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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 2019 – 31 December 2019

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# **1 Introduction**

## **1.1 Basic structure of the national legal system**

The German legal system is a federal, statutory law system. The centre of legal thought and practice is the parliamentary statute (although the practice – as we will see – is far more differentiated and fuzzy). The system is hierarchical: federal law takes precedence over state law, and every law has to be in compliance with the Constitution.

Due to the federal system, legislative powers are distributed between the federal and the state (*Land*) level in Germany. Most legislative powers relating to the key issues addressed by the gender equality directives still rest at the federal level. However, over the years, state competences have increased in relation to the civil service and work in the public sector. Legal and political disputes about gender equality are now often linked to the states' equality and higher education laws.

Despite the importance of statutory law, areas of significance in respect of gender equality, such as the multitude of social security schemes or many aspects of working life, are shaped not only by federal and state law, but also by collective and works agreements or the internal regulations of professional organisations with a right to self-regulate. Although internal regulations and collective agreements must comply with constitutional requirements, in the opinion of the author of this report, the level of judicial review concerning questions of gender equality in these areas of law leaves a great deal to be desired.

In addition, case law plays an important role and decisions of the higher and federal courts may have great influence and impact. Courts are established at the regional, state and federal level. Labour courts deal with discrimination in the field of employment, 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. There are also specialised courts for social and tax law.

Every court in Germany is obliged to examine whether the laws and regulations it intends to apply are in accordance with the Constitution including the constitutional guarantee of gender equality. It is true that only the Federal Constitutional Court is competent to decide on the constitutionality (and thus, validity) of laws enacted by the Federal Parliament (Bundestag) and therefore, all other courts questioning the constitutionality of parliamentary statutes have to refer to the Federal Constitutional Court for a decision ('special judicial review of statutes' or 'referral').<sup>1</sup> In addition to statutes, court decisions in violation of the principle of constitutional equality can also be subject to an annulment by the Federal Constitutional Court.

The competence to review and, in some cases, decide upon questions of compatibility with constitutional and EU law offers considerable opportunities for courts to further gender equality and to fight gender discrimination. Every court is competent to refer the question of constitutionality of a parliamentary statute to the Federal Constitutional Court and to review non-parliamentary regulations without referral. Every court is competent to directly apply EU gender equality law, to interpret national law in compliance with the EU directives and to refer questions of compatibility with EU law to the CJEU. Although claimants cannot oblige a national court to refer the case to the Federal Constitutional Court when doubting the constitutionality of national law, the refusal of a referral to the CJEU may be challenged before the Federal Constitutional Court as a violation of the right to due process before the legally competent judge.

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<sup>1</sup> In 15 out of 16 of the German states (*Bundesländer*), State Constitutional Courts decide upon the compatibility of state laws with the states' constitutions.

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

European gender equality and anti-discrimination directives were explicitly implemented by the 2006 General Equal Treatment Act and the 2006 Equal Treatment of Soldiers Act, both of which are federal statutes. Since then, no further explicit implementation by German legislation has taken place. Nevertheless, 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 (although not always in a satisfactory manner). These issues and concepts are covered by federal or state laws, collective and works agreements, internal regulations and court rulings, but very often the directives are only *indirectly* implemented by statutes or other regulations dealing with the key issues.

### *Legislation explicitly implementing Directives*

- General Equal Treatment Act of 14 August 2006, Official Journal 2006, p. 1897, implementing Directives 2000/43, 2000/78, 2002/73 and 2004/113;
- Equal Treatment of Soldiers Act of 14 August 2006, Official Journal 2006, p. 1897, 1904, implementing Directive 2002/73;
- SEPA-accompanying Act of 3 April 2013, Official Journal 2013, p. 610 (*Gesetz zur Begleitung der Verordnung (EU) Nr. 260/2012 zur Festlegung der technischen Vorschriften und der Geschäftsanforderungen für Überweisungen und Lastschriften in Euro und zur Änderung der Verordnung (EG) Nr. 924/2009 (SEPA-Begleitgesetz)*), implementing the *Test-Achats* ruling of the CJEU and thus, implementing Directive 2004/113.

### *Legislation with relevance for key issues of the directives*

- Act on the equality of female and male soldiers of 27 December 2004, Official Journal 2004, p. 3822;
- Act 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 Act of 24 April 2015, Official Journal 2015, p. 642;
- Appointments to Federal Bodies Act 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;
- Act on the further development of part-time work – introduction of a bridge part-time work of 11 December 2018, Official Journal 2018, p. 2384;
- Nursing Professions Act of 17 July 2017, entering into force on 1 January 2020, Official Journal 2017, p. 2581;
- Maternity Protection Act of 23 May 2017, Official Journal 2017, p. 1228;
- Federal Parental Allowances and Parental Leave Act of 5 December 2006, Official Journal 2006, p. 2748;
- Act on the better reconciliation of family, home care and work of 23 December 2014 (amending the 2008 Home Care Leave Act and the 2012 Family Home Care Leave Act), Official Journal 2014, p. 2462;
- Act on the regulation of a general minimum wage of 11 August 2014, Official Journal 2014, p. 1348;
- Occupational Pension Schemes Act of 19 December 1974, Official Journal 1974, p. 3610;
- Act on the improvement of services of the statutory pension insurance schemes of 23 June 2014, Official Journal 2014, 787;
- Act on performance improvement and stabilisation in the statutory pension schemes of 28 November 2001, Official Journal 2018, p. 2016;
- Protection Against Violence Act of 11 December 2001, Official Journal 2001, p. 3513;
- Act on the establishment and operation of a state-wide telephone helpline 'Violence Against Women' of 7 March 2012, Official Journal 2012, p. 448;
- Fiftieth law on amendments to the Penal Code – improvement of the protection of sexual autonomy of 4 November 2016, Official Journal 2016, p. 2460.



- Transsexuals Act of 10 September 1980, Official Journal 1980, p. 1654;
- Law on Amending the Information to be Recorded in the Birth Register (Amendments to the Civil Status Act) of 18 December 2018, Official Journal 2018, p. 2635.

### 1.3 Sources of law

The main sources of gender equality law are the constitutional guarantee of gender equality and the constitutional prohibition of sex discrimination as well as their statutory specification by the Federal Equality Act and the equality statutes of the states covering the civil service. Moreover, every German statute (federal or state) has to be in compliance with the Constitution or it could be declared invalid by the Federal Constitutional Court or one of the state constitutional courts. The requirements of the Constitution inspired some amendments to the states' higher education laws, explicitly implementing the obligation of universities to further gender equality, i.e. by affirmative action or by setting guidelines against sexual harassment and discrimination on the grounds of sex/gender.

European gender equality law is an important source of German gender equality law although unfortunately, the courts very rarely directly apply European law, such as Article 157 TFEU or the anti-discrimination directives. Therefore, the legislation explicitly implementing the European directives, namely the General Equal Treatment Act and the Equal Treatment of Soldiers Act, are important sources of gender equality law. Sometimes, courts refer to CJEU rulings on questions of sex/gender discrimination.

For a long time, international human rights treaties covering prohibitions of sex/gender discrimination were rarely used as a source of gender equality law. This is surprising because ratified international human rights treaties are in force in Germany and have the status of a federal statute, i.e. they take precedence over all sub-statutory legal norms as well as the entire state law including the states' constitutions. At the same time, the treaties continue to be valid at the international level and the case law of the Federal Constitutional Court requires the interpretation of domestic law, including the Constitution, to be in conformity with international law. Oddly enough, there is much discussion as to whether human rights treaties that have legal force equal to a federal statute are actually binding or directly applicable or even create subjective rights, although there is no mistake about their legally binding nature and the fact that they contain obligations for all public authorities on all levels – federal, state and local. The question on whether individuals can claim subjective rights has to be answered with regard to individual cases, but where there is the possibility to instigate an individual complaint procedure on an international level, that should be taken as a strong indication that subjective rights can be claimed. The general misunderstanding seems to be that there would be no difference between individual rights to a particular state action and individual rights to the fulfilment of state obligations by the appropriate means, the specific selection of which can be decided upon by the relevant public authority. Due to such misunderstandings, most national courts do not apply human rights directly or even indirectly. However, legal debates on this question are developing in Germany.

Beyond the level of constitutional, European and statutory law, there are other regulations that are important sources of law concerning gender equality issues. Important sub-statutory regulations are the internal regulations of professional organisations, the internal regulations of professional pension funds, and the internal regulations of public institutions, such as universities or public foundations, all of them with a (constitutional) right to self-regulate. In working life, collective agreements that are declared universally applicable constitute an important source of law.

Although the German legal system is a statutory law system, rather than a case law system, court decisions play an important role. As courts interpret and apply the statutory law, their rulings determine the precise content of the law; rulings of the higher and federal

courts have great impact and can in turn initiate legislative developments. In general, lower courts very rarely deviate from the established case law of a higher court.

Equality bodies have no competence to decide upon gender equality cases and, therefore, cannot be a source of law (they do not even have standing in court). Quasi-judicial bodies play no role in gender equality law. Equality bodies can do no more than encourage victims of gender-based discrimination to take legal action or commission and publish expert opinions developing legal argumentations strengthening gender equality.

The opinions of legal experts are not a source of law and there is no authoritative scholarly interpretation of statutes. However, the influence and impact of legal literature, especially legal commentaries, cannot be overestimated. Federal Constitutional Court judge and law professor, Susanne Baer, has aptly summarised the role of German legal commentary literature as 'the practice behind the practice'.<sup>2</sup>

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<sup>2</sup> Baer, S. (1997), 'Feministische Ansätze in der Rechtswissenschaft' (Feminist approaches to legal studies), in Rust, U. (ed.), *Juristinnen an Hochschulen – Frauenrecht in Lehre und Forschung*, pp. 153-181 (160).

## 2 General legal framework

### 2.1 Constitution

#### 2.1.1 Constitutional ban on sex discrimination

The German Constitution, the Basic Law, explicitly bans sex discrimination. Article 3(3) of the Basic Law prohibits any treatment that disadvantages or privileges a person on the grounds of sex, descent, race, language, origin, religion and religious or political opinion as well as any disadvantages due to disability. Following a judgment of the Federal Constitutional Court, the prohibition of discrimination on the grounds of sex also covers the prohibition of discrimination on the grounds of gender identity.<sup>3</sup>

#### 2.1.2 Other constitutional protection of equality between men and women

Article 3(2) of the German Constitution explicitly provides for equality between men and women. This includes the state's obligation to further the effective implementation of this principle of equality and to eliminate existing disadvantages.<sup>4</sup> In its landmark decision on the recognition and formal registration of a third gender identity, the Federal Constitutional Court emphasised 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.<sup>5</sup>

Whether the constitutional prohibition of sex discrimination and the principle of gender equality can be invoked in horizontal relations is subject to legal dispute.<sup>6</sup> Without doubt, the Constitution is binding on the state and its authorities. To what 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 legal controversy. Generally, the fundamental rights enshrined in the Constitution have only indirect horizontal effect, meaning that they are not directly binding between private parties. However, in its established case law, the Federal Constitutional Court states that the fundamental rights unfold their effect as constitutional 'value decisions' by 'radiating' into private law relationships and, thus, the courts are obliged to enforce them when interpreting civil and labour law, in particular via general clauses under civil law and indefinite legal terms.

In 2018, the Federal Constitutional Court decided upon the horizontal effect of the constitutional provision of equality before the law under Article 3(1) of the German Constitution.<sup>7</sup> The court maintained the general rule of only indirect horizontal effects and pointed out that such effects would not mean that legal relations between private individuals must be designed by them in principle in a manner that is in line with equality. Nevertheless, every general rule has its exception. The court decided that requirements under the constitutional provision of equal treatment for the relationship between private individuals may apply in specific situations. Horizontal effects may, for example, unfold if, by means of the householder executing their rights, individual persons are excluded from

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<sup>3</sup> Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16, [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010\\_1bvr201916en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html).

<sup>4</sup> See Baer, S., Markard, N. (2018), 'Article 3(2) of the Basic Law', in Mangoldt/Klein/Starck (Begr.), *Grundgesetz. Kommentar*, 7<sup>th</sup> ed., para 355; Sacksofsky, U. (2002), 'Article 3(2)(3) of the Basic Law' in D. C. Umbach/T. Clemens (Hrsg.), *Grundgesetz. Mitarbeiterkommentar*, Band I, para 349, 353.

<sup>5</sup> Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16, [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010\\_1bvr201916en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html).

<sup>6</sup> For an overview and more innovative approach see Uerpmann-Wittzack, R. (2008), 'Gleiche Freiheit im Verhältnis zwischen Privaten: Artikel 3 Abs. 3 GG als unterschätzte Verfassungsnorm' (Equal freedom in horizontal relations: Article 3(3) of the Basic Law as an underestimated constitutional norm) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 68, pp. 359-370, available at: [https://www.zaoerv.de/68\\_2008/vol68.cfm](https://www.zaoerv.de/68_2008/vol68.cfm).

<sup>7</sup> Federal Constitutional Court, judgment of 11 April 2018, 1 BvR 3080/09 (*Stadionverbot*).

events that are open to the public and organised by other private persons, on their own initiative and without regard for the individual person, and if the exclusion determines to a considerable extent the excluded person's participation in social life, because the organisers must not use their decision-making powers to exclude certain persons from such events without an objective reason.<sup>8</sup> This decision has attracted broad attention, but it does not decide the question of the horizontal effects of the prohibition of sex/gender discrimination under Article 3(2) of the Constitution. However, as the obligations of employers are specified by the General Equal Treatment Act implementing the European anti-discrimination directives, decisions on the horizontal effects of the constitutional prohibition of discrimination are especially important in respect of whether the social partners are thereby bound when negotiating, shaping and entering into collective agreements.

## 2.2 Equal treatment legislation

Germany has specific equal treatment legislation, namely the General Equal Treatment Act,<sup>9</sup> the Equal Treatment of Soldiers Act,<sup>10</sup> the Federal Equality Act<sup>11</sup> and the equality statutes of the states<sup>12</sup> as well as state legislation concerning higher education.<sup>13</sup>

All these laws explicitly prohibit sex/gender discrimination. The Federal Equality Act and the state equality statutes also focus on temporary measures, reconciliation, and women with disabilities. Some state legislation concerning higher education aims for gender equality and covers the prohibition of discrimination on the grounds of disability. The General Equal Treatment Act, which implements 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. The Equal Treatment of Soldiers Act contains the same definitions of direct and indirect discrimination, (sexual) harassment, instruction to discriminate, multiple discrimination and positive action measures as the General Equal Treatment Act; moreover, it covers all other discrimination grounds set out in the EU directives with the exception of age and some extended justifications concerning disability.

The Equal Treatment of Persons with Disabilities Act<sup>14</sup> does not contain an explicit prohibition of sex/gender discrimination. However, under Section 2, the particular concerns of women with disabilities must be taken into account and existing disadvantages must be eliminated in order to enforce equal rights for women and men and to avoid discrimination against women with disabilities on several grounds. Moreover, special measures are permitted to promote the effective implementation of equal rights for women with disabilities and to eliminate existing disadvantages.

<sup>8</sup> Recently, the Federal Constitutional Court has developed some interest in the effects of decisions of powerful private players upon the exercise of fundamental rights by individuals. The ruling in *Stadionverbot* is in compliance with the rulings upon the exercise of freedom of assembly by use of privatised public space, see Federal Constitutional Court, judgment of 22 February 2011, 1 BvR 699/06 (*Fraport*), and judgment of 18 July 2015, 1 BvQ 25/15 (*Bierdosenflashmob*).

<sup>9</sup> General Equal Treatment Act of 14 August 2006 (*Allgemeines Gleichbehandlungsgesetz*), Official Journal 2006, p. 1897, [https://www.gesetze-im-internet.de/englisch\\_agg/index.html](https://www.gesetze-im-internet.de/englisch_agg/index.html).

<sup>10</sup> Equal Treatment of Soldiers Act of 14 August 2006 (*Soldatengleichbehandlungsgesetz*), Official Journal 2006, p. 1897, 1904, <https://www.gesetze-im-internet.de/soldgg/>.

<sup>11</sup> Federal Equality Act of 24 April 2015 (*Bundesgleichstellungsgesetz*), Official Journal 2015, p. 642, [https://www.gesetze-im-internet.de/englisch\\_bgleig/index.html](https://www.gesetze-im-internet.de/englisch_bgleig/index.html).

<sup>12</sup> A compilation of the federal and state equality statutes is available under [http://www.vernetzungsstelle.de/index.cfm?uuid=B707C03404AD9B19F588422ECC8D51D8&and\\_uuid=1789C4EDCCE9E2FCFBC05C7F9E98B53F](http://www.vernetzungsstelle.de/index.cfm?uuid=B707C03404AD9B19F588422ECC8D51D8&and_uuid=1789C4EDCCE9E2FCFBC05C7F9E98B53F).

<sup>13</sup> A compilation of federal and state regulations on higher education is available under <https://www.kmk.org/dokumentation-statistik/rechtsvorschriften-lehrplaene/uebersicht-hochschulgesetze.html>.

<sup>14</sup> Equal Treatment of Persons with Disabilities Act of 27 April 2002 (*Behindertengleichstellungsgesetz*), Official Journal 2002, p. 1467, <https://www.gesetze-im-internet.de/bgg/>.

### 3 Implementation of central concepts

#### 3.1 General (legal) context

##### 3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

The authors of a comprehensive evaluation of the General Equal Treatment Act (AGG)<sup>15</sup> point out that the legal definition of discrimination does not suffice as long as important CJEU rulings such as *Coleman* and *Feryn* are not implemented and gender identity is not explicitly included in the prohibition of gender discrimination. They criticise the fact that the protection against sexual harassment is restricted to the field of employment, and note that positive action measures, although covered by the AGG, are hardly ever used in practice and that the enforcement provisions have several weaknesses. All these structural deficiencies impair the implementation of central concepts of anti-discrimination law.

The authors of the *Second Gender Equality Report* of the Federal Government<sup>16</sup> stated that gender equality has not yet been achieved in Germany. In their view, one of the main reasons for this failure is the way in which society (and the legal framework) organises paid work (including paid care work) and unpaid care work. The authors identified a 'gender care gap' illustrating structural inequalities between men and women. This shows that, on the one hand, the concept of 'reconciliation' deserves more attention as a central concept of gender equality, and on the other, that 'reconciliation' does not go far enough.

A 2017 study on gender pricing<sup>17</sup> came to the conclusion that the access to goods is not impaired by gender pricing but that women are discriminated against by the gender pricing of services and that the General Equal Treatment Act should be amended to fully implement EU anti-discrimination law addressing the problem. The access to and supply of services is an important area for gender equality law that is often overlooked because working life is so much at the forefront.

In 2019, the Federal Anti-Discrimination Agency published an expert study on the risks of algorithmic discrimination, which outlined several potential examples of algorithmic discrimination.<sup>18</sup> In 2019, the Berlin State anti-discrimination body published an assessment of algorithms and their risk of discrimination.<sup>19</sup> The author, Judith Scheer, pointed out that, particularly in the field of anti-discrimination work, in addition to the issues of hate speech, cyber mobbing and fake news, there was a lack of research on and knowledge about the mutual impacts of discrimination and digitisation, and the effects of these on individuals and society.

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<sup>15</sup> Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG\\_Evaluation.html](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG_Evaluation.html).

<sup>16</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin. Documents are available at: <https://www.gleichstellungsbericht.de/>. The committee of experts consisted of Eva Kocher (chair), Thomas Beyer, Eva Blome, Holger Bonin, Ute Klammer, Uta Meier-Gräwe, Helmut Rainer, Stephan Rixen, Christina Schildmann, Carsten Wippermann, Anne Wizorek, Aysel Yollu-Tok.

<sup>17</sup> An der Heiden, I. & Wersig, M. (2017), *Preisdifferenzierung nach Geschlecht in Deutschland* (Gender pricing in Germany), ADS: Berlin, [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Preisdifferenzierung\\_nach\\_Geschlecht.html?nn=10312816](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Preisdifferenzierung_nach_Geschlecht.html?nn=10312816).

<sup>18</sup> Orwat, C. (2019), *Diskriminierungsrisiken durch Verwendung von Algorithmen*, Federal Anti-Discrimination Agency, available at: [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Studie\\_Diskriminierungsrisiken\\_durch\\_Verwendung\\_von\\_Algorithmen.html](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Studie_Diskriminierungsrisiken_durch_Verwendung_von_Algorithmen.html).

<sup>19</sup> Scheer, J. (2019), 'Algorithmen und ihr Diskriminierungsrisiko. Eine erste Bestandsaufnahme' (Algorithms and their Risk of Discrimination. A first inventory), published by the Berlin State anti-discrimination body, available at: <https://www.berlin.de/sen/lads/ueber-uns/materialien/>.

