is a victim of discrimination, seeking social and legal aid, and deciding on legal action—with the lack of a right of associations to bring proceedings—are one of the main obstacles to effective protection against and the prevention of discrimination. In the opinion of the author as well as other legal commentators, the time period should be six months for all anti-discrimination claims,¹⁶² especially in comparison

¹⁵⁹ E.g. Fischer, T. *Strafgesetzbuch. Kommentar* (Commentary on the Penal Code) 64th ed. 2016 & 65th ed. 2018 whose commentary is the main source of legal expertise for criminal court judges and state attorneys in Germany.

¹⁶⁰ See Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, pp. 151ff, http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG_Evaluation.html.

¹⁶¹ The Federal Labour Court, judgment of 21 June 2012, 8 AZR 188/11, decided that in labour-law cases, the two-month period does not violate the principles of equivalence and effectiveness.

¹⁶² See German Women Lawyers' Association, Press Release of 18 August 2016; Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, pp. 145ff.

with time periods for other compensation claims, e.g. infringements of personality rights, which is generally three years.

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

Anti-discrimination interest organisations do not have standing in court. This is one of the main reasons for the lack of implementation of anti-discrimination law in Germany. The possibility of collective legal action in anti-discrimination law disburdens and empowers the victims, enforces the law and accompanies societal measures against discrimination. While consumer associations can seek collective redress, initiate class actions, represent consumers in court, enforce the law without any identifiable victim and even claim the confiscation of profits gained by the enterprise breaking the law on the protection of consumers, anti-discrimination associations have none of these rights. They can only offer judicial assistance and advice in court, and moreover are intimidated by the court's authority to withdraw their right to speak if they do not 'present the facts and the legal dispute appropriately' under Section 79(3)(3) of the Code of Civil Procedure.

There is one minor exemption: Under Section 23 of the Works Constitution Act and Section 17 of the General Equal Treatment Act, works councils¹⁶³ can take action against the employer in case of serious breach of his/her duties concerning non-discrimination. In practice, they have not done so yet. An important reason for this lack of action may be that works councils are not eager to accuse the employer of 'serious discrimination'. To safeguard effective access to courts and to further the enforcement of antidiscrimination law, a simple breach of the employer's duties concerning non-discrimination should suffice.¹⁶⁴ The requirement of a serious breach of duties arises from the legal concept of the Works Constitution Act and is unsuitable for anti-discrimination law.

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

Claimants have a right to (financial) legal aid for court and lawyers' fees if, by superficial examination, their case has a good chance of success.

11.5 Equality body

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

Yes. Since 2006, there is a general anti-discrimination authority on the federal level (*Antidiskriminierungsstelle des Bundes*).¹⁶⁵ Its powers extend to all grounds of discrimination contained in the European anti-discrimination directives. Its tasks are to inform individuals claiming to have been discriminated against and the general public of the legal means available in case of discrimination. Moreover, the authority shall conduct studies on discrimination and shall propose measures to prevent discrimination. The authority has no power to support individuals in anti-discrimination suits, and cannot impose any fines for discrimination. On the level of the states (*Länder*), only very few comparable bodies exist.¹⁶⁶

¹⁶³ Staff councils representing people employed by the State are not covered by these regulations. And the works councils cannot claim for the individual compensation and damages owed to the employee discriminated against.

¹⁶⁴ Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, pp. 142ff.

¹⁶⁵ See http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html.

¹⁶⁶ For example, the anti-discrimination authorities of Berlin (<http://www.berlin.de/lb/ads/>) and Schleswig-Holstein (<http://www.landtag.ltsh.de/beauftragte/ad/index.html>), and the anti-discrimination office for Saxony (<http://www.adb-sachsen.de/>).

11.6 Social partners

- 11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

Although the social partners are aware of their responsibility to prevent and abolish gender discrimination in collective agreements, they have not yet undertaken any systematic assessment. The legislator is reluctant to impose specific obligations on the social partners in this respect, pointing to its obligation to respect their freedom of coalition under the Constitution. Yet, legislation obliging the social partners to live up to their responsibility would be in compliance with the constitution as it would emphasise their existing obligations flowing from EU law.

11.7 Collective agreements

- 11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

Collective agreements play an important role in German labour law, but vary to a great extent. Most collective agreements are concluded at the level of the states. Collective agreements contain rules on various contents as well as the conclusion and dissolution of employment contracts. These rules are binding and directly applicable between an employer and employee if both are members of the social partners that concluded the agreement. Currently, there are 70 000 collective agreements in Germany, 502 of which have been declared to be generally applicable by the Ministry of Labour and Social Affairs. However, the Ministry explicitly rejects the publication of any agreements. Most collective agreements do not present themselves as particularly effective means to implement EU gender equality law. Critics argue that one important reason for this is that most social partners are male-dominated organisations.¹⁶⁷

¹⁶⁷ See Blaschke, S. (2008), *Frauen in Gewerkschaften: zur Situation in Österreich und Deutschland aus organisationssoziologischer Perspektive* (Women in trade unions in Austria and Germany), Munich; and the 2015 conference on the topic: <http://www.soziologie.phil.uni-erlangen.de/news/2015-05-tagung-geschlechterperspektiven-auf-gewerkschaften>.

12. Overall assessment

Overall, Germany's implementation of EU gender equality law is satisfactory on the legislative level. In many respects legislation goes beyond the requirements of the directives (e.g. the scope of application, maternity protection, parental allowances). In other fields there are disturbing gaps in implementation, such as the exclusion of dismissals from the scope of application of the General Equal Treatment Act, the lack of a right to return after parental leave, the resistance to implement Directive 2010/41/EU, the restriction of access to the courts and of legal protection in relation to the provision of goods and services to so-called 'mass contracts', thus limiting the protection of self-employed persons as well, and the restriction of the prohibition of sexual harassment to the area of employment. European Law requires unequivocal transposition of directives.

Moreover, although the courts and legal practitioners are aware of EU law, the case law of the CJEU, and the obligation to interpret national law in the light thereof, many provisions lack implementation in practice. Some of the main obstacles are the lack of non-discriminatory concepts of 'work of equal value', the overemphasis on the freedom of coalition for the social partners and their collective agreements, the requirement of fault in labour-law cases and the problems when dealing with questions of indirect or intersectional discrimination.

Annexes

Bibliography

- Adamietz, L. (2011), *Geschlecht als Erwartung. Das Geschlechtsdiskriminierungsverbot als Recht gegen Diskriminierung wegen der sexuellen Orientierung und der Geschlechtsidentität* (Gender as Expectation. The prohibition of gender discrimination as a legal means against discrimination on the grounds of sexual orientation and gender identity), Baden-Baden: Nomos.
- Baer, S., Bittner, M. & Göttsche, A. L. (2011), *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse* (Multidimensional discrimination—conceptions, theories and legal analysis), Berlin: ADS.
- Kocher, E. et al. (2013), *Das Recht auf eine selbstbestimmte Erwerbsbiographie* (The right to a self-determined employment biography), Baden-Baden: Nomos.
- Philipp, S. et al. (eds.) (2014), *Intersektionelle Benachteiligung und Diskriminierung. Soziale Realitäten und Rechtspraxis* (Intersectional disadvantaging and discrimination. Social reality and legal practice), Baden-Baden: Nomos.
- Spangenberg, U. & Wersig, M. (2013), *Geschlechtergerechtigkeit steuern. Perspektivenwechsel im Steuerrecht* (Steering gender equality. Change of perspective in tax law), Berlin: Sigma.

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