Two surveys on sexual harassment in the workplace in 2015<sup>20</sup> showed that such discrimination is still widespread, that almost no structural measures have been taken against it, that employees do not know their rights and employers do not know their duties, and that the legal protection against sexual harassment is mainly theoretical – paper law without practical implementation. However, it is notable that in compliance with earlier surveys on the topic, the vast majority of women and men agreed upon statutory definitions of sexual harassment as well as the necessity to implement an effective legal framework.

The above-mentioned findings were confirmed by a 2019 survey on sexual harassment in the workplace,<sup>21</sup> in which 13 % of female and 5 % of male employees reported sexual harassment (a broad majority experienced this form of discrimination more than once), mainly conducted by third parties such as customers, patients or clients. Over 80 % of the perpetrators were male. More than 40 % of all employees had no idea where to report sexual harassment in the enterprises they were working for.

On 7 July 2019, the Federal Government published the report on the first evaluation of the implementation of the Pay Transparency Act and on wage equality in enterprises with fewer than 200 employees.<sup>22</sup> Only 2 % of all employees surveyed (4 % of whom were working in larger businesses, with more than 200 employees), used their right to request information on remuneration for comparable work. Less than half of the companies asked carried out a remuneration review to detect discriminatory wage structures, and in the public sector, only a quarter have done so. Consequently, trade unions have demanded statutory amendments to extend the right to information to every employee, independent of the size of the company, and to enforce the prohibition of pay discrimination by introducing non-discriminatory pay structures, sanctions for non-compliance, and class action.<sup>23</sup>

To explore reasons for the persistent gender pay gap, a 2019 study on male-female gaps in ex ante wage expectations<sup>24</sup> conducted a survey of more than 15 000 students. The researchers found a significant and large gap in wage expectations closely resembling the actual gender pay gap. Their analysis found that sorting and negotiation styles affect the gender gap in wage expectations much more than prospective child-related labour force interruptions. This study indicates the important influence of gender stereotyping, and shows how the gender pay gap is anticipated and to some extent primed before individuals enter the labour market.

Although the gender pay gap is more pronounced in employment relationships with private employers, the civil service does not demonstrate a structure of equal remuneration. A

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<sup>20</sup> See [https://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Geschlecht/sexuelle\\_Belaestigung/sex\\_Belaestigung\\_node.html](https://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Geschlecht/sexuelle_Belaestigung/sex_Belaestigung_node.html).

<sup>21</sup> See Schröttle, M., Meshkova, K and Lehmann, C. (2019) *Tackling sexual harassment in the workplace – strategic solutions and interventions*, Federal Anti-Discrimination Agency, available at: [https://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2019/PK\\_Schroettle\\_Studie\\_Sexuelle\\_Belaestigung.html](https://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2019/PK_Schroettle_Studie_Sexuelle_Belaestigung.html).

<sup>22</sup> Federal Government (2019), *Bericht der Bundesregierung zur Wirksamkeit des Gesetzes zur Förderung der Entgelttransparenz zwischen Frauen und Männern sowie zum Stand der Umsetzung des Entgeltgleichheitsgebots in Betrieben mit weniger als 200 Beschäftigten* (Report of the Federal Government on the effectiveness of the Pay Transparency Act and on the status of implementation of the equal pay requirement in companies with fewer than 200 employees), <https://www.bmfsfj.de/blob/137224/79c7431772c314367059abc8a3242a55/bericht-der-br-foerderung-entgelttransparenz-data.pdf>.

<sup>23</sup> See DGB (German Trade Union Confederation) (2019) 'Government must tighten up the Pay Transparency Act', press release, 10 July 2019, <https://www.dgb.de/themen/++co++d5fe2412-a307-11e9-a996-52540088cada>.

<sup>24</sup> Kiessling, L. et al. (2019), *Gender Differences in Wage Expectations: Sorting, Children, and Negotiation Styles*, IZA: Institute of Labour Economics, <http://ftp.iza.org/dp12522.pdf>.

2018 analysis of the remuneration system of the states' civil services<sup>25</sup> discovered that the assessment of working activities was not made according to common criteria, that the same characteristics were defined differently, the requirement levels had different characteristics and definitions, and the structures and amounts of the remuneration tables were also different. These inconsistencies created latitude for adverse impacts upon female-dominated working activities and, thus, for indirect pay discrimination based on sex/gender. Due to the complexity of the collective agreements for the civil service, the lack of information and the difficulty of finding appropriate comparators, as well as the restriction of legal action that can be taken by individual claimants, the authors of the study deemed it nearly impossible to seek effective legal redress. With explicit regard to Article 157 TFEU, they suggested that public employers should guarantee the fundamental right to equal pay in real working life, which would also set an example for the private sector.

Moreover, following a request by the opposition, the Federal Ministry for Family, Senior Citizens, Women and Youth had to admit that the annual equality index for 2018<sup>26</sup> confirmed that there had been no progress in female leadership in the highest federal administrative bodies.<sup>27</sup> Moreover, statistics showed that the vast majority of federal authorities and administrative bodies have never been run by a woman and that there is no indication of that changing any time soon.<sup>28</sup>

In addition to demonstrating the hostile stance of major parts of the German legal discourse towards positive action measures to achieve gender equality, a 2014 study<sup>29</sup> showed that gender quotas fail in practice due to overly complex assessment procedures, with the result that it is nearly impossible for women to be equally qualified within the civil services.

Several studies on the implementation of the 2015 Act on the equal participation of women and men in leading positions of private companies and in the civil service, focusing on executive and supervisory boards of private companies, do not paint a positive picture. One author points out that the statutory gender quota for supervisory boards covering 107 companies in Germany describes the new glass ceiling for women: although the 30 % gender quota is just about fulfilled by the 160 most important DAX-index listed companies in terms of the statistical average, 27 of these companies appointed only one female supervisory board member and 23 appointed none.<sup>30</sup> Without enforceable legal obligations, companies do not seem eager to increase the number of female board members. This is especially true for executive boards: 75 % of all important companies appointed no female executive board members, and only 7 out of the 160 most important DAX-index listed companies appointed more than one – meaning two. Another 2019 study shows that women have particularly low chances of promotion to leadership positions in

<sup>25</sup> Jochmann-Döll, A. & Tondorf, K. (2018), *Gleiches Entgelt für gleichwertige Arbeit? Die Entgeltordnung des Tarifvertrags der Länder (TV-L) auf dem Prüfstand* (Equal pay for equivalent work?), ADS: Berlin, [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Entgelt\\_UN\\_Gleichheit\\_TV\\_L.html?nn=7742234](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Entgelt_UN_Gleichheit_TV_L.html?nn=7742234).

<sup>26</sup> Federal Statistical Office (2019), *Gleichstellungsindex 2018. Gleichstellung von Frauen und Männern in den obersten Bundesbehörden* (Equality Index 2018. Equality between men and women in the highest federal administrative bodies), <https://www.bmfsfj.de/blob/136468/d43f9c7b1f98fccee400dfcfdcc43251/gleichstellungsindex-2018-destatis-data.pdf>.

<sup>27</sup> See <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/gleichstellung-von-frauen-in-obersten-bundesbehoerden-weiter-vorantreiben/136430>.

<sup>28</sup> See <https://www.zeit.de/politik/deutschland/2019-06/bundesverwaltung-frauen-fuehrungspositionen-gleichstellung-sexismus>.

<sup>29</sup> 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.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMV16-2051.pdf>.

<sup>30</sup> Weckes, M. (2019), 'Strahlungsarmes "Quötchen". Die Geschlechterverteilung in Aufsichtsrat und Vorstand 2019' *Mitbestimmungsreport* No. 48, [https://www.boeckler.de/pdf/p\\_mbf\\_report\\_2019\\_48.pdf](https://www.boeckler.de/pdf/p_mbf_report_2019_48.pdf).



the financial sector: only around 10 % of executive board members at the 100 most important banks and 60 most important insurance companies in Germany are female, while the proportion of women on the supervisory boards of these institutions has stagnated at 23 %.<sup>31</sup> Given such slow progress, it would take 80 years to achieve gender parity on company boards in the German financial and insurance sector. Extremely inflexible working times prove to be a special obstacle to female leadership here. The authors of a third analysis reach the conclusion that tailored policy packages are needed in equal employment policy-making concerning leadership and board positions, including strong symbolic role models, procedural and evaluative instruments, reporting obligations and awareness raising, as well as specific and effective sanctions or, at least, the plausible threat of such sanctions.<sup>32</sup>

Further research projects on the implementation of anti-discrimination concepts concerning goods and services, the non-discrimination of transgender persons and the constitutionality of tax law privileges for women-only non-profit organisations are under way. More could be done, especially given that the research on sex/gender discrimination commissioned and published by the Federal Anti-Discrimination Authority is sparse and often outdated.<sup>33</sup> The Federal Government is required to produce gender equality reports every session; the Third Gender Equality Report, which is expected to be published at the end of 2020, will deal with gender equality in a digitalised economy.<sup>34</sup>

### 3.1.2 Other issues

The General Equal Treatment Act as the main implementation of EU anti-discrimination law uses the term '*Benachteiligung*' (putting at a disadvantage) instead of discrimination. Although this should imply no weakening of the legal protection, this terminology shows the great reluctance of legal discourse and legal practice to face discrimination as a widespread legal and social problem. The implementation of EU anti-discrimination law met with strong resistance from German law professors, lawyers and politicians, and this approach is still having a significant impact.

Most conceptualisations of anti-discrimination law in Germany are restricted to questions of equal treatment and the possible justifications for unequal treatment, without addressing questions of structural and institutionalised discrimination, distribution of resources, gender hierarchies, gender stereotypes and gender-based violence.<sup>35</sup> Innovative and advanced concepts of human rights law, especially the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), are mostly ignored. The same is still true for innovative legal commentaries that state that, notwithstanding the symmetrical wording of Article 3(2) of the Basic Law, its normative protection is asymmetrical in view of historically developed structural inequalities and current hierarchical gender relations.<sup>36</sup> The constitutional guarantee of gender equality has to be applied generally in favour of women to achieve substantial equality because its

<sup>31</sup> Holst, E. & Wrohlich, K. (2019), 'Frauen in Spitzengremien von Banken und Versicherungen: Dynamik kommt nun auch in Aufsichtsräten zum Erliegen' in *DIW Wochenbericht* No. 3, pp. 38-50, [https://www.diw.de/documents/publikationen/73/diw\\_01.c.611752.de/19-3-3.pdf](https://www.diw.de/documents/publikationen/73/diw_01.c.611752.de/19-3-3.pdf).

<sup>32</sup> Bothfeld, S. & Rouault, S. (2019), *Gender quotas for corporate boards – Why authority does not suffice. A comparative analysis of policy package design*, Berlin: Harriet Taylor Mill Institute, [https://www.harriet-taylor-mill.de/images/Discussion\\_Paper\\_37.pdf](https://www.harriet-taylor-mill.de/images/Discussion_Paper_37.pdf).

<sup>33</sup> One reason might be that the funding does not cover professional empirical research or broader legal expertise.

<sup>34</sup> See <https://www.gleichstellungsbericht.de/de/topic/43.dritter-gleichstellungsbericht.html>.

<sup>35</sup> For an overview, emphasising the positive exceptions, see Wrase, M. (2019), *Gender Equality in German Constitutional Law*, WZB Discussion Paper, Berlin. Available at: <https://www.wzb.eu/de/publikationen/discussion-papers/bei-der-praesidentin>.

<sup>36</sup> Baer, S., Markard, N. (2018), 'Article 3(2) of the Basic Law', in: v. Mangoldt/Klein/Starck (Begr.), *Grundgesetz. Kommentar*, 7th ed., para 360ff; Sacksofsky, U. (2002), 'Article 3(2)(3) of the Basic Law', in: D. C. Umbach/T. Clemens (Hrsg.), *Grundgesetz. Mitarbeiterkommentar*, Band I, para 333.



meaning is that of an anti-patriarchal prohibition of domination<sup>37</sup> respective prohibition of hierarchisation,<sup>38</sup> rather than being a question of the equal or unequal treatment of equal citizens.

While Germany celebrated the 70<sup>th</sup> anniversary of its Constitution – the Basic Law – and the 100<sup>th</sup> anniversary of women's right to vote, it became more and more obvious that gender equality is not an integral part of German legal history and that Article 3(2) of the Basic Law is one of the most strongly contested constitutional provisions. Since the 1980s, the legal debate about gender equality has been restricted to 'gender quotas' which are deemed illegitimate or unconstitutional by major parts of German legal discourse. Nowadays, resentment against what is seen as the 'unjustified preferential treatment of unqualified women' is a very successful topic even in state election campaigning. This is due to longstanding resentment, which is further fuelled by the rise of right-wing populist parties and movements, employing anti-feminism as fertile common ground and an entry into the societal mainstream.

The political success of right-wing populist parties and movements and the resulting repeated political adjustments by (especially, but not only) conservative parties result in racist takeovers of feminist politics in both societal discourse and law making. This is especially true for measures against gender-based violence, where political and legislative majorities can only be obtained if, to put it bluntly, *white* women are protected against black men.<sup>39</sup> However, other policy areas, such as reproductive rights and social security are also affected. In the opinion of the author of this report, feminist politics aiming at gender equality are never out of danger of taking a neoliberal stance and/or reproducing other societal hierarchies and structural discrimination; currently, they may be being used to strengthen racist and anti-refugee politics in Germany.

Finally, it has to be noted that anti-discrimination law is not part of legal education and training and that lawyers cannot officially specialise in this field. As a cause or consequence or both, there is a very small body of German legal literature on anti-discrimination law and the number of court decisions is far from overwhelming. Moreover, not every legal author dealing with anti-discrimination law is familiar with the key concepts. For example, an online commentary on Article 3 of the Basic Law used by many law students and lawyers does not even provide a definition of discrimination but limits itself to a rant upon 'political correctness', which does not contribute to professional legal training. The good news is that a comprehensive *Handbook on Anti-Discrimination Law* is due to be published by competent editors and authors in 2020.<sup>40</sup>

### 3.1.3 General overview of national acts

The General Equal Treatment Act contains provisions on and definitions of central concepts such as direct and indirect discrimination, intersectional discrimination, instruction to discriminate, (sexual) harassment and positive action measures. The Equal Treatment of Soldiers Act contains the same definitions and provisions.

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<sup>37</sup> Sacksofsky, U. (1996), *Das Grundrecht auf Gleichberechtigung. Eine rechtsdogmatische Untersuchung zu Artikel 3 Absatz 2 des Grundgesetzes* (The fundamental right to equality. A legal-doctrinal analysis of Article 3(2) of the Basic Law), 2nd edition, Baden-Baden: Nomos.

<sup>38</sup> Baer, S. (1995), *Würde oder Gleichheit? Zur angemessenen grundrechtlichen Konzeption von Recht gegen Diskriminierung am Beispiel sexueller Belästigung am Arbeitsplatz in der Bundesrepublik Deutschland und den USA* (Dignity or Equality? An appropriate fundamental rights concept of anti-discrimination law using the example of sexual harassment in the workplace in the Federal Republic of Germany and the USA), Baden-Baden: Nomos.

<sup>39</sup> See AK Fe.In (2019), *Frauen\*Rechte und Frauen\*Hass. Antifeminismus und die Ethnisierung von Gewalt* (Women's Rights and Misogyny. Anti-feminism and the Ethnicisation of Violence).

<sup>40</sup> Mangold, A.K & Payandeh, M. (eds) (2020), *Handbuch Antidiskriminierungsrecht. Strukturen, Rechtsfiguren, Konzepte* (Handbook on Anti-Discrimination Law. Structures, Legal Constructs, Concepts).

The Act on the equality of female and male soldiers<sup>41</sup> focuses on affirmative action and temporary special measures, reconciliation of working and family life, gender-sensitive language, and the competences of equal opportunity commissioners. The law does not contain any definition of sex/gender discrimination, but this gap is filled by the definitions provided in the Equal Treatment of Soldiers Act.

The Federal Equality Act and the state equality statutes as well as the Appointments to Federal Bodies Act and the Act on the equal participation of women and men in leading positions of private companies and in the civil service, deal with positive action measures. The Federal Equality Act and most of the state equality statutes contain concepts of structural discrimination as well as covering questions of reconciliation, intersectional discrimination and the effective implementation of gender equality.

The national acts provide some basic definitions, but mainly refer just to general concepts of sex/gender and of discrimination (direct, indirect, multiple) and of positive action or temporary special measures, leaving the conceptualisation to the competence of the courts.

Neither the Transsexuals Act<sup>42</sup> nor the Act on amending the information to be recorded in the birth register<sup>43</sup> contains definitions of sex/gender, transgender or intersex. The amended Civil Status Act employs the term 'variations of sex development', which does not suggest a break from former approaches of pathologisation and devaluation.

### 3.1.4 Political and societal debate and pending legislative proposals

There are two topics giving rise to political, societal and legal debate on questions of sex/gender discrimination in Germany. The first is the question of positive action measures, affirmative action, parity legislation or 'gender quotas'. The second is the implementation of the Federal Constitutional Court ruling on a legally acknowledged third gender option for persons identifying themselves or being identified as neither male nor female.

Since the 1980s, there have been intense discussions in (western) German legal discourse about the legitimacy of quotas for women, most of which reject the idea that such quotas are constitutional. However, the structural discrimination against women in the labour market was so obvious that federal and state legislation and policies decided to take affirmative action in the civil service (the overwhelming majority opinion in legal and political discourse argued that private employers and companies could not be obliged to act against discrimination). Many legal scholars explained why such gender quotas in favour of women would violate the prohibition of sex discrimination enshrined in the Constitution. The German gender quota legislation cases were decided upon by the CJEU rather than by the German Federal Constitutional Court. However, this may be only one of the reasons why positive action measures are still contested and fought against to this very day. After 40 years of gender quota legislation, the 1992 decision of the Federal Constitutional Court on night work<sup>44</sup> and the amendments to the German Constitution concerning gender equality in 1994,<sup>45</sup> leading legal commentaries still claim that gender quota regulations are incompatible with the Constitution. Today, the specific focus of highly

<sup>41</sup> Act on the equality of female and male soldiers of 27 December 2004, Official Journal 2004, p. 3822, <https://www.gesetze-im-internet.de/sqleig/>.

<sup>42</sup> Transsexuals Act of 10 September 1980, Official Journal 1980, p. 1654, [http://www.lexsoft.de/cqi-bin/lexsoft/justizportal\\_nrw.cgi?xid=139295,1](http://www.lexsoft.de/cqi-bin/lexsoft/justizportal_nrw.cgi?xid=139295,1).

<sup>43</sup> Act on amending the information to be recorded in the birth register (amendments to the Civil Status Act) of 18 December 2018, Official Journal 2018, p. 2635. Section 45(b) of the amended Civil Status Act is available under <https://www.gesetze-im-internet.de/pstq/>.

<sup>44</sup> Federal Constitutional Court, judgment of 28 January 1992, 1 BvR 1025/82, 1 BvL 16/83, 1 BvL 10/91, BVerfGE 85: 191-214 (*Nachtarbeitsverbot*), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/01/rs19920128\\_1bvr102584.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/01/rs19920128_1bvr102584.html).

<sup>45</sup> Law on amendments to the German Constitution of 27 October 1994, Official Journal 1994, p. 3146.

emotional debate is the question of parity legislation (see Section 3.6.5 below) to further gender equality in political participation.

The discussion about temporary special measures to guarantee women's participation in the labour market and in political decision-making is linked to discussions about dealing with a third gender option introduced by the Federal Constitutional Court. In its 2017 landmark decision on the constitutional requirement to legally recognise genders other than male or female, the court strongly emphasised that the addition of a third gender option does not impair the rights of persons identifying themselves as male or female or change anything for them, and, due to the differentiated concepts of Article 3(2) and Article 3(3) of the German Constitution, does not mean that gender quotas or other temporary special measures for women would become pointless.<sup>46</sup> Nonetheless, major parts of legal and political discourse claim that, unfortunately, quotas for women have become illegal or at least, amendments to gender quotas are necessary to include genders other than the female gender (the latest display of this new concern for conservative minds is the public lamentations that parity legislation would discriminate against intersex persons). Meanwhile, there are vast fields of regulation and administration that certainly do need major amendments to implement the constitutional court ruling, including questions of marriage and parenthood, representation, the addressing of persons, job advertisements, toilets and changing rooms, sport activities etc.

## 3.2 Sex/gender/transgender

### 3.2.1 Definition of 'gender' and 'sex'

First, it is important to know that only one term, '*Geschlecht*' is used for sex and gender in the German (legal) language. This term is not defined in German legislation. Under the Civil Status Act, the sex of every newborn child must be recorded in the birth register immediately after birth. Legal literature as well as practice tacitly assumed that this meant a male or female sex without exceptions and that the question of which sex a child was would be easily answered by medical expertise. This assumption was thoroughly disturbed by the recognition of transgender and intersex persons. Nevertheless, there is still no statutory definition. Since December 2018, the amended Civil Status Act has used the term 'variations of sex development' to cover intersex, but again without further explanation.

For some time, the Federal Constitutional Court and German legal discourse considered the term *Geschlecht* to just mean men and women, a view that seemed to be supported by Article 3 of the German Basic Law stating the equality of men and women in Article 3(2) and the prohibition of sex discrimination in Article 3(3). Moreover, the Federal Constitutional Court had taken 'natural' sex/gender differences between men and women for granted, including social roles and the gendered division of labour. It was only with the famous night work decision<sup>47</sup> in 1992 that the court decided that 'functional differences in the division of labour' were not a valid justification for the unequal treatment of women and in future only 'compelling biological differences'<sup>48</sup> would be allowed to apply. This came

<sup>46</sup> Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16 (*Dritte Option*).

<sup>47</sup> Federal Constitutional Court, judgment of 28 January 1992, 1 BvR 1025/82, 1 BvL 16/83, 1 BvL 10/91, BVerfGE 85: 191-214 (*Nachtarbeitsverbot*), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/01/rs19920128\\_1bvr102584.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/01/rs19920128_1bvr102584.html).

<sup>48</sup> The Federal Social Court, judgment of 27 August 2019, B 1 KR 37/18 R, decided that the obligation of an insured patient to contribute to the costs of non-medically required cosmetic surgery does not violate the constitutional prohibition of sex/gender discrimination, even when it concerns breast augmentations which are nearly exclusively relevant to women. The court argued that the fact that women make use of cosmetic surgery to a higher percentage than men is based on their own free decision on the basis of subjective individual beauty ideals and not on structural discrimination, and that neither the constitution nor courts should encourage or consolidate outdated role models and gender stereotypes. The court's decision, as such, seems to be right but the arguments are very doubtful, given that gender stereotyping is a central part of structural discrimination.

close to a legal interpretation of the differences between and interdependencies of biological sex and social gender but the court generally stuck to the idea of two sexes that are different by nature.

However, in its rulings on the rights of transgender persons, the Federal Constitutional Court explained that the term *Geschlecht* would also cover 'gender identity'.<sup>49</sup> The court remained vague about a definition of gender identity, but stated that *Geschlecht* was not only a biological question but included psychological gender identity and individual decisions about gender recognition.<sup>50</sup> Despite the obvious pitfalls of pathologisation, the court developed a quite revolutionary case law. The identification of 'gender identity' as a legal issue was followed by the de-coupling of gender identity and sexual orientation through the recognition of same-sex partnerships of transgender persons (thus establishing factual same-sex marriage long before it was recognised by the law),<sup>51</sup> and of gender identity and anatomical/biological sex through the abolition of the obligation to undergo compulsory sex confirmation surgery to achieve legal recognition of one's gender identity.<sup>52</sup> This double de-coupling of different dimensions of *Geschlecht* has fundamentally shaken up hegemonic orders of sex/gender.

On 10 October 2017, the Federal Constitutional Court decided that the constitutional prohibition of discrimination based upon sex/gender contained in Article 3(3) of the German Basic Law also protects persons who do not permanently identify as male or female, and that this prohibition is also violated when the Civil Status Act requires that the gender of a child be registered but does not allow for a further positive entry other than male or female.<sup>53</sup> The court cited expertise from a wide scope of other disciplines and declared that in the natural sciences and medicine in particular, a binary sex/gender order had not been retained and that a broad variety of sex developments were recognised. Further, there was broad agreement in the medical and psycho-social sciences that *Geschlecht* cannot be determined or even produced solely on the basis of genetic-anatomical-chromosomal characteristics, but is also determined by social and psychological factors.

After the 2017 ruling of the Federal Constitutional Court on the protection of persons who do not permanently identify as male or female, amendments to the Civil Status Act became necessary. It was obvious that it would be best to create new comprehensive legislation on the status and rights of transgender and intersex persons. However, the ministry responsible for civil status issues is the Federal Ministry for Internal Affairs, which is led by a truly conservative politician. After having lost the battle against the introduction of same-sex marriage, conservative parties felt the urgent need to protect hegemonic sex/gender orders as part of their core values. The Ministry denied the need for a comprehensive statutory framework and maintained the tradition of legislative inactivity concerning transgender persons and legislative devaluation concerning intersex persons (see below).

Although the Federal Constitutional Court, over a period of nearly 40 years, has declared several requirements of the Transsexuals Act to be invalid or not applicable, the relevant amendments to the law were not made. The invalidity or non-applicability of several

<sup>49</sup> Federal Constitutional Court, judgment of 16 March 1982, 1 BvR 938/81, judgment of 26 January 1983, 1 BvL 38, 40, 43/92, judgment of 15 August 1996, 2 BvR 1833/95, judgment of 6 December 2005, 1 BvL 3/03, judgment of 18 July 2006, 1 BvL 1, 12/04, judgment of 27 May 2008, 1 BvL 10/05, judgment of 11 January 2011, 1 BvR 3295/07, and judgment of 27 October 2011, 1 BvR 2027/11, mostly available at: <http://www.servat.unibe.ch/dfr/> or [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

<sup>50</sup> Federal Constitutional Court, judgment of 15 August 1996, 2 BvR 1833/95, <https://www.dgti.org/tsgrecht.html?id=94>.

<sup>51</sup> Federal Constitutional Court, judgment of 6 December 2005, 1 BvL 3/03.

<sup>52</sup> Federal Constitutional Court, judgment of 11 January 2011, 1 BvR 3295/07, [http://www.bverfg.de/e/rs20110111\\_1bvr329507.html](http://www.bverfg.de/e/rs20110111_1bvr329507.html).

<sup>53</sup> Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16, available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010\\_1bvr201916en.html;jsessionid=C9B3BA3FE2B03AC5C343E852EB72E19C.2\\_cid370](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html;jsessionid=C9B3BA3FE2B03AC5C343E852EB72E19C.2_cid370) (in English).

sections of the law is declared in footnotes, which is a very unusual way of dealing with invalid norms, especially for so many years. When the law on same-sex marriage was adopted, the Transsexuals Act was amended by deleting the revocation of the change of the first name when entering into marriage with a person of the opposite gender registration because this regulation would no longer work with the introduction of same-sex marriages. The need for further amendments has been stated time and again. However, as the remaining sections of the Transsexuals Act neither form a consistent law nor cover important fields such as education, healthcare, data protection, marriage, parenthood or an explicit prohibition of discrimination, it would be preferable to introduce a completely new legal framework.<sup>54</sup>

Legal developments concerning the registration of intersex individuals took a different path. Following a broad societal, ethical and human-rights based discussion, the relevant regulations were amended. Under the Act on amendments to the Civil Status Act of 7 May 2013, which entered into force on 1 November 2013, parents were no longer obliged to register the sex/gender of an intersex newborn child.<sup>55</sup> Children who could not be attributed to the female or the male gender were to be entered in the register of births without a gender specification. Adult persons born before 2013 could request the correction of their registered birth gender when their gender identity was neither male nor female. Unfortunately, the amendments did not cover the legal consequences of living without a registered sex/gender (e.g. concerning marriage, parenthood or anti-discrimination law); and only 4 % of intersex children born after its entry into force were registered with no gender specification or a blank gender.<sup>56</sup> The 2017 Federal Constitutional Court ruling introducing a third positive gender recognition ('diverse') contained an implementation period until 31 December 2018.

On 13 December 2018, the Bundestag passed the Law on amending the information to be recorded in the birth register with amendments to the Civil Status Act.<sup>57</sup> Under Section 45b, persons with 'variations of sex development' can declare to the registry office that the gender entry in the birth register should be replaced by the recognised possibility of the entry of 'divers' or no entry at all. Transgender persons are still waiting for regulations on the due legal recognition of their gender identity<sup>58</sup> and corresponding amendments to many other fields of law, especially family law.

### 3.2.2 Protection of transgender, intersex and non-binary persons

Article 3(3) of the German Constitution prohibits any disadvantageous treatment or treatment that privileges a person on the grounds of sex, descent, race, language, origin, religion and religious or political opinion as well as any disadvantages due to disability. As a result of a landmark Federal Constitutional Court decision, the prohibition of

<sup>54</sup> 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.

<sup>55</sup> Law on amendments to the Civil Status Act (*Gesetz zur Änderung personenstandsrechtlicher Vorschriften*) of 7 May 2013, more information at: <http://dipbt.bundestag.de/extrakt/ba/WP17/451/45180.html>.

<sup>56</sup> See Althoff, N., Schabram, G. & Follmar-Otto, P. (2016), *Gutachten Geschlechtervielfalt im Recht* (Expertise on sex/gender diversity in law), DIMR: Berlin.

<sup>57</sup> Law on amending the information to be recorded in the birth register (Amendments to the Civil Status Act) of 18 December 2018, Official Journal 2018, p. 2635, [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&start=//\\*%5B@attr\\_id=%27bgbl118s2639.pdf%27%5D#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl118s2635.pdf%27%5D\\_1569458457814](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5B@attr_id=%27bgbl118s2639.pdf%27%5D#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl118s2635.pdf%27%5D_1569458457814).

<sup>58</sup> The Higher Regional Court of Nürnberg, judgment of 3 September 2019, 11 W 1880/19, stated explicitly that there is one statute for 'transsexuals' and one statute for intersex persons covering different requirements for the legal recognition of gender identity and that these differences would not constitute discrimination on the grounds of sex/gender. Unfortunately, the court displayed disturbing ignorance concerning the central concepts of sex, gender, gender identity, inter\* and trans\*.

discrimination on the grounds of sex also covers the prohibition of discrimination on the grounds of gender identity.<sup>59</sup>

The court explained that Article 3(3) first sentence of the German Constitution protects persons who do not permanently identify with the two categories male and female against discrimination based on their gender, which is neither exclusively male nor exclusively female. Thus, intersex and non-binary persons are protected against discrimination under the prohibition of discrimination on the grounds of sex. Legal commentaries on constitutional law agree on this finding and point out that transgender is included in this protection against gender discrimination.

When the Federal Constitutional Court previously decided that several sections of the Transsexuals Act, especially those covering the requirements for gender reassignment, were incompatible with the Constitution, the court based its decisions on the fundamental right of personality and dignity, not on the principle of gender equality.<sup>60</sup> Thus, the court did not recognise gender identity as a question of gender equality. This view was contested by legal authors whose interpretation of the concept of gender equality covered non-discrimination because of sex/gender as well as gender identity (transgender and intersex persons) and sexual orientation.<sup>61</sup>

The Federal Constitutional Court's view was also criticised on the basis that granting protection under the right of personality rather than the prohibition of discrimination would make discrimination as a structural societal problem invisible, would individualise the experience of gender discrimination and would not fully separate questions of transgender identity from discussions about personal health problems.

The 2017 landmark decision of the Federal Constitutional Court stating that the prohibition of discrimination on the grounds of sex covers the prohibition of discrimination on the grounds of gender identity as well can be read as a paradigm shift, not only for intersex and non-binary persons but for transgender persons as well. Since October 2017, transgender, intersex and non-binary persons have been protected from discrimination under Article 3(3) of the German Constitution.

The 2006 General Equal Treatment Act prohibits any disadvantageous treatment on the grounds of, among others, sex/gender and 'sexual identity'. Within the German legal system, the term 'sexual identity' is only used in some of the German state constitutions that entered into force after 1990 and are very seldom applied. 'Sexual identity' is a confusing mixture of 'sexual orientation' and 'gender identity'. Accordingly, there was (and still is) some confusion about the question whether 'sexual identity' covers sexual orientation or gender identity or both. The main arguments against a broad meaning of the term 'sexual identity' are that although sexual orientation might be seen as a question of identity, there are some good arguments against this conception and, more importantly, the fact that gender identity as such is not linked to any specific sexual orientation – transgender or intersex persons may be homosexual or heterosexual or bisexual or asexual, etc. However, due to its prior use in state constitutions, controversially, it was discussed whether Article 3(3) of the Basic Law (the Federal Constitution) should be amended by including 'sexual identity' as a prohibited ground of discrimination. The Committee for Justice and Consumer Protection of the Federal Parliament held a public

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<sup>59</sup> Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010\\_1bvr201916en.html;jsessionid=C9B3BA3FE2B03AC5C343E852EB72E19C.2\\_cid370](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html;jsessionid=C9B3BA3FE2B03AC5C343E852EB72E19C.2_cid370) (in English).

<sup>60</sup> Federal Constitutional Court, judgments of 11 January 2011, 1 BvR 3295/07, and of 6 December 2005, 1 BvL 3/03.

<sup>61</sup> 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.



hearing on this topic on 12 February 2020.<sup>62</sup> The majority of the committee agreed upon the necessity of legal protection against discrimination on the grounds of sexual orientation and gender identity but, so far, no further action has been taken. The most important point is for there to be effective legal protection; the wording is less important although certainly not insignificant.

The term 'sexual identity' was partly interpreted as covering sexual orientation only and partly as covering gender identity, too. However, a growing number of legal experts suggested that transgender and intersex persons should be protected from discrimination under the category of sex/gender. In 2015, the Federal Labour Court decided that the discrimination of a transgender person constitutes prohibited discrimination either on the grounds of sexual identity or – in accordance with European directives – on the grounds of sex/gender.<sup>63</sup> The court pointed out that, at the time of the introduction of the law, the legislature may have seen transgender and intersex as covered by the category of 'sexual identity', but that this term was and is unknown in European (anti-discrimination) law and therefore, both categories could apply without weakening the protection in any way.

The Federal Labour Court further explained that a person who considers him\*herself to be discriminated against because of transsexuality already satisfies her\*his burden of proof if he\*she submits indications which suggest with a high probability that she\*he was perceived as a transsexual person and therefore disadvantaged. In such a case, the presumption is justified that the discriminating/disadvantaging person has assumed transsexuality and that this assumption was partly responsible for his\*her decision.

### 3.2.3 Specific requirements

Generally, there are no specific requirements to enjoy protection against discrimination, although the limits of binary thought are a factor. In 2007, the Administrative Court of Frankfurt decided that the non-hiring of a transgender applicant for the law enforcement services did not constitute indirect discrimination on the grounds of sex/gender and/or direct discrimination on the grounds of disability because the requirement of endogenous hormone supply was a mandatory occupational requirement for working in law enforcement.<sup>64</sup> However, in 2014, the Administrative Court of Berlin decided that a transgender civil servant working for the German Federal Bureau of Investigation could not be denied the appointment as civil servant for life on the sole ground that he was a post-operative transgender person.<sup>65</sup> The court explained that the operative and hormonal change of sex/gender was not an illness but a process accepted by federal and constitutional law and that this process as such did not indicate a premature inability to work in the future.

Transgender individuals who want to change their legal gender must file an application before the competent local court. Transgender applicants have to have considered themselves not to belong to the sex/gender indicated in their birth registration any longer but to the opposite sex/gender for at least three years. Two different medical or psychological experts appointed by the court have to testify on this individual sense of belonging as well as to conclude that it is highly probable that this sense of belonging to

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<sup>62</sup> All documents are available at: [https://www.bundestag.de/ausschuesse/a06\\_Recht/anhoerungen#](https://www.bundestag.de/ausschuesse/a06_Recht/anhoerungen#).

<sup>63</sup> Federal Labour Court, judgment of 17 December 2015, 8 AZR 421/14.

<sup>64</sup> Administrative Court of Frankfurt, judgment of 3 December 2007, 9 E 5697/06.

<sup>65</sup> Administrative Court of Berlin, judgment of 30 April 2014, 36 K 394.12.

the opposite sex/gender will not change.<sup>66</sup> The applicable law, the Transsexuals Act,<sup>67</sup> required, among other things, mandatory surgery, sterilisation, divorce, German citizenship and a minimum age. However, in several decisions, the Federal Constitutional Court decided that all these additional requirements were incompatible with the Constitution.

### 3.3 Direct sex discrimination

#### 3.3.1 Explicit prohibition

Direct sex discrimination is explicitly prohibited in German legislation. 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. This is a direct implementation of the definitions given in the European directives, although it has 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.<sup>68</sup>

#### 3.3.2 Prohibition of pregnancy and maternity discrimination

Pregnancy and maternity discrimination are explicitly prohibited in legislation as forms of direct sex discrimination. Section 3(1)(2) of the General Equal Treatment Act states that direct discrimination on the grounds of sex will also be taken to occur in relation to employment (access to employment, employment and working conditions, pay, vocational training, employment organisations etc.) in the event of the less favourable treatment of a woman on account of pregnancy or maternity.<sup>69</sup> 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.

#### 3.3.3 Specific difficulties

Following the implementation of the *Test-Achats* ruling, there are no specific difficulties in applying the concept of direct sex discrimination in Germany (despite the usual problems of enforcement of anti-discrimination law). Intersectional discrimination and some kinds of indirect discrimination and sexual harassment remain the major problems. Direct sex discrimination rarely occurs because it is easy to discover.<sup>70</sup> What is still missing under the General Equal Treatment Act, is the prohibition of discrimination in cases without an

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<sup>66</sup> The Federal Constitutional Court, judgment of 17 October 2017, 1 BvR 747/17, confirmed the requirement of these two expert opinions by explaining that changing one's gender is a severe and troublesome process which might require therapeutic support. But the court pointed out that the decision whether to seek for therapeutic assistance or not is completely at the discretion of the transgender person. Therefore, medical and psychological experts must not use the necessary assessment to persuade or even force other persons to seek therapeutic guidance and must not ask questions beyond those necessary to give their expert opinion on the topics asked for by the law.

<sup>67</sup> Act on the alteration of first names and the determination of gender affiliation in special cases – Transsexuals Act (*Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen – Transsexuellengesetz*) of 10 September 1980, as amended, available at: <https://www.gesetze-im-internet.de/tsg/BJNR016540980.html>.

<sup>68</sup> Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, pp. 25f, suggest using the correct term, 'discrimination'.

<sup>69</sup> Confirmed by Federal Labour Court, judgment of 24 February 2016, 7 AZR 253/14.

<sup>70</sup> For direct discrimination on grounds of maternity (protection) see: Federal Labour Court, judgment of 2 August 2006, 10 AZR 425/05, and judgment of 24 February 1999, 10 AZR 258/98. Interestingly, 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.



identifiable victim (CJEU in *Feryn*).<sup>71</sup> One of the reasons for this might be that the system of legal protection and enforcement is strictly based on individual rights.

### 3.4 Indirect sex discrimination

#### 3.4.1 Explicit prohibition

Indirect sex discrimination is explicitly prohibited in German legislation. Section 3(2) of the General Equal Treatment Act states that indirect discrimination will 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, which stipulates 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.

#### 3.4.2 Statistical evidence

Generally, statistical evidence can be used in order to establish a presumption of indirect sex discrimination, but the Federal Labour Court has clearly restricted the use of statistical data as *prima facie* evidence.<sup>72</sup> In contrast to the State Labour Court of Berlin and Brandenburg in the same anti-discrimination lawsuit, the Federal Labour Court remained unimpressed by the fact that 69 % of the employees of the defendant were female, while all executive board members, highest managers and 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.<sup>73</sup>

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.<sup>74</sup> 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 against 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.<sup>75</sup>

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<sup>71</sup> Judgment of the Court (Second Chamber) of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, 2008, Case C-54/07, ECLI:EU:C:2008:397.

<sup>72</sup> 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.

<sup>73</sup> 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 could very rarely enjoy the advantages of a statutory shift of the burden of proof. The adoption of the Pay Transparency Act did not considerably change this situation, see section 11.5 below.

<sup>74</sup> Labour Court of Stuttgart, judgment of 26 April 2007, 15 Ca 11133/06.

<sup>75</sup> 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 of identifying 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.

### 3.4.3 Application of the objective justification test

The objective justification test is mainly applied correctly by national courts. However, when the (gendered) body and/or public safety is 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 Frankfurt<sup>76</sup> and for women who are under 163 cm tall by the Administrative Court of Düsseldorf,<sup>77</sup> both of which invoked 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 the employment of a female police officer who is 161 cm tall, especially considering that in other German states<sup>78</sup> the minimum height for female police staff is 160 cm.

The Administrative Court of Schleswig-Holstein considered minimum height requirements for police officers to constitute unjustified indirect sex discrimination.<sup>79</sup> The State Labour Court of Cologne agreed in the case of a minimum height for pilots of 165 cm.<sup>80</sup> 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 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.<sup>81</sup> The main formal<sup>82</sup> argument was that the state 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 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. The newly elected State Parliament of North Rhine-Westphalia seems to have decided against a more advanced understanding of indirect discrimination and temporary measures and against taking the relevant judgments of the CJEU (e.g. *Kalliri*)<sup>83</sup> into proper consideration. In October 2017, the Government of North Rhine-Westphalia introduced a standard minimum height requirement for female and male applicants for the police forces of 163 cm. The State Administrative Court of North Rhine-Westphalia decided that such a standard requirement, although excluding a quarter of female and only a very small number of male applicants, is in accordance with constitutional and European law.<sup>84</sup> The court acknowledged the standard minimum height requirement to constitute indirect sex

<sup>76</sup> Administrative Court of Frankfurt, judgment of 3 December 2007, 9 E 5697/06.

<sup>77</sup> Administrative Court of Düsseldorf, judgment of 2 October 2007, 2 K 2070/07.

<sup>78</sup> See Administrative Court of Berlin, judgment of 1 June 2017, 5 K 219.16, and State Administrative Court of Berlin and Brandenburg, judgment of 27 January 2017, OVG 4 S 48.16, confirming a minimum body height of 160 cm for female police officers in the state of Berlin.

<sup>79</sup> Administrative Court of Schleswig-Holstein, judgment of 26 March 2015, 12 A 120/14.

<sup>80</sup> State Labour Court of Cologne, judgment of 25 June 2014, 5 Sa 75/14.

<sup>81</sup> State Administrative Court of North Rhine-Westphalia, judgment of 21 September 2017, 6 A 916/16; confirmed by State Administrative Court of North Rhine-Westphalia, judgment of 28 June 2018, 6 A 2016/17.

<sup>82</sup> More than one administrative judge involved in lower-instance proceedings in North Rhine-Westphalia 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.

<sup>83</sup> Judgment of the Court (First Chamber) of 18 October 2017, *Ypourgos Esoterikon and Ypourgos Ethnikis paideias kai Thriskevmaton v. Maria-Eleni Kalliri*, Case C-409/16, ECLI:EU:C:2017:767.

<sup>84</sup> State Administrative Court of North Rhine-Westphalia, judgment of 28 June 2018, 6 A 2016/17.

discrimination,<sup>85</sup> but held that this discrimination was justified by a minimum height of 163 cm being a genuine and determining occupational requirement under Article 14(2) of Directive 2006/54. The court explained that a height of 163 cm was the mandatory lower limit necessary to maintain the police's ability to function and therefore may not be reduced for reasons of equal treatment, in short: that a reduction below an objectively determined aptitude was out of the question. In strict accordance with this judgment, the State Administrative Court of Saarland decided that the state's standard minimum height for police forces was indirect sex discrimination justified as a determining occupational requirement under Article 14(2) of Directive 2006/54, approving a minimum height of 162 cm.<sup>86</sup> It remains to be seen whether the state police's ability to function will falter in the face of applicants with this body height.

Another problem is the possibility of a strong gender bias in the proposed objective justification. In August 2019, the Administrative Court of Berlin confirmed the decision of the choirmaster of the famous Berlin State and Cathedral Choir not to accept a girl as singer because she could not produce the specific 'boys' choir sound'.<sup>87</sup> It is doubtful whether the discrimination in question is 'indirect' as the choir was and is advertised as a boys' choir and encourages the application of boys only. At very least, the court should have dealt more deeply with the question of the gender-neutrality of the 'boys' choir sound' criterion and with the assurance of the choirmaster that he would accept any girl who could produce this special sound given that he said that, in 30 years of working experience, he had only once met a girl 'sounding like a boy'.

#### 3.4.4 Specific difficulties

There are some difficulties 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 against part-time workers, especially before the Part-Time and Fixed-Term Employment Act entered into force.<sup>88</sup>

However, 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 special discriminatory context or discriminatory intention, and reveal problems in identifying comparable groups and in dealing with statistical data.<sup>89</sup>

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<sup>85</sup> Obviously, the court was not considering the possibility of a constitutional obligation of legislation or the Government to further gender equality and to tackle (indirect but obvious) sex discrimination.

<sup>86</sup> State Administrative Court of Saarland, judgment of 25 March 2019, 1 B 2/19.

<sup>87</sup> Administrative Court of Berlin, judgment of 16 August 2019, 3 K 113.19.

<sup>88</sup> 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.

<sup>89</sup> See Sacksofsky, U. (2010), *Mittelbare Diskriminierung und das Allgemeine Gleichbehandlungsgesetz* (Indirect discrimination and the General Equal Treatment Act), Berlin, pp. 21ff.

### 3.5 Multiple discrimination and intersectional discrimination<sup>90</sup>

#### 3.5.1 Definition and explicit prohibition

Multiple discrimination and/or intersectional discrimination is covered by German legislation. Unequal treatment on several grounds is explicitly addressed in Section 4 of the General Equal Treatment Act which requires that the justification extends to all these grounds as well: 'Where unequal treatment occurs on several of the grounds referred to under Section 1, this unequal treatment may only be justified under Sections 8 to 10 and 20 when the justification extends to all those grounds for which the equal treatment occurred.' Nevertheless, there is some discourse in Germany asserting that there would be no legal protection against multiple or intersectional discrimination which is obviously not the case but might be based upon the very small amount of case law.

Under the General Equal Treatment Act, applicants may simultaneously invoke several grounds of discrimination in the same claim and the statutory legal framework would provide for greater chances of success and even higher damages. But there are several obstacles. First, the number of anti-discrimination cases is low and thus, there is a lack of experience and routine within the courts. Secondly, in respect to goods and services, different statutory provisions and protection levels apply for protection against racist discrimination and other forms of discrimination. Thirdly, many courts are still struggling with the concept of indirect discrimination, as could be seen in cases concerning disadvantages due to wearing a Muslim headscarf.<sup>91</sup>

#### 3.5.2 Case law and judicial recognition

Although multiple and intersectional discrimination have to be considered as a rule and not an exception, there have only been a few court cases in Germany.<sup>92</sup> The main reason for this is that the courts do not realise that they are dealing with multiple/intersectional discrimination and that the vast majority of claimants do not focus on this question, but tend to focus on the ground of discrimination that 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 constitute direct discrimination on the grounds of religion intertwined with indirect discrimination on the grounds of gender and racial prejudice.<sup>93</sup> When young men of an alleged foreign ethnic origin are denied access to clubs and discotheques, some courts have identified intersectional discrimination on the

<sup>90</sup> For more information, see Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

<sup>91</sup> References and critique by Baer, S. & Wrase, M. (2006), 'Zwischen Integration und "westlicher" Emanzipation: Verfassungsrechtliche Perspektiven zum Kopftuch(-verbot) und der Gleichberechtigung' (Between integration and 'Western' emancipation: (prohibitions of) headscarf and gender equality), in: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (KritV) Vol. 89, No. 4, Schwerpunkt: Menschenwürde, pp. 401-416. In cases concerning 'neutrality statutes' formally prohibiting the wearing of religious clothing at work but in fact applying nearly solely to Muslim women wearing the headscarf, the courts still focus solely on possible violations of religious freedom and discrimination on the grounds of religion and do not analyse the intersectional and partly indirect discrimination on the grounds of religion, gender and racist attributions, e.g. State Labour Court of Berlin and Brandenburg, judgment of 27 November 2018, 7 Sa 963/18. As claimants are fully aware of this self-restriction of the courts, they restrict their own legal argument to questions of freedom of religion and religious equality.

<sup>92</sup> 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](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Mehrdimensionale_Diskriminierung_jur_Analyse.pdf).

<sup>93</sup> 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.

grounds of gender and racial prejudice,<sup>94</sup> while some solely focus on the racist implications.<sup>95</sup> 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.

### 3.6 Positive action

#### 3.6.1 Definition and explicit prohibition

As means to achieve gender equality and freedom from discrimination, positive action measures are part of German non-discrimination law.

According to Article 3(2)(2) of the Federal Constitution, public entities are under an obligation to further women's equality in actual practice. There has always been legal debate about the content and extent of this provision although the Federal Constitutional Court gave some strong hints, especially in its famous decision on night work.<sup>96</sup> The provision under Article 3(2)(2) is legally binding but the consequences are still debated. However, one consequence is that the Bundestag and the federal states (*Länder*) have enacted laws to further equality between the sexes.<sup>97</sup>

The equality acts (*Gleichstellungsgesetze*) on federal and state level contain obligations to further gender equality, including affirmative action and positive measures such as gender quotas as well as equal opportunity officers and measures for the reconciliation of working and family life. Most of these statutes 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, 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. Some states have started to amend their equality laws and acts on the civil service in recent years, especially by introducing gender quotas with the requirement of *substantially* equal qualification for the civil service.<sup>98</sup>

Under the amended Appointments to Federal Bodies Act (*Bundesgremienbesetzungsgesetz*), a statutory 50 % gender quota to be reached by 2018 entered into force. This is a legally binding obligation. Unfortunately, the annual equality index for 2018, published on 5 June 2019, confirmed that there had been no progress in female leadership within the highest federal administrative bodies.<sup>99</sup>

Further, every German state has its own procurement statute (*Vergabegesetz*) and the majority contain a regulation that the promotion of women by the (private) contractor can be considered as a possible social criterion when deciding on the procurement procedure

<sup>94</sup> 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.

<sup>95</sup> 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.

<sup>96</sup> Federal Constitutional Court, judgment of 28 January 1992, 1 BvR 1025/82, 1 BvL 16/83, 1 BvL 10/91, BVerfGE 85: 191-214 (*Nachtarbeitsverbot*), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/01/rs19920128\\_1bvr102584.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/01/rs19920128_1bvr102584.html).

<sup>97</sup> A compilation of the federal and state equality statutes is available at: [http://www.vernetzungsstelle.de/index.cfm?uuid=B707C03404AD9B19F588422ECC8D51D8&and\\_uuid=1789C4EDCCE9E2FCFBC05C7F9E98B53F](http://www.vernetzungsstelle.de/index.cfm?uuid=B707C03404AD9B19F588422ECC8D51D8&and_uuid=1789C4EDCCE9E2FCFBC05C7F9E98B53F). The statutes are legally binding, but their effectiveness can be debated. In particular, the Federal Equality Act does not work too well concerning leading positions within the federal administration, especially the administration of the Federal Government.

<sup>98</sup> E.g. North Rhine-Westphalia, Mecklenburg Pomerania and Lower Saxony; see the statements of the German Women Lawyers' Association, available at: <https://www.djb.de/verein/Kom-u-AS/K5/2016.html>.

<sup>99</sup> Federal Statistical Office (2019), *Gleichstellungsindex 2018. Gleichstellung von Frauen und Männern in den obersten Bundesbehörden* (Equality Index 2018. Equality between men and women in the highest federal administrative bodies), <https://www.bmfsfj.de/blob/136468/d43f9c7b1f98fccc400dfcfdcc43251/gleichstellungsindex-2018-destatis-data.pdf>.

and finally, the contract. However, public authorities are enabled, rather than obliged to use this criterion.

Apart from regulations with regard to supervisory board members (see below) or public procurement, private employers are not obliged to adopt positive action measures. They are slightly encouraged: Section 5 of the General Equal Treatment Act states that unequal treatment will only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on the grounds of sex/gender in the field of employment or in the provision of goods and services.

### 3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

There is strong antipathy towards positive action measures in German legal and political discourse. This might be the reason why the term 'positive action' is very seldom used. Many equality statutes of the states employ the term 'equal opportunities' (or name their laws this way, such as the Act on the realisation of equal opportunities for women and men in the public sector of the State of Baden-Württemberg), and the same is true for laws on higher education or the internal regulations of universities.

Some of the regulators as well as the implementing authorities use the term 'equal opportunities' strategically as a kind of appeasement policy to avoid the terms 'positive action', 'affirmative action' or 'gender quota', while in fact employing positive action measures to reach substantive equality. In 1994, immediately after amendments to the Constitution introducing Article 3(2)(2) of the Basic Law, the political parties involved in the amendments could not agree upon the question of whether positive action measures were now compatible with the Constitution or, on the contrary, excluded. Until this very day and despite the rulings of the Federal Constitutional Court as well as the CJEU and the subsequent statutory amendments, many judges, lawyers and legal scholars claim that positive action measures, especially quotas, would impair the principle of equal qualification, aptitude and professional performance.<sup>100</sup> Since any German quota regulation presupposes the same qualification, aptitude and performance of applicants (which is one of the main problems acknowledging the fact that gender-biased assessment procedures and persistent gender stereotypes lead to the devaluation of female qualifications), it is impossible that they come into conflict with the performance principle. Their scope of application begins precisely where that of the performance principle ends.

Nonetheless, a greater number of legal commentaries and authors emphasise that the law would only require 'equal opportunities', thus questioning the compatibility of positive action measures with the Constitution. Feminist legal scholars (and practitioners) point out that the discussion about equality of opportunities or results is not very effective, since the elimination of disadvantages, in particular structural discrimination and harmful gender role stereotypes, may require different Government measures depending on the situation.<sup>101</sup> The state's obligation to enforce equal rights in Article 3(2)(2) of the Basic Law makes it clear that the prohibition of discrimination on the grounds of sex/gender not only aims at formal equal treatment, but always at the elimination of actual disadvantages as well, meaning there is a state obligation to guarantee equality in freedom as well as

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<sup>100</sup> An especially unfortunate example was given by the Association of German Administrative Court Judges (2016), 'Stellungnahme zu dem Antrag zur Reform der Wahl für die obersten Bundesgerichte vom 17. Februar 2016' (Statement on the draft law on the reform of elections to the federal courts), who claimed that gender quotas would 'inevitably conflict with the principle of performance enshrined in the constitution' and that there was great danger of the election of a less qualified female candidate. (Some days later, the Federal Constitutional Court confirmed the election of a less qualified *male* candidate instead of a better qualified female candidate with the argument that the *electoral element* would limit the performance principle.)

<sup>101</sup> See Baer, S., Markard, N. (2018), 'Article 3(2) of the Basic Law', in v. Mangoldt/Klein/Starck (Begr.), *Grundgesetz. Kommentar*, 7th ed., para 367ff; Sacksofsky, U. (2002), 'Article 3(2)(3) of the Basic Law', in: D. C. Umbach/T. Clemens (Hrsg.), *Grundgesetz. Mitarbeiterkommentar*, Band I, para 350ff.

the individual right of women not to suffer disadvantages solely because of their sex/gender.<sup>102</sup>

### 3.6.3 Specific difficulties

There are some difficulties in relation to positive action in Germany. 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 overly complex systems of qualification assessment leading to the result that there are hardly ever two persons with equal qualifications, let alone a man and a woman.<sup>103</sup> 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.

Such amendments try to address the problem of how to establish equal qualification in the face of structural sex/gender discrimination. The judgments of the CJEU were not very helpful in this regard. Although the court encouraged the use of positive action by stating that such measures could be legitimate in general, it constrains their use at the same time by requiring equal qualification without reflecting the gender bias in deciding about qualifications or the impact of gender stereotypes. In the decision of *Abrahamsson*<sup>104</sup> the court even acknowledged the fact that gender-biased assessment procedures and persistent gender stereotypes lead to the devaluation of female qualifications but held that the qualification must be equal. In the author's opinion, this was a severe mistake with a view to achieving gender equality in employment. Moreover, the CJEU ignored the different (and higher) state obligations set by CEDAW although European law including case law must not interfere with the standards set by international human rights treaties ratified by all EU Member States. Clinging to such concepts of formal equal qualification entails irresolvable dilemmas. Important legal commentaries in Germany, for example, state that women's qualifications are often judged unfavourably and that actual or anticipated burdens of family tasks can also have a negative impact, yet, in the next paragraph, insist upon the requirement that a qualification must always be equal to apply any gender quota<sup>105</sup> without answering the question that inevitably arises, which is how equal qualification can be established when the assessment procedures are deeply gender-biased.

The 2016 Act on the modernisation of the Civil Service Act 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 experienced specific hardships, and under 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.<sup>106</sup> The court accepted the regulation that female civil

<sup>102</sup> See Baer, S., Markard, N. (2018), 'Article 3(2) of the Basic Law', in v. Mangoldt/Klein/Starck (Begr.), *Grundgesetz. Kommentar*, 7th ed., para 355; Sacksofsky, U. (2002), 'Article 3(2)(3) of the Basic Law', in D. C. Umbach/T. Clemens (Hrsg.), *Grundgesetz. Mitarbeiterkommentar*, Band I, para 349, 353. Nußberger, A. (2018), 'Article 3(2) of the Basic Law', in: Sachs (Hrsg.), *Grundgesetz. Kommentar*, 8th ed., para 261, regards the elimination of actual disadvantages of women as the state's duty to protect (which, in the light of statistical findings, impacts in particular on the professional situation of women).

<sup>103</sup> 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.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMV16-2051.pdf>.

<sup>104</sup> Judgment of the Court (Fifth Chamber) of 6 July 2000, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, Case C-407/98, 2000 ECR I-05539, ECLI:EU:C:2000:367.

<sup>105</sup> E.g. Langenfeld, C. (2015), 'Article 3', in Maunz/Dürig (Hrsg.), *Grundgesetz. Kommentar*, para 95f.

<sup>106</sup> State Administrative Court of North Rhine-Westphalia, judgment of 21 February 2017, 6 B 1109/16.



servants are to be given preference in promotion under the provision of a substantially equal qualification, aptitude and professional performance, unless a male applicant experienced specific hardships. However, 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, not only by the media but by political parties as well, as a decision upon the general incompatibility of positive action measures with the Constitution. 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.<sup>107</sup> 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.<sup>108</sup> 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.

The use of resentment in public opinion 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.<sup>109</sup> Another strong indicator of fundamental misunderstandings of gender equality law is the fact that all new state equality acts or recent amendments to state and federal equality acts introduce a formally gender-neutral approach to positive action measures in covering men and women alike 'when they are underrepresented.' Much less visible, most of the same 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.<sup>110</sup> 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 court gave the opinion that the lack of the reconciliation of working and family life, the problem of sexual harassment at the workplace and the small number of women in leading positions were all signs of the structural discrimination against women. As long as this structural discrimination was not effectively tackled, the legislature was authorised 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.<sup>111</sup> 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 and that, quite the

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<sup>107</sup> Act on amendments to the Civil Service Act of North Rhine-Westphalia of 19 September 2017, <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument?Id=XMMGVB1729|764|765>.

<sup>108</sup> State Administrative Court of North Rhine-Westphalia, judgment of 5 September 2019, 6 B 852/19. The judgment confirmed the return to the former regulation although it also decided that two more years of service and experience did not constitute a 'specific hardship' in favour of a male applicant.

<sup>109</sup> See <https://www.qwi-boell.de/de/2016/09/28/antifeminismus-scharnier-zwischen-rechtem-rand-und-mitte>, with many further references.

<sup>110</sup> State Constitutional Court of Mecklenburg-Western Pomerania, judgment of 10 October 2017, LVerfG 7/16, available at: <https://www.mv-justiz.de/gerichte-und-staatsanwaltschaften/landesverfassungsgericht/>.

<sup>111</sup> State Labour Court of Schleswig-Holstein, judgment of 2 November 2017, 2 Sa 262 d/17.



opposite, the use of affirmative action or special measures is an essential tool in achieving substantial equality.

Another problem is that women in leading positions – whether they were actually appointed by employing gender quotas or not – are stigmatised 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 against 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.<sup>112</sup>

#### 3.6.4 Measures to improve the gender balance on company boards

Germany has adopted measures that aim to improve the gender balance on company boards. The Act on the equal participation of women and men in leading positions of private companies and in the civil service, adopted on 6 March 2015, introduced a statutory 30 % gender quota for supervisory boards of the 100 most important private companies in Germany, to be achieved by 2016.<sup>113</sup> In cases of non-compliance, the election is void and the seat designated for a member of the underrepresented gender remains vacant. In addition, the act obliges many important companies to publish target gender quotas for boards and positions at the highest management level. Critics point to the narrow scope of application and doubt the effectiveness of the sanctions, calling for statutory gender quotas on executive boards and at higher management levels, as well as more effective sanctions, such as the invalidity of the resolutions of the non-compliant board or corporate tax disadvantages.<sup>114</sup> 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 supervisory boards covers only 108 companies in Germany. On average, these 108 companies currently fulfil their legal obligation of 30 % female supervisory board members. In the civil service, the quota requirements can only be fulfilled by applying the regulations on the preferential recruitment or promotion of equally qualified women, but the law is silent as to how private companies must reach the 30 % gender quota on supervisory boards. With reference to the ‘quota decisions’ of the CJEU as well as Article 157 TFEU and Article 23(1) of the Charter, two legal essays (with very similar wording in this regard) claim the incompatibility of the quota requirement for supervisory boards of 100 companies with European law.<sup>115</sup> As far as can be seen, this opinion has not been confirmed by any court.

Although the obligation on private companies to set themselves target gender quotas covers 2 500 to 3 500 private companies, there are no effective sanctions in the event that companies set 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.<sup>116</sup> In March 2017, the Federal Minister for Family, Senior Citizens, Women and Youth expressed her disappointment with the broad failure of

<sup>112</sup> 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>.

<sup>113</sup> Act 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, see <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/frauen-und-arbeitswelt>.

<sup>114</sup> See German Women Lawyers Association, Statement of 7 October 2014, <https://www.djb.de/verein/Kom-u-AS/K1/st14-17/>, and the Berlin declaration by seventeen women’s organizations, available at: <https://www.djb.de/st-pm/pm/pm18-04/>.

<sup>115</sup> Olbrich, H. & Krois, C. (2015), ‘Das Verhältnis von “Frauenquote” und AGG’, in *Neue Zeitschrift für Arbeitsrecht*, S. 1288 (1291), and Schleusener, A. (2016), ‘Diskriminierungsfreie Einstellung zwischen AGG und Frauenförderungsgesetz’, *Neue Zeitschrift für Arbeitsrecht – Beilage*, S. 50 (54).

<sup>116</sup> See <http://www.spiegel.de/karriere/frauenquote-in-mdax-unternehmen-keine-weiblichen-vorstaende-a-1135060.html>.

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.<sup>117</sup> In 2018, the ministry announced that there would be an annual monitoring report on the development of women's and men's representation on boards and in management positions of the private and public sectors as well as an annual equality index with regard to the highest federal administrative bodies to be published by the Federal Statistical Office on 31 December every year.<sup>118</sup> The annual equality index for 2018 was published on 5 June 2019 and confirmed that there had been no progress in female leadership in federal administrative bodies.<sup>119</sup> The Federal Ministry for Family, Senior Citizens, Women and Youth announced the intention to tighten legal regulations on the topic.<sup>120</sup>

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.<sup>121</sup> On average, the 160 most important DAX-index listed companies have boards with 30 % female members, but in fact, 27 of these companies appointed only one female supervisory board member and 23 appointed none.<sup>122</sup> Within the financial sector (banks and insurance companies), the proportion of women on the supervisory boards has stagnated at 23 %.<sup>123</sup> The 107 statutory quota-subject companies reached a 34 % women quota on their supervisory boards, while comparable companies without statutory obligations increased representation only to the level of having 22 % female supervisory board members.<sup>124</sup> Moreover, 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.<sup>125</sup> By the end of 2017, 68.5 % of the 200 largest companies in Germany had no female members at all on their executive boards.<sup>126</sup>

In February 2019, only 8.8 % of the executive board members of the 160 most important DAX-index listed companies (9.6 % on the boards of the 107 quota-subject companies)<sup>127</sup> were female, and 53 of them set themselves a zero target quota for women in leading management positions.<sup>128</sup> Out of 1 747 companies, obliged to set themselves target gender quotas, 757 companies set themselves a zero target quota and 664 set no quota

<sup>117</sup> See <http://www.spiegel.de/karriere/manuela-schwesig-droht-firmen-mit-harter-quote-fuer-frauen-in-fuehrungsjobs-a-1137809.html>.

<sup>118</sup> See <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/frauen-und-arbeitswelt/quote-oeffentlicher-dienst/quote-fuer-mehr-frauen-in-fuehrungspositionen--oeffentlicher-dienst/116016>.

<sup>119</sup> Federal Statistical Office (2019), *Gleichstellungsindex 2018. Gleichstellung von Frauen und Männern in den obersten Bundesbehörden* (Equality Index 2018. Equality between men and women in the highest federal administrative bodies), <https://www.bmfsfj.de/blob/136468/d43f9c7b1f98fccc400dfcfdcc43251/gleichstellungsindex-2018-destatis-data.pdf>.

<sup>120</sup> See <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/gleichstellung-von-frauen-in-obersten-bundesbehoerden-weiter-vorantreiben/136430>.

<sup>121</sup> German Institute for Economic Research (DIW) (2018), 'Women Executives Barometer 2018', 18 January 2018, press release, available at: [https://www.diw.de/sixcms/detail.php?id=diw\\_01.c.574761.en](https://www.diw.de/sixcms/detail.php?id=diw_01.c.574761.en).

<sup>122</sup> Weckes, M. (2019), 'Strahlungsarmes "Quötchen". Die Geschlechterverteilung in Aufsichtsrat und Vorstand 2019' *Mitbestimmungsreport* No. 48, [https://www.boeckler.de/pdf/p\\_mbf\\_report\\_2019\\_48.pdf](https://www.boeckler.de/pdf/p_mbf_report_2019_48.pdf).

<sup>123</sup> Holst, E. & Wrohlich, K. (2019), 'Frauen in Spitzengremien von Banken und Versicherungen: Dynamik kommt nun auch in Aufsichtsräten zum Erliegen' in *DIW Wochenbericht* No. 3, pp. 38-50, [https://www.diw.de/documents/publikationen/73/diw\\_01.c.611752.de/19-3-3.pdf](https://www.diw.de/documents/publikationen/73/diw_01.c.611752.de/19-3-3.pdf).

<sup>124</sup> See FidAR (2019), Women on Board Index 2019, [https://www.fidar.de/webmedia/documents/wob-index-185/2019-06/190114\\_Studie\\_WoB-Index\\_185\\_III.pdf](https://www.fidar.de/webmedia/documents/wob-index-185/2019-06/190114_Studie_WoB-Index_185_III.pdf).

<sup>125</sup> Allbright Foundation (2017), 'Ein ewiger Thomas-Kreislauf?', available at: <https://www.allbright-stiftung.de/allbright-berichte>.

<sup>126</sup> German Institute for Economic Research (DIW) (2018), 'Women Executives Barometer 2018', 18 January 2018, press release, available at: [https://www.diw.de/sixcms/detail.php?id=diw\\_01.c.574761.en](https://www.diw.de/sixcms/detail.php?id=diw_01.c.574761.en).

<sup>127</sup> See FidAR (2019), Women on Board Index 2019, [https://www.fidar.de/webmedia/documents/wob-index-185/2019-06/190114\\_Studie\\_WoB-Index\\_185\\_III.pdf](https://www.fidar.de/webmedia/documents/wob-index-185/2019-06/190114_Studie_WoB-Index_185_III.pdf).

<sup>128</sup> See <https://www.manager-magazin.de/unternehmen/karriere/immer-noch-kaum-frauen-in-den-vorstaenden-a-1261613.html>.

at all.<sup>129</sup> 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 amendments to the existing legal obligations would force the companies to give an explanation for their target quotas and that serious consideration was being given to the idea of sanctions.<sup>130</sup>

### 3.6.5 Positive action measures to improve the gender balance in other areas

Germany has adopted other positive action measures to improve the gender balance in some areas, such as universities and political participation and representation.

In academia, various programmes to increase the number of female researchers and professors exist at university, state and federal level. One of the most important programmes during the last years was (and still is) the female professors programme run by the Federal Ministry of Education and Research in cooperation with the states.<sup>131</sup> Universities qualify for participation in the programme through gender equality proposals that are externally assessed. Universities that submit a convincing gender equality proposal can apply for start-up funding for up to three professorships filled by women for a period of five years. The programme is now in its third round, has been funded with a total of EUR 500 million and has led to the appointment of more than 500 female professors and the strengthening of gender equality structures at universities. The third funding phase focuses on the promotion of young researchers. The legitimacy of the programme was debated, but the third phase shows that it was accepted, mainly because it uses financial incentives.

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 %). However, following the elections in September 2017, the percentage of female members of the Federal Parliament (Bundestag) dropped to a mere 30.9 % (from 36.5 % in the preceding legislative period), which is the lowest percentage in the past 20 years.<sup>132</sup> 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.<sup>133</sup> Between 21.8 % to 40.7 % of members of the state Parliaments are female.<sup>134</sup> Women make up no more than 25 % of local council members. More than 90 % of all mayors in Germany are male.

During the 1980s, the idea of gender quotas in political candidate lists was vividly discussed but a male-dominated jurisprudence rejected any concept of a binding quota in public affairs.<sup>135</sup> 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.<sup>136</sup> In November 2016, a civil society alliance brought an action before the Bavarian Constitutional Court claiming that the Bavarian election laws violate the

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<sup>129</sup> See <https://www.manager-magazin.de/unternehmen/karriere/immer-noch-kaum-frauen-in-den-vorstaenden-a-1261613.html>.

<sup>130</sup> See <https://www.manager-magazin.de/unternehmen/karriere/immer-noch-kaum-frauen-in-den-vorstaenden-a-1261613.html>.

<sup>131</sup> See <https://www.bmbf.de/de/das-professorinnenprogramm-236.html>.

<sup>132</sup> See <https://www.bpb.de/gesellschaft/gender/frauen-in-deutschland/49418/frauenanteil-im-deutschen-bundestag>.

<sup>133</sup> See <https://www.welt.de/politik/deutschland/article169078778/Diese-Fraktionen-haben-den-geringsten-Frauenanteil.html>.

<sup>134</sup> See <https://www.lpb-bw.de/frauenanteil-laenderparlamenten>.

<sup>135</sup> See Foljanty, L. (2012), 'Demokratie und Partizipation' (Democracy and participation), in: *Feministische Rechtswissenschaft*, pp. 287-309 (298ff), with further references.

<sup>136</sup> An overview with many key players 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](https://www.uni-kassel.de/fb07/fileadmin/datas/fb07/5-Institute/IWR/Laskowski/djbZ_3_2014_Editorial_Fokus.pdf).

constitutional principle of gender equality.<sup>137</sup> The Bavarian Constitutional Court was chosen because the Bavarian Constitution covers popular actions. In March 2018, the Bavarian Constitutional Court decided that the Bavarian election laws do not violate the Bavarian Constitution but that positive action measures would do so.<sup>138</sup> The court emphasised the freedom of electoral decision (while factual political and regional quotas in electoral lists are no problem, gender quotas would be) and the freedom of political parties to manage their internal organisation (which can be doubted due to their constitutional position). The case is now pending before the Federal Constitutional Court.

In January 2019, the Brandenburg State Parliament adopted the first *parité* legislation in Germany, which entered into force in the summer of 2020, after the 2019 Brandenburg state elections.<sup>139</sup> Under the new legislation, half of the electoral list positions must be allocated to women and the other half to men. On 20 May 2019, the Pirate Party of Brandenburg, together with two individual complainants, lodged a constitutional complaint against and an action for judicial review of the amendment to the Brandenburg State Electoral Act introducing compulsory gender quotas in electoral lists.<sup>140</sup> The procedure is pending. In July 2019, the Thuringia State Parliament adopted *parité* legislation to enter into force after the 2019 state parliamentary elections.<sup>141</sup> The nomination of direct candidates is not affected by the new legislation but the State Government has discussed amendments in this regard to guarantee the effective implementation of gender equality in state parliamentary elections. Legal expertise and legal opinion are strongly divided on the question of the compatibility of *parité* legislation with the Constitution.

### 3.7 Harassment and sexual harassment

#### 3.7.1 Definition and explicit prohibition of harassment

Harassment is explicitly prohibited in German legislation. Section 3(3) of the General Equal Treatment Act and Section 3(3) of the Equal Treatment of Soldiers Act contain definitions of harassment that are almost exactly the same as that in Article 2(1)(c) of Directive 2006/54 with only one exception: the German laws do not continuously employ the term discrimination but use '*Benachteiligung*' (putting at a disadvantage), without intending to weaken the protection as compared to the directives.

#### 3.7.2 Scope of the prohibition of harassment

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 specific 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 in that it contains several exceptions. However, all published court decisions deal with harassment in the workplace and not in any other context. The potential of the prohibition of harassment on the grounds of sex to fight sexist hate speech in digital spaces has not yet been explored – neither in case law nor in legal literature.<sup>142</sup>

<sup>137</sup> See <https://www.aktionsbuendnis-parite.de/>.

<sup>138</sup> Bavarian Constitutional Court, judgment of 26 March 2018, Vf. 15-VII-16, available at: <https://www.bayern.verfassungsgerichtshof.de/bayverfgh/rechtsprechung/>.

<sup>139</sup> See <https://www.lto.de/recht/nachrichten/n/brandenburg-beschliesst-gesetz-gleichstellung-paritaet-frauen-landtag/>.

<sup>140</sup> See <https://www.piratenbrandenburg.de/2019/05/verfassungsbeschwerde-und-organklage-gegen-paritaetsgesetz-eingereicht/>.

<sup>141</sup> *Siebtes Gesetz zur Änderung des Thüringer Landeswahlgesetzes – Einführung der paritätischen Quotierung* of 5 July 2019, see Plenary protocol at: [https://www.thueringer-landtag.de/uploads/tx\\_tltcalendar/protocols/Arbeitsfassung154.pdf](https://www.thueringer-landtag.de/uploads/tx_tltcalendar/protocols/Arbeitsfassung154.pdf).

<sup>142</sup> 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.

### 3.7.3 Definition and explicit prohibition of sexual harassment

Sexual harassment is explicitly prohibited in German legislation. Section 3(4) of the General Equal Treatment Act and Section 3(4) of the Equal Treatment of Soldiers Act contain definitions of sexual harassment that are almost exactly the same as in Article 2(1)(d) of Directive 2006/54 with only one exception: the German laws do not continuously employ the term discrimination but use '*Benachteiligung*' (putting at a disadvantage).

### 3.7.4 Scope of the prohibition of sexual harassment

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 in order to be consistent with the Directive, must be eliminated for the private sector, education and the provision of goods and services by compliant interpretation. There is no case law to support this opinion. Moreover, legislation concerning education falls under the competence of the states and rules concerning the conduct on campus are subject to the internal regulations of the academic institution. 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.<sup>143</sup>

### 3.7.5 Understanding of (sexual) harassment as discrimination

Section 3(3) and (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.

### 3.7.6 Specific difficulties

In the beginning, the implementation of the prohibition of sexual harassment faced the usual problems: gender stereotypes, sexist structures, burden of proof, majority of cases brought by male claimants, i.e. perpetrators, reluctance of courts to deal with this topic etc. However, in respect of working life, the development of case law was encouraging. In a case involving the severe sexual harassment of a male temporary worker by a male permanent staff member, the Federal Labour Court made a landmark decision on sexual harassment at the workplace in general.<sup>144</sup> 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 form of 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.

However, the (unjustified) limitation of the scope of application remains a major issue. Under the General Equal Treatment Act, legal action cannot be taken against sexual harassment in cases concerning access to goods and services. Further, it has to be noted

<sup>143</sup> 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](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Sexuelle_Belaestigung_im_Hochschulkontext.html?nn=6575434).

<sup>144</sup> 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>.



that the number of sexual harassment cases concerning working life is very small.<sup>145</sup> Despite innovative case law, three surveys on sexual harassment in the workplace in 2015<sup>146</sup> and 2019<sup>147</sup> (see Section 3.1 above) showed that this kind of discrimination is still widespread, that there are nearly no structural measures taken against it, that employees do not know their rights and employers do not know their duties, and that the legal protection against sexual harassment is mainly notional (although innovative) law without practice.

### 3.8 Instruction to discriminate

#### 3.8.1 Explicit prohibition

Instructions to discriminate are explicitly prohibited in German legislation. 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 will be deemed to be prohibited discrimination (*Benachteiligung*), especially in the fields of employment when a person instructs an employee to discriminate against another employee.

#### 3.8.2 Specific difficulties

The main difficulty concerning this concept is that there is next to no case law – just one court decision. However, the one decision mentioning Section 3(5) of the General Equal Treatment Act is interesting as it confirms that the provisions of a collective agreement can constitute a prohibited instruction to discriminate (while denying any entitlement to compensation by insisting on the requirement of fault of the employer which is incompatible with EU law).<sup>148</sup>

### 3.9 Other forms of discrimination

Assumed discrimination is covered by the law. Section 7(1) of the General Equal Treatment Act states that in the field of employment, the prohibition of discrimination will also apply where the person committing the act of discrimination only assumes the existence of any of the grounds covered by the law. However, there is no comparable provision concerning discrimination by association. The General Equal Treatment Act was enacted before the *Coleman* case and has not been amended since (except for the implementation of the *Test Achats* ruling).

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

Another more recent topic is algorithmic discrimination. In 2019, the Federal Anti-Discrimination Agency published an expert study on the risks of algorithmic discrimination, which outlined several potential examples of algorithmic discrimination.<sup>149</sup> There is ongoing debate whether gender equality and non-discrimination law has to be amended to fight algorithmic discrimination or whether it can be used at all in this field.

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<sup>145</sup> But courts repeatedly confirm that sexual harassment can justify dismissal without notice and other severe sanctions, e.g. State Labour Court of Rhineland-Palatinate, judgment of 18 October 2019, 1 Sa 76/19; State Labour Court of Hesse, judgment of 16 July 2019, 15 Sa 1495/18.

<sup>146</sup> See [https://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Geschlecht/sexuelle\\_Belaestigung/sex\\_Belaestigung\\_node.html](https://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Geschlecht/sexuelle_Belaestigung/sex_Belaestigung_node.html).

<sup>147</sup> See [https://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2019/PK\\_Schroettle\\_Studie\\_Sexuelle\\_Belaestigung.html](https://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2019/PK_Schroettle_Studie_Sexuelle_Belaestigung.html).

<sup>148</sup> State Administrative Court of Lower Saxony, judgment of 25 February 2014, 5 LA 204/13.

<sup>149</sup> Orwat, C. (2019), *Diskriminierungsrisiken durch Verwendung von Algorithmen*, Federal Anti-Discrimination Agency, available at: [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Studie\\_Diskriminierungsrisiken\\_durch\\_Verwendung\\_von\\_Algorithmen.html](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Studie_Diskriminierungsrisiken_durch_Verwendung_von_Algorithmen.html).

On the one hand, authors emphasise that bans on discrimination are only of limited use as instruments for regulating algorithms because only the decision based on an algorithmic data analysis can be brought to court while the algorithmic findings as such are not covered by anti-discrimination law – even if they are discriminatory and disadvantageous and the decision is based (primarily) on them.<sup>150</sup> Philipp Hacker argues that in most cases in which bias is an accidental feature of the data processing, unfavourable treatment arguably does not occur ‘on grounds of’ and therefore does not amount to direct discrimination, and that if the decision maker himself makes labelling decisions affected by implicit bias, it seems more convincing to view this as a case of direct discrimination as the less favourable result is a direct consequence of the biased labelling.<sup>151</sup> The German Women Lawyers’ Association confirms that mere prohibitions of discrimination are not sufficient as legal instruments to counteract algorithmic discrimination as these always presuppose that discrimination has occurred.<sup>152</sup>

In contrast, other authors point out that the provisions of the German anti-discrimination law are ‘technology-neutral’ and therefore in principle also capture algorithmic decision-making processes, or they suggest that no unregulated areas have been created, which is as doubtful as the idea that European anti-discrimination law demands the need for some kind of intent. In his 2018 study on algorithmic accountability,<sup>153</sup> Christoph Busch emphasises the relevance of private autonomy and suggests that, from the point of view of the General Equal Treatment Act, it makes no difference whether a violation of the prohibition of discrimination in the selection of applicants is committed by a person or an automated e-recruiting system. Kai von Lewinsky and Raphael de Barros Fritz assume that the employer may be liable for damages through the use of algorithms in personnel decisions under anti-discrimination law.<sup>154</sup>

However, nearly all authors emphasise enforcement problems.<sup>155</sup> In his 2017 article on algorithms as a challenge for the legal system, Mario Martini points out the structural inequalities to the detriment of consumers who have no serious opportunity to detect, let alone prove, the infringements, causalities, knowledge or fault of enterprises that use algorithm-based systems.<sup>156</sup> Therefore, he argues for a differentiated shift of the burden of proof with a considerable burden of proof on the provider or user of algorithms, which corresponds to his superior knowledge and a fair distribution of liability.

### 3.10 Evaluation of implementation

The 2006 General Equal Treatment Act is a very formal transposition of the directives on the one hand, following a copy-and-paste procedure regarding the definition of central concepts. A more comprehensive approach integrating the new regulations into an existing

<sup>150</sup> See Fröhlich, W. & Spiecker genannt Döhmann, I. (2018), ‘Können Algorithmen diskriminieren?’, <https://verfassungsblog.de/koennen-algorithmen-diskriminieren/>.

<sup>151</sup> Hacker, P. (2018), ‘Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies against Algorithmic Discrimination under EU Law’, *Common Market Law Review*, pp. 1143ff.

<sup>152</sup> German Women Lawyers’ Association (2020), ‘Stellungnahme zu dem Weißbuch der EU-Kommission “Zur Künstlichen Intelligenz – ein europäisches Konzept für Exzellenz und Vertrauen”’ (Statement on the EU Commission White Paper “On Artificial Intelligence – A European Concept for Excellence and Trust”), <https://www.djb.de/verein/Kom-u-AS/ASDigi/st20-20/>.

<sup>153</sup> Busch, C. (2018), *Gutachten Algorithmic Accountability* (Assessment of algorithmic accountability), pp. 46 ff, <https://www.abida.de/sites/default/files/ABIDA%20Gutachten%20Algorithmic%20Accountability.pdf>.

<sup>154</sup> Von Lewinsky, K. & de Barros Fritz, R. (2018), ‘Arbeitgeberhaftung nach dem AGG infolge des Einsatzes von Algorithmen bei Personalentscheidungen’ (Employer liability due to the use of algorithms in personnel decisions), *Neue Zeitschrift für Arbeitsrecht*: 620-624.

<sup>155</sup> See Scheer, J. (2019), ‘Algorithmen und ihr Diskriminierungsrisiko. Eine erste Bestandsaufnahme’ (Algorithms and their Risk of Discrimination. A first inventory), published by the Berlin State anti-discrimination body, p. 14, available at: <https://www.berlin.de/sen/lads/ueber-uns/materialien/>; Busch, C. (2018), *Gutachten Algorithmic Accountability* (Assessment of algorithmic accountability), pp. 48, <https://www.abida.de/sites/default/files/ABIDA%20Gutachten%20Algorithmic%20Accountability.pdf>.

<sup>156</sup> See Martini, M. (2017), ‘Algorithmen als Herausforderung für die Rechtsordnung’ (Algorithms as a challenge for the legal system), *JuristenZeitung* 21: 1017-1025 (1024).

legal framework might have been favourable but as there had been nearly no anti-discrimination law binding on private parties, such an approach would have constituted a real challenge. The formal approach can be explained by the legislative history which was characterised by strong opposition to the implementation and last-minute compromises.

This history also explains disturbing gaps in the implementation, although it does not justify them. European law requires unequivocal transposition of directives. There are substantial gaps and other indicators that the implementation has failed significantly: the restriction of the prohibition of sexual harassment to the area of employment; the exclusion of dismissals from the scope of application of the General Equal Treatment Act; the restriction of the possible use of statistical data to prove indirect discrimination; the requirement of fault in labour law cases; the lack of an explicit prohibition of discrimination by association; the courts' struggling with concepts of indirect and intersectional discrimination; and, overall, the fact that the number of anti-discrimination court cases is vanishingly small in Germany.

### **3.11 Remaining issues**

There are no remaining issues to report.



## **4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)**

### **4.1 General (legal) context**

#### **4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay**

The gender pay gap remains at 21 % in Germany with significant differences between Western (22 %) and Eastern (7 %) Germany.<sup>157</sup> This has not changed since 2002. The gender pay gap in 2018 varied greatly from sector to sector, but women earned no more than men in any sector of the economy. However, the gender pay gap of 9 % in the public sector is much narrower than in the private sector (23 %). The gender pay gap is a key indicator of structural inequalities between women and men in working life. The Earnings Statistics Act, implemented in 2007, provides a database for research on the development and causes of pay inequality, with possibilities for counter strategies to target the causes.<sup>158</sup>

The authors of the *Second Gender Equality Report* of the Federal Government<sup>159</sup> did not only identify a 'gender care gap' illustrating structural inequalities between men and women, especially in the way society (and the legal framework) organises paid work (including paid care work) and unpaid care work, they also focused on the gender pay gap and its causes. They pointed out the well-known structural factors and employment history differences between women and men, such as gender-specific segregation of the labour market, gender-biased work assessment procedures, a lower presence of women in managerial positions, interruptions in female employment due to care work, the high percentage of female employees working part-time or in so-called 'minijobs', the adverse effects of tax law and the related social security disadvantages for women.

Although the gender pay gap is more pronounced in employment relationships with private employers, the civil service does not display a structure of equal remuneration. A 2018 analysis of the remuneration system of the states' civil service<sup>160</sup> discovered that the assessment of working activities did not take place according to common criteria, that the same characteristics were defined differently, the requirement levels had different characteristics and definitions, and the structures and amounts of the remuneration tables were also different. These inconsistencies created latitude for adverse impacts on female-dominated working activities and, thus, for indirect pay discrimination based on sex/gender. Due to the complexity of the collective agreements for the civil service, the lack of information, the difficulty in finding appropriate comparators as well as the restriction of legal action that can be taken by individual claimants, the authors of the study deemed it nearly impossible to seek effective legal redress. With explicit regard to Article 157 TFEU, they suggested that public employers should guarantee the fundamental right to equal pay in real working life, which would also set an example for the private sector.

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 Statistical Office considers it possible that minimum

<sup>157</sup> See <https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-1/gender-pay-gap.html>.

<sup>158</sup> As a result of the Quarterly Earnings Survey required by the Act, available at: [https://www.destatis.de/DE/Themen/Arbeit/Verdienste/Verdienste-Verdienstunterschiede/\\_inhalt.html](https://www.destatis.de/DE/Themen/Arbeit/Verdienste/Verdienste-Verdienstunterschiede/_inhalt.html).

<sup>159</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin. Documents are available at <https://www.gleichstellungsbericht.de/>. The committee of experts consisted of Eva Kocher (chair), Thomas Beyer, Eva Blome, Holger Bonin, Ute Klammer, Uta Meier-Gräwe, Helmut Rainer, Stephan Rixen, Christina Schildmann, Carsten Wippermann, Anne Wizorek, and Aysel Yollu-Tok.

<sup>160</sup> Jochmann-Döll, A. & Tondorf, K. (2018), *Gleiches Entgelt für gleichwertige Arbeit? Die Entgeltordnung des Tarifvertrags der Länder (TV-L) auf dem Prüfstand* (Equal pay for equivalent work?), Berlin: ADS, [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Entgelt\\_UN\\_Gleichheit/TV\\_L.html?nn=7742234](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Entgelt_UN_Gleichheit/TV_L.html?nn=7742234).

wages reduced the gender pay gap from 22 % in 2014 to 21 % in 2015.<sup>161</sup> The minimum wage was raised to EUR 8.84 per hour on 1 January 2017.<sup>162</sup>

Most of the discussions and publications (although not studies) concerning the gender pay gap are concerned with pointing out that the 'adjusted' gender pay gap is only 6 % and therefore no severe discrimination would occur, whereby 'adjusted' means that structural factors such as the segregation of the labour market are disregarded. Even the Federal Government draws this distinction when asked to explain the failure in closing the gender pay gap.<sup>163</sup> Moreover, the factors that are often used to calculate the 'adjusted' pay gap in turn point to discrimination, such as the lower payment of part-time workers or persons with breaks in employment.<sup>164</sup> The Federal Government has set itself the target of reducing the pay gap to 10 % by 2030. There is no indication that the necessary steps have been taken yet.

#### 4.1.2 Surveys on the difficulties of realising equal treatment at work

Although the Federal Anti-Discrimination Agency points out that the question of equal treatment at work is about more than the gender pay gap, it does not offer any further information.<sup>165</sup> The Federal Ministry for Family, Senior Citizens, Women and Youth offers information about some projects concerning equality-oriented career choices, wage transparency, women in leading positions and female entrepreneurs, but has published no recent surveys or studies.<sup>166</sup>

#### 4.1.3 Other issues

In the financial crisis, the German Government made several far-reaching decisions. On the one hand, it has reduced social security provision or made access to it much more difficult, which has impacted on women in particular. It has also focused on export industries, thereby promoting industries in which men predominate, albeit without taking into account the fact that they are undergoing fundamental transformation processes. Such export industries continue to be the focus of attention, and at the same time no consideration has been given to how to deal with the rapidly growing service sector, in which many men and women work under unacceptable conditions and with wages that do not secure their livelihoods. With the privatisation of essential areas of previously public tasks, the state has released important areas of work from its control, and the Minimum Wage Act is proving to be fairly ineffective.

At the same time, deep-rooted cultural and structural gender inequalities still seem to exist, as evidenced by the worsening gender-based segregation of the labour market.<sup>167</sup> Gender-specific career choices are increasing, rather than decreasing. The unequal distribution of care work is persistent. Although significantly more women are now employed, the total working time volume of women has not increased - more women share

<sup>161</sup> See [https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2016/03/PD16\\_097\\_621pdf.pdf?\\_blob=publicationFile](https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2016/03/PD16_097_621pdf.pdf?_blob=publicationFile).

<sup>162</sup> See <http://www.tagesschau.de/wirtschaft/mindestlohn-erhoehung-101.html>.

<sup>163</sup> See Federal Government (2019), *Bericht der Bundesregierung zur Wirksamkeit des Gesetzes zur Förderung der Entgelttransparenz zwischen Frauen und Männern sowie zum Stand der Umsetzung des Entgeltgleichheitsgebots in Betrieben mit weniger als 200 Beschäftigten* (Report of the Federal Government on the effectiveness of the Pay Transparency Act and on the status of implementation of the equal pay requirement in companies with fewer than 200 employees), p. 2, <https://www.bmfsfj.de/blob/137224/79c7431772c314367059abc8a3242a55/bericht-der-br-foerderung-entgelttransparenz-data.pdf>.

<sup>164</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin, p. 94.

<sup>165</sup> See [https://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Geschlecht/Gleichbehandlung\\_der\\_Geschlechter\\_im\\_Arbeitsleben\\_neu/Gleichbehandlung\\_Geschlechter\\_Arbeitsleben\\_node.html](https://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Geschlecht/Gleichbehandlung_der_Geschlechter_im_Arbeitsleben_neu/Gleichbehandlung_Geschlechter_Arbeitsleben_node.html).

<sup>166</sup> See <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/frauen-und-arbeitswelt>.

<sup>167</sup> See Federal Government (2017), *Second Gender Equality Report*, Berlin, with further references. Documents are available at: <https://www.gleichstellungsbericht.de/>.

the same total working time, meaning that they work in ever smaller part-time jobs. The massive expansion of childcare has not yet had a significant impact. Gender stereotypes, which are internalised at an early age, (not least due to an aggressive marketing policy for all things that children might need, offering one version for girls and one for boys) play an important role in entrenching gender segregation.

The rise of right-wing populist parties and movements furthers anti-feminism and traditional gender roles.<sup>168</sup> Moreover, left-wing policies often claim that 'identity politics' (meaning anti-discrimination politics and the protection of minorities) have caused the rise of right-wing populism and draw the hardly helpful conclusion that they have to focus on the 'normal citizen' (meaning the *white* blue-collar worker).<sup>169</sup> Instead of accommodating or participating in such a backlash against gender and other equality policies, there is a need for new strategies to deal with the transformation of working life.

#### 4.1.4 Political and societal debate and pending legislative proposals

There is always some political and societal debate about the gender pay gap, especially when the new statistics are published, but in these debates, the main concern is the question of the 'adjusted' pay gap — a focus that hides most of the gender inequality problem. The Government and the Bundestag are proud that the Pay Transparency Act entered into force, although there is no indication that this act will lead to a decrease in the gender pay gap, and there is no indication that further legislative proposals are on their way. The first evaluation of the Pay Transparency Act showed nearly no effects of the new legislation: the right to information was hardly used and companies neither voluntarily review their remuneration structures nor comply with their reporting obligations.<sup>170</sup>

The authors of the *Second Gender Equality Report* of the Federal Government<sup>171</sup> stated that there is need for continuous and institutionalised monitoring, given that the gender pay gap is the result of a complex interplay of different inequalities in the labour market. They suggested setting up a permanent Equal Pay Commission at the Federal Anti-Discrimination Agency, whose role would be to develop certifications and to monitor the development of equal pay. It should also regularly collect indicators that measure the extent to which earnings for work of equal value differentiate along gender lines (Comparable Worth Index). In addition, this commission should support the establishment of an appropriate counselling structure at regional level. The social partners and gender equality policy makers should both be involved in such a commission.

The authors of the *Second Gender Equality Report*<sup>172</sup> further suggested that in public communication, the Federal Statistical Office should stop using methodologically correct, but extremely misleading terms, such as 'adjusted' and 'unadjusted' wage gaps. More realistic terms would be 'causally still unexplained gap in gross hourly wage' (instead of 'adjusted wage gap') and 'real gap in gross hourly wage' (instead of 'unadjusted wage gap'). They recommend that the Federal Statistical Office takes into account not only the gender pay gap but the gender care gap, the gender pension gap and the gender overall

<sup>168</sup> E.g. AK Fe.In (2019), *Frauen\*Rechte und Frauen\*Hass. Antifeminismus und die Ethnisierung von Gewalt* (Women's Rights and Misogyny. Anti-feminism and the Ethnisation of Violence); Schutzbach, F. (2019), *Antifeminismus macht rechte Positionen gesellschaftsfähig* (Anti-feminism makes right-wing positions socially acceptable), <https://www.gwi-boell.de/de/2019/05/03/antifeminismus-macht-rechte-positionen-gesellschaftsfahig>.

<sup>169</sup> E.g. Heisterhagen, N. (2018), *Die liberale Illusion: warum wir einen linken Realismus brauchen* (The liberal illusion: why we need a left-wing realism).

<sup>170</sup> Federal Government (2019), *Report on the implementation of the Pay Transparency Act with Comments by the Social Partners*, <https://www.bmfsfj.de/bmfsfj/service/publikationen/bericht-der-bundesregierung-zur-wirksamkeit-des-gesetzes-zur-foerderung-der-entgelttransparenz-zwischen-frauen-und-maennern/137226>.

<sup>171</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin. Documents are available at: <https://www.gleichstellungsbericht.de/>.

<sup>172</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin. Documents are available at: <https://www.gleichstellungsbericht.de/>.

earnings gap in its annual report. The experts suggested that the Federal Statistical Office might improve the methodology for the calculation of indicators to reduce the gender pay gap by making calculations as differentiated as possible, to better understand the intersectional nature of gender discrimination in this field, and to develop appropriate measures.

## 4.2 Equal pay

### 4.2.1 Implementation in national law

The principle of equal pay for equal work or work of equal value is implemented in German legislation. 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.<sup>173</sup> 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.<sup>174</sup>

The unequal treatment of workers in general provisions, especially the arbitrary establishment of groups of workers,<sup>175</sup> is prohibited under the unwritten general principle of equal treatment in labour law.<sup>176</sup> 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.<sup>177</sup> 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 remuneration<sup>178</sup> of part-time work.

On 6 July 2017, the Pay Transparency Act entered into force.<sup>179</sup> Former drafts had been discussed and amended on many occasions to water down the means for the effective enforcement of equal pay. Nevertheless, 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. However, the first evaluation reports do not suggest any greater success of the law.<sup>180</sup>

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<sup>173</sup> 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.

<sup>174</sup> Federal Labour Court, judgment of 15 January 1955, 1 AZR 305/54.

<sup>175</sup> Federal Labour Court, judgment of 21 June 2000, 5 AZR 806/98; Federal Labour Court, judgment of 17 November 1998, 1 AZR 147/98.

<sup>176</sup> See Hinrichs, O. in: Däubler, W. and Bertzbach, M. (eds.) (2008), *Allgemeines Gleichbehandlungsgesetz. Handkommentar*, Section 2 para. 198, 2<sup>nd</sup> ed., Baden-Baden.

<sup>177</sup> Including equal pay, see Berg, P. in: Däubler, W. (ed.) (2010), *Betriebsverfassungsgesetz. Kommentar*, Section 75 para. 46, 12th ed., Frankfurt a M.

<sup>178</sup> State Labour Court of Baden-Württemberg, judgment of 29 January 2016, 17 Sa 84/15: including time credits.

<sup>179</sup> Pay Transparency Act of 30 June 2017, Official Journal 2017, p. 2152, <https://www.gesetze-im-internet.de/entgelttranspg/BJNR215210017.html>.

<sup>180</sup> See Federal Government (2019), *Bericht der Bundesregierung zur Wirksamkeit des Gesetzes zur Förderung der Entgelttransparenz zwischen Frauen und Männern sowie zum Stand der Umsetzung des Entgeltgleichheitsgebots in Betrieben mit weniger als 200 Beschäftigten* (Report of the Federal Government

One reason is that most of the employers, managers, or similar stakeholders surveyed are adamant that their own company's pay structures are in full conformity with the principle of equal pay. Furthermore, only 2 % of the employees surveyed used their information rights.

#### 4.2.2 Definition in national law

The concept of pay is defined in legislation. 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.

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.<sup>181</sup> 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. In 2017, the Federal Labour Court emphasised that survivor's pension and special occupational pensions are elements of 'pay' under Article 157 TFEU.<sup>182</sup>

#### 4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

German law does not entirely implement Article 4 of Recast Directive 2006/54. 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 Collective Bargaining Act (*Tarifvertragsgesetz*),<sup>183</sup> which contains no provisions on equal pay and 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.<sup>184</sup> 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.<sup>185</sup> These judgments promoted the false idea that gender equality and equal pay could be subject to unlimited bargaining by male-dominated social partners.<sup>186</sup> Although most trade unions in Germany

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on the effectiveness of the Pay Transparency Act and on the status of implementation of the equal pay requirement in companies with fewer than 200 employees), <https://www.bmfsfj.de/blob/137224/79c7431772c314367059abc8a3242a55/bericht-der-br-foerderung-entgelttransparenz-data.pdf>.

<sup>181</sup> 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.

<sup>182</sup> Federal Labour Court, judgment of 26 September 2017, 3 AZR 733/15.

<sup>183</sup> Collective Bargaining Act of 25 August 1969, Official Journal 1969, p. 1323, <https://www.gesetze-im-internet.de/tvg/BJNR700550949.html>.

<sup>184</sup> Federal Labour Court, judgment of 17 December 2009, 6 AZR 665/08.

<sup>185</sup> Federal Labour Court, judgment of 19 January 2011, 3 AZR 29/09.

<sup>186</sup> 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



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 persist in Germany. The gender pay gap can still be partly explained by indirectly discriminatory provisions in collective agreements,<sup>187</sup> including collective agreements with public services and social institutions that still contain gender-discriminatory classification systems.<sup>188</sup>

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 design their remuneration systems in such a way that excludes any pay discrimination on the grounds of sex. 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 under the Pay Transparency Act.<sup>189</sup> 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 overly complex and often still gender-discriminatory job classifications established by collective agreements are one of the main obstacles to equal pay.

Moreover, the main problem of the Pay Transparency Act is that it does not provide for further consequences in the event of a violation of the prohibition of pay discrimination on the grounds of sex/gender.<sup>190</sup> 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.<sup>191</sup> 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 discrimination<sup>192</sup> has been identified, time and again, as one of the main obstacles to achieving gender equality.

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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, does not even mention different payments for the female applicant and her male co-workers but consequently uses the male form when referring to the applicant, thus obstructing any understanding of the case.

<sup>187</sup> See Kocher, E. (2007), 'Gleichstellungspolitik und Individualansprüche' (Equality policy and individual claims) *Kritische Justiz*, Baden-Baden: Nomos, pp. 22-34.

<sup>188</sup> 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 overhaul 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 shut down after 2012.

<sup>189</sup> Critique by Markard, N. (2019), 'Das Gebot der Entgeltgleichheit: Verfassungsrechtliche Perspektiven' in *JuristenZeitung* No. 74(11), pp. 534-542.

<sup>190</sup> See German Women Lawyers' Association (2019), *Stellungnahme zur öffentlichen Anhörung des Bundestagsausschusses für Familie, Senioren, Frauen und Jugend am 18. März 2019* (Statement on the public hearing of the Committee for Family Affairs, Senior Citizens, Women and Youth of the Federal Parliament on 18 March 2019), <https://www.djb.de/verein/Kom-u-AS/K1/st19-07/>.

<sup>191</sup> See German Women Lawyers' Association (2019), *Stellungnahme zur öffentlichen Anhörung des Bundestagsausschusses für Familie, Senioren, Frauen und Jugend am 18. März 2019* (Statement on the public hearing of the Committee for Family Affairs, Senior Citizens, Women and Youth of the Federal Parliament on 18 March 2019), <https://www.djb.de/verein/Kom-u-AS/K1/st19-07/>.

<sup>192</sup> 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), Berlin: ADS, pp. 141ff, 159ff; Fuchs, G., Konstatzky, S., Liebscher, D., Berghahn, S. (2009), 'Rechtsmobilisierung für Lohngleichheit' (Mobilisation 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 mobilisation of the law against digital violence)', E-Paper, <https://www.gwi-boell.de/de/2018/01/09/kollektive-rechtsmobilisierung-gegen-digitale-gewalt>.

#### 4.2.4 Related case law

German courts supported the deficiencies of statutory law by establishing sophisticated differences between the principle of equal pay and the prohibition of pay discrimination, giving broad leeway to collective bargaining,<sup>193</sup> refusing to review complicated work assessment procedures due to lack of criteria and displaying gender stereotypes in the basis of their decisions. Legal action against pay discrimination has only been successful in some cases concerning pensions.

Before the 2017 Pay Transparency Act entered into force, courts decided time and again that neither Article 157 TFEU nor Sections 1 or 7 of the General Equal Treatment Act provide for the general principle of 'the same pay for the same work' but only apply in cases of sex/gender discrimination which, unfortunately, could nearly never be found or proven.<sup>194</sup>

In one case, the court stated that the difference in remuneration between the female claimant and a male colleague doing the same or equivalent work was due to a previous court settlement in favour of this colleague and, therefore, that there was no sex/gender discrimination as the higher salary for the male colleague was not motivated by his sex/gender.<sup>195</sup> However, the court failed to explain why motivations should be relevant at all. In the case of equal or equivalent work by men and women, any difference in treatment must be justified by an objective reason. In the case in question, this reason could only be an *acquis* acquired legitimately through a court settlement but the court failed to clarify to what extent the *acquis* could be regarded as legitimately acquired when taking into account the principle of equal pay.

Another case concerned a factory in which shoes were manufactured and in which female production workers were paid less than male production workers for decades until 31 December 2012.<sup>196</sup> As of 1 January 2013, all production employees, male and female, received the same salary. Then, in 2014, a new remuneration system was introduced which provided for 5 different levels of pay for different working activities. Under the new system, 84 % of the male production employees, but only 28 % of the female production employees, fulfilled the requirements of the advantageous pay level 03 or higher. Nevertheless, the court ruled that there was no pay discrimination and thus, no violation of Article 157 TFEU, because the defendant employer had explained in detail how, in a longer process with external experts, the various pay levels were differentiated on the basis of specific activities and work tasks in the manufacturing process without any regard to the sex/gender of the employees involved.

During the public hearing in another case, 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.<sup>197</sup> This amazing display of harmful gender stereotypes did not have any consequences for the judge. Several organisations, among them the German Women Lawyers' Association, heavily criticised the decision and the judicial remarks.<sup>198</sup>

<sup>193</sup> There is only one judgment (Federal Labour Court, judgment of 20 August 2002, 9 AZR 353/01) in favour of a female applicant declaring regulations of a collective agreement to be unconstitutional, but as the applicant lost her vacation benefits due to her maternity leave taken before birth, this might be seen rather as a decision on maternity protection, although one involving equal pay.

<sup>194</sup> E.g. Federal Administrative Court, judgment of 9 April 2013, 2 C 5/12; Federal Labour Court, judgment of 25 January 2012, 4 AZR 147/10; State Labour Court of Rhineland-Palatinate, judgment of 11 October 2018, 5 Sa 455/15; State Labour Court of Baden-Württemberg, judgment of 21 October 2013, 1 Sa 7/13; Labour Court of Berlin, judgment of 1 February 2017, 56 Ca 5356/15.

<sup>195</sup> State Labour Court of Baden-Württemberg, judgment of 21 October 2013, 1 Sa 7/13.

<sup>196</sup> State Labour Court of Rhineland-Palatinate, judgment of 11 October 2018, 5 Sa 455/15.

<sup>197</sup> Labour Court of Berlin, judgment of 1 February 2017, 56 Ca 5356/15.

<sup>198</sup> See Press release of the German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K1/pm17-07/>.



They pointed out that the court should have focused on the equivalence of the actual work performed and the working conditions as well as the comparability of qualifications, not on seniority and disputable collective agreements.

Some legal actions concerning pensions were more successful. The Federal Constitutional Court and the Federal Administrative Court decided that statutory reductions of retirement pensions due to former part-time work violated the constitutional as well as European Union law prohibiting sex and pay discrimination.<sup>199</sup> Thus, the courts followed the ruling of the CJEU in joined cases C-4/02 *Schönheit* and C-5/02 *Becker*.

Another case concerned the calculation of an occupational pension for a female part-time employee employed by a trade union. The Federal Labour Court ruled that the occupational pension must be calculated in such a way that it is granted in the amount corresponding to the exact proportion of the female part-time employee's working time to the working time of a comparable full-time employee.<sup>200</sup> Otherwise there would be discrimination against part-time workers and thus indirect discrimination against women, violating, among others, Article 157 TFEU.

A third case concerned a statutory state provision for occupational pension schemes for employees of the German state of Hamburg, which provided that the lower pension would be suspended if an employee was entitled to both a survivor's pension and a retirement pension under the statutory provisions of the state of Hamburg. The Federal Labour Court decided that it could not be ruled out that more female than male former employees of Hamburg would be adversely affected by this regulation, thus, causing a violation of Article 157 TFEU, and called on the state labour court to again carefully examine whether there was indirect discrimination on the grounds of sex/gender.<sup>201</sup> The Federal Labour Court referred to various CJEU rulings, among them the cases C-443/15 *Parris*, C-427/11 *Kenny*, C-385/11 *Elbal Moreno*, C-285/02 *Elsner-Lakeberg*, C-379/99 *Menauer*, C-400/93 *Dansk Industri*, C-200/91 *Coloroll*, C-43/75 *Defrenne*.<sup>202</sup>

In August 2019, the State Administrative Court of Bavaria<sup>203</sup> decided that the calculation of pensions for retired civil servants infringes Article 157 TFEU in that taking into account statistical data on the different average life expectancies of men and women results in a lower pension component for male civil servants. (As there is no class action or collective action or other form of lifting the burden of legal action from the victims of pay discrimination in Germany, the few equal pay cases before the courts are mainly brought by civil servants or white collar workers suing the state and not a personally well-known employer.) The court explained that the calculation in question violated neither the statutory regulations on pensions nor constitutional requirements but was incompatible with EU law, and it dealt extensively with the case law of the CJEU.

<sup>199</sup> Federal Constitutional Court, judgment of 18 June 2008, 2 BvL 6/07, and Federal Administrative Court, judgment of 12 December 2012, 2 B 90/11.

<sup>200</sup> Federal Labour Court, judgment of 14 July 2015, 3 AZR 594/13.

<sup>201</sup> Federal Labour Court, judgment of 26 September 2017, 3 AZR 733/15.

<sup>202</sup> Judgment of the Court (First Chamber) of 24 November 2016, *David L. Parris v. Trinity College Dublin and Others*, Case C-443/15, ECLI:EU:C:2016:897; Judgment of the Court (Third Chamber), 28 February 2013, *Margaret Kenny and Others v. Minister for Justice, Equality and Law Reform and Others*, Case C-427/11, ECLI:EU:C:2013:122; Judgment of the Court (Eighth Chamber), 22 November 2012, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, Case C-385/11, ECLI:EU:C:2012:746; Judgment of the Court (First Chamber) of 27 May 2004, *Edeltraud Elsner-Lakeberg v. Land Nordrhein-Westfalen*, Case C-285/02, ECLI:EU:C:2004:320; Judgment of the Court (Sixth Chamber) of 9 October 2001, *Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG v. Hans Menauer*, Case C-379/99, ECLI:EU:C:2001:527; Judgment of the Court of 31 May 1995, *Specialarbejderforbundet i Danmark v. Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, Case C-400/93, ECLI:EU:C:1995:155; Judgment of the Court of 28 September 1994, *Coloroll Pension Trustees Ltd v. James Richard Russell, Daniel Mangham, Gerald Robert Parker, Robert Sharp, Joan Fuller, Judith Ann Broughton and Coloroll Group plc*, Case C-200/91, ECLI:EU:C:1994:348; Judgment of the Court of 8 April 1976, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, Case C-43/75, ECLI:EU:C:1976:56.

<sup>203</sup> State Administrative Court of Bavaria, judgment of 14 August 2019, 14 BV 18.671.

#### 4.2.5 Permissibility of pay differences

The General Equal Treatment Act does not cover justifications for pay differences, and under 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. As pointed out above, there is no general principle of 'the same pay for the same work' and, therefore, pay differences are legitimate as long as they do not constitute sex/gender discrimination in the view of the courts.

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 market,<sup>204</sup> 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 CJEU'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 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 relevant activity and not upon the employee's individual performance. In conflict with the CJEU rulings (especially *Barber*),<sup>205</sup> the statutory justifications do not differentiate between the different components of the remuneration.<sup>206</sup>

#### 4.2.6 Requirement for comparators

Theoretically, a comparator is required in German law as regards equal pay. 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. However, in practice, equal pay cases are not decided with regard to the sex and income of comparable employees,<sup>207</sup> but with regard to overly complex job classifications set up by collective agreements, which are not challenged by the courts.

Under Sections 10 to 16 of the Pay Transparency Act, 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. However, this does not work out well

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<sup>204</sup> As a 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.

<sup>205</sup> See German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K1/st17-05/>.

<sup>206</sup> Judgment of the Court of 17 May 1990, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, Case C-262/88, ECLI:EU:C:1990:209.

<sup>207</sup> See German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K1/st17-05/>.

<sup>208</sup> 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.

in practice.<sup>208</sup> According to the first evaluation of the Pay Transparency Act in 2019, the right to obtain such information is rarely exercised.<sup>209</sup>

#### 4.2.7 Existence of parameters for establishing the equal value of the work performed

For a considerable time, German statutory law did not 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 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,<sup>210</sup> skills and abilities, the variety of professional duties<sup>211</sup> and educational qualifications.<sup>212</sup> 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.<sup>213</sup> In its judgments, the court demonstrated its own difficulties with the non-discriminatory definition of equal pay for work of equal value.<sup>214</sup>

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 relevant 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.

#### 4.2.8 Other relevant rules or policies

To the author's knowledge, there are no other relevant rules or policies that provide such parameters.

#### 4.2.9 Job evaluation and classification systems

In 2011, the Government offered Logib-D as a management tool to help employers identify whether there was a pay gap between their male and female employees.<sup>215</sup> There were strong indications that another tool (called eg-check)<sup>216</sup> was better suited to detect pay discrimination on the grounds of sex/gender and to design pay structures and evaluation systems free of sex/gender discrimination. The Logib-D tool was designed to detect only the 'adjusted' wage gap, ignoring structural and indirect discrimination of women in working life. In 2019, the Federal Ministry for Family, Senior Citizens, Women and Youth presented a newly developed tool, the EVA list for the evaluation of job assessment

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<sup>208</sup> See Markard, N. (2019), 'Das Gebot der Entgeltgleichheit: Verfassungsrechtliche Perspektiven' in *JuristenZeitung* No. 74(11), pp. 534-542.

<sup>209</sup> Federal Government (2019), *Report on the implementation of the Pay Transparency Act with Comments by the Social Partners*, <https://www.bmfsfj.de/bmfsfj/service/publikationen/bericht-der-bundesregierung-zur-wirksamkeit-des-gesetzes-zur-foerderung-der-entgelttransparenz-zwischen-frauen-und-maennern/137226>.

<sup>210</sup> Federal Labour Court, judgment of 26 January 2005, 4 AZR 171/03.

<sup>211</sup> Federal Labour Court, judgment of 23 August 1995, 5 AZR 942/93.

<sup>212</sup> Federal Labour Court, judgment of 10 December 1997, 4 AZR 264/96.

<sup>213</sup> See Federal Labour Court, judgment of 23 August 1995, 5 AZR 942/93.

<sup>214</sup> 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.

<sup>215</sup> See <https://www.bmfsfj.de/bmfsfj/service/publikationen/logib-d/82318>.

<sup>216</sup> See [https://www.eg-check.de/eg-check/DE/Weichenseite/weiche\\_node.html](https://www.eg-check.de/eg-check/DE/Weichenseite/weiche_node.html).

procedures and sample analyses.<sup>217</sup> The EVA list is based on the realisation that discriminatory job evaluations in the form of devaluations of women-dominated work embedded in the procedures of job evaluation, in collective agreements or company agreements, are one of the main reasons for the gender pay gap.<sup>218</sup> The EVA list is a testing instrument for uncovering discrimination in written regulations on job evaluation, based on European and German case law and developed on the basis of current legal literature and instruments such as eg-check.<sup>219</sup>

#### 4.2.10 Wage transparency

There had been broad discussion about wage transparency and some regulation before 2017. For example, works councils are entitled to have access to information about the wages of all employees in a company in detail under the Works Constitution Act (*Betriebsverfassungsgesetz*).<sup>220</sup> The Federal Labour Court confirmed this statutory entitlement and clarified that it was not restricted to anonymised lists and the works council is not required to demonstrate a 'specific' need for a non-anonymised gross payroll if the employer maintains one.<sup>221</sup> The same goes for the representation of freelancers working for public broadcasters.<sup>222</sup> Moreover, the employer is obliged to report on the state of affairs within the company, and this includes the topic of gender equality. If the employer is found to have committed grave violations of the prohibition on discrimination, works councils and trade unions can seek a court order obliging them to stop. However, the statutory regulations have never been put into practice.

As mentioned above, on 6 July 2017, the Pay Transparency Act entered into force after long discussions and significant watering down of the means for the effective enforcement of equal pay contained in the first draft.<sup>223</sup> Nevertheless, the Act contains an explicit prohibition of direct and indirect pay discrimination on the grounds of sex/gender (including pregnancy and motherhood), and provides some 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. Agreements violating the prohibition of pay discrimination on the grounds of sex/gender are invalid. Victimisation connected to the exercising of rights under this law is prohibited.

In addition to an individual right to obtain information, the Act covers pay audits and reporting duties on equal pay. Unfortunately, reporting duties are restricted to companies with more than 500 employees and there are no effective sanctions in the case of non-compliance. Pay audits are not mandatory and the right to information is restricted to companies with more than 200 employees, although the majority of women work in smaller enterprises.

The first major case of pay discrimination pending before the court (of third instance) after the adoption of the Pay Transparency Act is not destined to give cause for high hopes concerning the enforcement of the prohibition of pay discrimination. The case was lost in the first instance with amazing reasoning based on the nature of women<sup>224</sup> and in the

<sup>217</sup> See <https://www.bmfsfj.de/bmfsfj/service/publikationen/der-entgeltgleichheit-einen-schritt-naeher/80406>.

<sup>218</sup> See <https://www.bmfsfj.de/blob/93494/e17b577ac517a8bfa186fdc99974a3e/der-entgeltgleichheit-einen-schritt-naeher-die-eva-liste-beispiele-data.pdf>.

<sup>219</sup> See <https://www.bmfsfj.de/blob/93494/e17b577ac517a8bfa186fdc99974a3e/der-entgeltgleichheit-einen-schritt-naeher-die-eva-liste-beispiele-data.pdf>.

<sup>220</sup> Works Constitution Act of 25 September 2001, Official Journal 2001, p. 2518, [https://www.gesetze-im-internet.de/englisch\\_betrvq/index.html](https://www.gesetze-im-internet.de/englisch_betrvq/index.html) (English version).

<sup>221</sup> Federal Labour Court, judgment of 7 May 2019, 1 ABR 53/17.

<sup>222</sup> State Administrative Court of Berlin and Brandenburg, judgment of 19 December 2019, OVG 62 PV 7.19.

<sup>223</sup> Pay Transparency Act of 30 June 2017, Official Journal 2017, p. 2152, <https://www.gesetze-im-internet.de/entgtranspg/BJNR215210017.html>.

<sup>224</sup> Labour Court of Berlin, judgment of 1 February 2017, 56 Ca 5356/15. 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

second instance because the State Labour Court of Berlin and Brandenburg stated that the claimant could not prove that the lower remuneration (in comparison to 12 male colleagues) was based upon sex discrimination and no other reasons.<sup>225</sup> Moreover, the State Labour Court rejected the claimant's right to information under Section 10 of the Pay Transparency Act with the argument that the claimant as a freelancer was not covered by the personal scope of application of the Act.

#### 4.2.11 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

The European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency is formally applied in Germany. On 6 July 2017, the Pay Transparency Act (*Entgelttransparenzgesetz*) entered into force.<sup>226</sup> 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 companies with more than 500 employees and there are no effective sanctions in the case of non-compliance. Pay audits are not mandatory.<sup>227</sup> The right to information is restricted to companies 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. 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 privileging of 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 action, more rights for works councils and binding obligations, the principle of equal pay will not be strengthened by isolated transparency measures.<sup>228</sup>

There is serious doubt that pay transparency can indeed bring about any change in court decisions. In a recent case of (alleged) pay discrimination, the Labour Court of Berlin emphasized that Article 157 TFEU would not require equal pay for equal work but prohibits sex discrimination.<sup>229</sup> 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 other 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

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shorter periods of employment of women, less seniority and thus, lower wages without any discrimination involved.

<sup>225</sup> State Labour Court of Berlin and Brandenburg, judgment of 5 February 2019, 16 Sa 983/18.

<sup>226</sup> Pay Transparency Act of 30 June 2017, Official Journal 2017, p. 2152, <https://www.gesetze-im-internet.de/entgelttransp/BjNR215210017.html>.

<sup>227</sup> 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.

<sup>228</sup> 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/>.

<sup>229</sup> Labour Court of Berlin, judgment of 1 February 2017, 56 Ca 5356/15.

childcare periods would often lead to shorter periods of employment by women, less seniority and, thus, lower wages without any discrimination being involved. The State Labour Court of Berlin and Brandenburg confirmed the ruling of the first instance court and denied the applicant the shift of the burden of proof because she could not offer further evidence that the lower remuneration for the work of equal value was based upon sex/gender discrimination.<sup>230</sup>

Generally, the main problem is that even when significant differences between the wages of male and female employees performing the same or equivalent work are confirmed, there never seems to be pay discrimination on the grounds of sex/gender. There is always another reason for the differences. Despite the shift of the burden of proof, courts held that the information pursuant to Section 11 of the Pay Transparency Act, even when confirming large differences in remuneration between a female claimant and the median of the male peer group, is not an indication of discrimination within the meaning of Section 22 of the General Equal Treatment Act.<sup>231</sup> The reason is that the median of the remuneration of male colleagues (as defined by the Pay Transparency Act) is not conclusive in the opinion of the courts, which miss the point that the employer can easily contradict an inconclusive median—the shift of the burden of proof is not the end of the court proceedings.

The first evaluation of the effects of the Pay Transparency Act after its entry into force was published in 2019 and shows that the majority of employers have not yet explored the new regulations in depth, let alone applied the rules, evaluated their systems or changed structures.<sup>232</sup> Some employees feel happier due to the existence of the law, but they do not exercise their rights, and many employees are still not aware of them. However, the main problem is not that the right to information is very seldom used but that there are no sanctions for infringements or enforcement mechanisms, such as an effective shift of the burden of proof and the ability to bring a class action, although the state has a constitutional obligation to fight pay discrimination on the grounds of sex/gender effectively.<sup>233</sup>

#### 4.2.12 Other measures, tools or procedures

There are several measures and policies to further equal pay. For example, in 2008 Germany held its first Equal Pay Day.<sup>234</sup> Initiated by Business and Professional Women Germany, the event takes place annually in March. Every year, a key aspect of the gender pay gap is highlighted for discussion. Separate events take place in the fourth quarter of the year to inform stakeholders about the key topic and to prepare activities for Equal Pay Day.

With the 'cliché-free' initiative and the nationwide Girls' Day (and, less successful, Boys' Day) campaign, the Federal Government is promoting gender-equitable career choices and

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<sup>230</sup> State Labour Court of Berlin and Brandenburg, judgment of 5 February 2019, 16 Sa 983/18.

<sup>231</sup> State Labour Court of Lower Saxony, judgment of 1 August 2019, 5 Sa 196/19.

<sup>232</sup> See Federal Government (2019), *Bericht der Bundesregierung zur Wirksamkeit des Gesetzes zur Förderung der Entgelttransparenz zwischen Frauen und Männern sowie zum Stand der Umsetzung des Entgeltgleichheitsgebots in Betrieben mit weniger als 200 Beschäftigten* (Report of the Federal Government on the effectiveness of the Pay Transparency Act and on the status of implementation of the equal pay requirement in companies with fewer than 200 employees), <https://www.bmfsfj.de/blob/137224/79c7431772c314367059abc8a3242a55/bericht-der-br-foerderung-entgelttransparenz-data.pdf>.

<sup>233</sup> See Markard, N. (2019), 'Das Gebot der Entgeltgleichheit: Verfassungsrechtliche Perspektiven' in *JuristenZeitung* No. 74(11), pp. 534-542.

<sup>234</sup> See <https://www.equalpayday.de/startseite/>.



vocational counselling.<sup>235</sup> In 2009, the government published guidelines on the implementation of equal pay for work of equal value.<sup>236</sup>

### 4.3 Access to work, working conditions and dismissal

#### 4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

The personal scope in relation to access to employment, vocational training, working conditions etc. is defined in German law. 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 temporary<sup>237</sup> 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 relationship<sup>238</sup> or whose employment relationship has ended. Volunteers might be covered by interpreting the section in the light of European Union law.<sup>239</sup> So-called 'one-Euro jobbers'<sup>240</sup> are not covered. According to Section 6(3) of the General Equal Treatment Act, self-employed persons, 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.

#### 4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

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 CJEU 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 such action may, if the requisite conditions under EU law are met, be considered to be an abuse of rights.<sup>241</sup> As German legal discourse has been dominated by fear of the abuse of anti-discrimination law, this decision was warmly welcomed.<sup>242</sup>

#### 4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

The exception on occupational activities has been implemented in German law. 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

<sup>235</sup> See <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/frauen-und-arbeitswelt/klischeefrei-und-girls-day/initiativen-zur-berufswahl-von-maedchen--klischeefrei-und-girls-day/80404>.

<sup>236</sup> See <https://www.bmfsfj.de/bmfsfj/service/publikationen/fair-p-l-ay---entgeltgleichheit-fuer-frauen-und-maenner/80416>.

<sup>237</sup> 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.

<sup>238</sup> 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 CJEU, C-423/15.

<sup>239</sup> Wendeling-Schröder, U. & Stein, A. (2008), 'Section 6 paragraph 8', *Allgemeines Gleichbehandlungsgesetz. Kommentar* (Commentary on the General Equal Treatment Act), Munich.

<sup>240</sup> Those who top up their unemployment assistance by working for one euro per hour.

<sup>241</sup> CJEU decision of 28 July 2016, *Kratzer*, C-423/15, ECLI:EU:C:2016:604.

<sup>242</sup> References and critical analysis by Baer, S. (2002), "'Ende der Privatautonomie" oder grundrechtlich fundierte Rechtsetzung?' ("The End of Private Autonomy" or Rights-Based Legislation?) *Zeitschrift für Rechtspolitik*, Vol. 35, pp. 290-294.



to sex only. There are no official assessments available on this topic. The courts have decided that (female) sex/gender may constitute a genuine and determining occupational requirement for equal opportunity commissioners<sup>243</sup> and official guardians<sup>244</sup> but not for a gym teacher.<sup>245</sup>

More surprising are the decisions of the State Administrative Court of North Rhine-Westphalia<sup>246</sup> and the State Administrative Court of Saarland<sup>247</sup> on standard minimum height requirements for female and male applicants for the police forces of 163 cm (North Rhine-Westphalia) and 162 cm (Saarland). The courts decided that these standard requirements, excluding a quarter of female and only a very small number of male applicants, constituted indirect sex discrimination but were justified as a genuine and determining occupational requirement under Article 14(2) of Directive 2006/54. The main argument was that the state police forces' ability to function were put into question when recruiting police officers smaller than this absolute minimum height. It has to be noted that the State Administrative Court of Saarland claims to strictly follow the decision of the State Administrative Court of North Rhine-Westphalia although a minimum height requirement of 162 cm undoubtedly lies below the 'absolute minimum' of 163 cm. Moreover, in the state of Berlin, the minimum height requirement for female police staff, confirmed by the courts,<sup>248</sup> is only 160 cm.

#### 4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

There is effective protection against dismissal in the legal framework of maternity protection and parental leave (see below) but the effectiveness of protection against non-hiring, non-renewal of a fixed-term contract or non-continuation of a contract is more than questionable. As long as the Federal Anti-Discrimination Agency simply advises female job applicants not to answer or to lie in an application interview to the question of a possible desire to have children,<sup>249</sup> it can be assumed that there is a larger problem. The agency is obviously aware of widespread discrimination against young female applicants or employees, but these cases are neither settled nor brought to court.

#### 4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

As there is no explicit implementation of Directive 2006/54, it is hard to say whether the exception on protection for women, in particular as regards pregnancy and maternity, has fully been implemented in German law. However, although formally not based on Article 28(1) of the Recast Directive 2006/54, the Maternity Protection Act (see below) offers broad protection.

#### 4.3.6 Particular difficulties

There are some difficulties related to the personal and material scope of German law in relation to access to work, employment and working conditions.

<sup>243</sup> 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.

<sup>244</sup> State Labour Court of Lower Saxony, judgment of 19 April 2012, 4 SaGa 1732/11.

<sup>245</sup> Federal Labour Court, judgment of 19 December 2019, 8 AZR 2/19.

<sup>246</sup> State Administrative Court of North Rhine-Westphalia, judgment of 28 June 2018, 6 A 2016/17.

<sup>247</sup> State Administrative Court of Saarland, judgment of 25 March 2019, 1 B 2/19.

<sup>248</sup> State Administrative Court of Berlin and Brandenburg, judgment of 27 January 2017, OVG 4 S 48.16, and Administrative Court of Berlin, judgment of 1 June 2017, 5 K 219.16.

<sup>249</sup> See [https://www.antidiskriminierungsstelle.de/DE/Beratung/Der\\_aktuelle\\_Fall/Geschlecht/Geschlecht\\_inhalt\\_Kinderwunsch.html?nn=9230170](https://www.antidiskriminierungsstelle.de/DE/Beratung/Der_aktuelle_Fall/Geschlecht/Geschlecht_inhalt_Kinderwunsch.html?nn=9230170), last sentences.

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 as they cannot fulfil the requirements of Section 19 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'.<sup>250</sup>

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.<sup>251</sup> 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.

#### 4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

The General Equal Treatment Act could not implement the provisions of Directive 2006/54/EC due to the date of its entry into force,<sup>252</sup> including positive action measures under Article 3 of the Recast Directive.

In the 1980s, the structural discrimination against women in the labour market had become obvious. Therefore, federal and state legislation and policies decided upon affirmative action in the civil service (because the overwhelming majority opinion in the legal and political discourse was that private employers and companies could not be obliged to act against discrimination). Many legal scholars explained why such gender quotas in favour of women would violate the prohibition of sex discrimination enshrined in the Constitution. As the Federal Constitutional Court was spared a decision on this topic, the decisions of the European court became the guiding star for questions of positive action within the civil service while, later on, the implementation of the relevant European directives would decide upon the legitimacy and legality of positive action in private employment.

As the first three CJEU decisions were based on German cases, they unfolded a special impact on German legal discourse. The decision of *Kalanke*<sup>253</sup> seemed to put an end to all the new positive action measures, affirmative action measures and quotas for women within the civil service. The majority legal opinion had prevailed. Legislators and public authorities considered withdrawing any newly introduced quotas for women. Fortunately,

<sup>250</sup> See Bauer, J. H. et al. (2011), 'Section 2 paragraph 16', *Allgemeines Gleichbehandlungsgesetz. Kommentar* (Commentary on the General Equal Treatment Act), 3rd ed Munich.

<sup>251</sup> 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.

<sup>252</sup> The General Equal Treatment Act entered into force on 14 August 2006 and thus, the Parliament could not take Directive 2006/54 of 5 July 2006 into consideration. While the German Government still claims that the GETA would implement Directive 2006/54 as well, the official materials of the legislative procedure show clearly that it implements Directives 2000/43, 2000/78, 2002/73 and 2004/113 and no more.

<sup>253</sup> Judgment of the Court of 17 October 1995, *Eckhard Kalanke v. Freie Hansestadt Bremen*, Case C-450/93, ECLI:EU:C:1995:322.

the decisions of *Marschall*<sup>254</sup> and *Badeck*<sup>255</sup> adjusted the first decision and stated that it was legitimate to hire or promote women instead of equally qualified men, unless there were exceptional reasons to decide in favour of the male candidate. Since then, this has been the approach to gender quotas in the civil service.

#### **4.4 Evaluation of implementation**

Generally, the principle of equal pay for equal work or work of equal value is implemented in German legislation. However, it is notable that an explicit prohibition of pay discrimination as well as the definition of central concepts such as work of equal value were lacking before the adoption of the Pay Transparency Act. There is very little case law and pay discrimination cases not connected to occupational pensions have not been successfully brought to court which indicates significant barriers to the access to justice, given that the gender pay gap remains at more than 20 %.

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 or the problems concerning the burden of proof (see Section 11.5 below). The privileging of 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 action, more rights for works councils and binding obligations, the principle of equal pay will not be strengthened by isolated transparency measures.

There seems to be broad discrimination against female employees, especially due to (the possibility of) pregnancy and maternity. However, this claim is based solely upon anecdotal evidence as there are no studies, no case law and no measures to end this discrimination. Despite all the efforts of Girls' Days, the gender-segregation of the labour market is growing. Further and new measures are needed to put the law on non-discrimination in working life into practice.

#### **4.5 Remaining issues**

There are no remaining issues to report.

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<sup>254</sup> Judgment of the Court of 11 November 1997, *Hellmut Marschall v. Land Nordrhein-Westfalen*, Case C-409/95, ECLI:EU:C:1997:533.

<sup>255</sup> Judgment of the Court of 28 March 2000, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, Case C-158/97, ECLI:EU:C:2000:163.

## 5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)<sup>256</sup>

### 5.1 General (legal) context

#### 5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

Although the head of the Federal Anti-Discrimination Agency confirms that female employees suffering disadvantages due to their pregnancy or maternity are common,<sup>257</sup> nearly no cases are reported on the agency's website.<sup>258</sup> This finding, in combination with an obvious lack of court decisions on the topic, suggests severe problems with access to justice. Moreover, although the evaluation of the General Equal Treatment Act deeply analyses the problems of enforcement of prohibition of discrimination,<sup>259</sup> it does not offer any insight into the problems of enforcement of legislation against discrimination on the grounds of pregnancy, maternity protection or parental or carer's leave.

A 2019 study on pay discrimination on the grounds of maternity<sup>260</sup> shows that mothers taking parental leave suffer severe financial disadvantages through decreased wages and that flexible working times are no solution. When mothers take parental leave for up to 12 months, their wages drop by 6.5 %, but when they take parental leave for more than 12 months (e.g. because there is more than one child), their wages drop by 10 %. Furthermore, although deciding to make use of flexible working times increases the average wage hour for female workers by 4.5 %, the wages of mothers who had taken more than 12 months of parental leave drop by 16 %. In order to promote the gender-neutral division of paid work and care work and to reduce strong prejudices against working mothers, the authors of the study suggest the abolition of tax incentives for gender-segregated labour and the gender care gap, maintaining childcare facilities and introducing family working times, allowing both parents to reduce their working hours to share care work.

The authors of the *Second Gender Equality Report* of the Federal Government<sup>261</sup> identified a 'gender care gap' illustrating structural inequalities between men and women after having analysed the way society (and the legal framework) organises paid work (including paid care work) and unpaid care work. The gender care gap was calculated on the basis of the data of the third Time Usage Survey from 2012 and 2013 and is 52.4 % meaning that women perform about one and a half times as much unpaid care work as men – in absolute terms, this is 87 minutes more per day on average. The experts suggested, among other things, financial incentives for a more gender-equal distribution of the taking

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<sup>256</sup> See Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, Aileen (2015) *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

<sup>257</sup> See <https://www.tagesspiegel.de/wirtschaft/probleme-nach-der-elternteit-wenn-frauen-im-job-plotzlich-unerwünscht-sind/8653974-all.html> and [https://www.antidiskriminierungsstelle.de/DE/Beratung/Der\\_aktuelle\\_Fall/Geschlecht/Geschlecht\\_inhalt\\_Kinderwunsch.html?nn=9230170](https://www.antidiskriminierungsstelle.de/DE/Beratung/Der_aktuelle_Fall/Geschlecht/Geschlecht_inhalt_Kinderwunsch.html?nn=9230170).

<sup>258</sup> Research for such cases on [www.antidiskriminierungsstelle.de](http://www.antidiskriminierungsstelle.de) was futile.

<sup>259</sup> Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin.

<sup>260</sup> Lott, Y. & Eulgem, L. (2019), 'Lohnnachteile durch Mutterschaft. Helfen flexible Arbeitszeiten?' in *WSI Report No. 49*, [https://www.boeckler.de/pdf/p\\_wsi\\_report\\_49\\_2019.pdf](https://www.boeckler.de/pdf/p_wsi_report_49_2019.pdf).

<sup>261</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin, available at <https://www.gleichstellungsbericht.de/>. The committee of experts consisted of Eva Kocher (chair), Thomas Beyer, Eva Blome, Holger Bonin, Ute Klammer, Uta Meier-Gräwe, Helmut Rainer, Stephan Rixen, Christina Schildmann, Carsten Wippermann, Anne Wizorek, and Aysel Yollu-Tok.

of parental leave.<sup>262</sup> They strongly recommended the introduction of an effective right to return to the former or an equivalent workplace after taking parental or care leave and the maintenance of all rights and entitlements obtained before taking the leave.<sup>263</sup> The experts made the criticism that neither the regulations on parental leave nor the regulations on carer's leave contained rules for an adjustment of employment relationships in the context of the employee's return to work.

Further, the expert authors of the *Second Equality Report* criticised the complexity and lack of transparency of the regulations under the Home Care Leave Act and the Family Home Care Leave Act and the small number of persons taking care leave under these laws.<sup>264</sup> They recommended consolidation of both laws and amendments to make them more concise and manageable. The fact that the experts pointed out that employees taking care leave must not suffer any disadvantages suggests that the opposite is the case. The experts strongly recommended the introduction of a flexible time budget of 120 days in total to take carer's leave (for days or weeks or months over several years) while being reimbursed by compensation of payment in an amount comparable to parental allowances.<sup>265</sup> The statutory entitlement to 120 days of carer's leave in total and carer's allowances would be financed by taxes.

The Federal Ministry for Family, Senior Citizens, Women and Youth published a report on being a father in Germany today presenting some data on the expectations, role models, use of time, family and working life framework and the real distribution of care work.<sup>266</sup> The main findings are that fathers wish to spend time with their children and that many of them consider fairer arrangements of the distribution of care work within the partnership but only very few realise these considerations. A considerable proportion (34 % of the men between 18 and 35 years of age) still think in terms of traditional role models with male breadwinners and female carers at home. Many other fathers face severe difficulties with their wish to reduce full-time work to 90 % or 80 %, and studies show that German fathers have the greatest amount of working hours per week compared to fathers in other European countries. In 28 % of couples with children under the age of 18 years, the fathers are the male breadwinners while the mothers do not perform paid work; both parents work part time in only 5 % of all couples.

Other studies show that the number of fathers receiving parental allowances and, thus, taking parental leave, is constantly rising and reached 39 % in 2016.<sup>267</sup> However, while 76 % of the mothers receive parental allowances for 10 to 14 months (and 19 % for 15 months or longer), only 7 % of the fathers stay at home for 10 to 14 months (and less than 1.5 % for longer).<sup>268</sup>

A 2019 study on parental leave<sup>269</sup> points out that the total number and percentage of fathers taking parental leave has increased significantly from 3 % to 37 % since the introduction of the Federal Parental Allowances and Parental Leave Act, but has to be compared to the 90 % of mothers taking parental leave. More significantly, while mothers take parental leave for a period of 10 to 12 months, 72 % of fathers who take parental leave do so for only two months. The two main reasons for fathers deciding against (longer) parental leave are financial concerns and fear of disadvantages at work. New statutory incentives to work part time while taking parental leave have mildly influenced

<sup>262</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin, p. 103.

<sup>263</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin, pp. 120-121.

<sup>264</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin, p. 113.

<sup>265</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin, pp. 113-114.

<sup>266</sup> Federal Ministry for Family, Senior Citizens, Women and Youth (2018) *Väterreport. Vater sein in Deutschland heute* (Fathers Report. Being a father in Germany today), Berlin: BMFSFJ, <https://www.bmfsfj.de/bmfsfj/service/publikationen/vaeterreport/112722>.

<sup>267</sup> See <https://www.wsi.de/de/sorgearbeit-14618-elterngeldbezug-in-deutschland-14907.htm>.

<sup>268</sup> See <https://www.wsi.de/de/sorgearbeit-14618-dauer-des-bezugs-von-elterngeld-14903.htm>.

<sup>269</sup> Samtleben, C., Schäper, C. & Wrohlich, K. (2019), 'Elterngeld und Elterngeld Plus: Nutzung durch Väter gestiegen, Aufteilung zwischen Müttern und Vätern aber noch sehr ungleich', in *DIW Wochenbericht* No. 35, [https://www.diw.de/documents/publikationen/73/diw\\_01.c.673396.de/19-35-1.pdf](https://www.diw.de/documents/publikationen/73/diw_01.c.673396.de/19-35-1.pdf).

the behaviour of mothers but did not change the decision of fathers to stay at work full time. The authors of the study suggest an increase of parental allowances, especially for low-paid jobs, and more information on parental leave for both parents.

### 5.1.2 Other issues

There are two cultures in Germany concerning the question of institutional care for children. In the Eastern parts of the country, parents are used to returning to work early and make use of care institutions such as kindergartens or full-day school because German Democratic Republic (GDR) politics campaigned for the model of the 'working mother'. In the Western and southern parts of the country, mothers are expected to stay home with their children until their third birthday or longer. While the GDR politics exerted pressure on mothers to return to work and did not imagine interruptions of working life by fathers, the Federal Republic of Germany (FRG) model supported the male breadwinner and thus, female poverty in old age. In the 1990s, the Eastern infrastructure of institutionalised childcare was quickly disestablished and daily schooling times were reduced considerably. After much emotional controversy about what was considered either 'Western colonialism' or the 'return of communism', Germany has re-introduced a public childcare infrastructure.

From 1 August 2013, every child above the age of one was entitled to early childhood education and care by a kindergarten under Section 24(3) of the Social Code No 8 (*Sozialgesetzbuch VIII, SGB VIII*) as amended by the Support of Children Act.<sup>270</sup> The costs for the necessary development and establishment of childcare institutions to offer places for every child was divided between national, state and local levels. However, parents still have to pay kindergarten fees, the amounts of which differ noticeably between municipalities. On 12 September 2013, the Federal Administrative Court decided that parents may be entitled to a reimbursement of the costs for private childcare when the local authority responsible failed to offer the statutory guaranteed place in a kindergarten.<sup>271</sup> Today, in southern and Western German states, there is still a lack of tens of thousands of kindergarten places.

This history does not fully explain the behaviour of the German Government concerning the reconciliation directive. Watering down the European directives to the German national standard as early as the design stage seems to sum up German anti-discrimination politics of the last years perfectly.

### 5.1.3 Overview of national acts on work-life balance issues

There is some legislation concerning work-life balance issues:

- Maternity Protection Act of 23 May 2017, Official Journal 2017, p. 1228;
- Federal Parental Allowances and Parental Leave Act of 5 December 2006, Official Journal 2006, p. 2748;
- Act on the better reconciliation of family, home care and work of 23 December 2014 (amending the 2008 Home Care Leave Act and the 2012 Family Home Care Leave Act), Official Journal 2014, p. 2462;
- Act on the further development of part-time work – introduction of a bridge part-time work of 11 December 2018, Official Journal 2018, p. 2384.

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<sup>270</sup> Support of Children Act, (*Gesetz zur Förderung von Kindern unter drei Jahren in Tageseinrichtungen und in Kindertagespflege (Kinderförderungsgesetz – KiföG)*) of 10 December 2008, Official Journal (*Bundesgesetzblatt, BGBl.*), part I, p. 2403, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/kifoeg-gesetz.property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

<sup>271</sup> Federal Administrative Court, judgment of 12 September 2013, 5 C 35/12, <http://www.bverwg.de/entscheidungen/entscheidung.php?ent=120913U5C35.12.0>.



#### 5.1.4 Political and societal debate and pending legislative proposals

For some years now, the Government and the Bundestag have discussed the introduction of a statutory entitlement to fixed-term part-time work, especially covering a statutory entitlement to return to full-time work after having reduced working time to work part-time for a certain period. This was expected to reduce disadvantages for employees choosing to work part-time to raise children or care for close relatives in need. Until now, there was only a statutory entitlement to reduce working time but not to return to full-time work. On 11 December 2018, the Act on the further development of part-time work – introduction of a bridge part-time work was passed by the Bundestag, amending the Part-Time and Fixed-Term Employment Act, and entering into force on 1 January 2019.<sup>272</sup>

## 5.2 Pregnancy and maternity protection

### 5.2.1 Definition in national law

The question of who is a pregnant worker is answered by German statutory law. Under Section 1, the new Maternity Protection Act of 23 May 2017<sup>273</sup> 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 is 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 recognised 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 or with a 'diverse' status may become pregnant in the future. The law itself speaks of pregnant and breastfeeding 'persons'.

### 5.2.2 Obligation to inform employer

Under Section 15(1) of the Maternity Protection Act, a pregnant woman should inform her employer of her pregnancy and the expected date of delivery as soon as she knows that she is pregnant. A breastfeeding woman should inform her employer as soon as possible that she is breastfeeding. Under Section 15(2) of the Maternity Protection Act, at the employer's request, a pregnant woman must present a medical certificate or the certificate of a midwife or maternity nurse as proof of her pregnancy, containing the expected date of delivery.

The employer must not give information about the pregnancy of the employee to third parties within or outside the company except when the person in question is responsible for guaranteeing maternity protection in the specific case. Moreover, the works council is entitled to information on the name of every pregnant employee, even against their will, in order to monitor compliance with health and safety regulations under Section 80 of the Works Constitution Act.<sup>274</sup>

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<sup>272</sup> Act on the further development of part-time work – introduction of a bridge part-time work of 11 December 2018, Official Journal 2018, p. 2384, <https://www.bmas.de/DE/Service/Gesetze/brueckenteilzeit.html>.

<sup>273</sup> Act 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/muschg\\_2018/BJNR122810017.html](https://www.gesetze-im-internet.de/muschg_2018/BJNR122810017.html).

<sup>274</sup> State Labour Court of Munich, judgment of 27 September 2017, 11 TaBV 36/17.



### 5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

Due to the recent entry into force of the thoroughly amended legislation with comprehensive definitions, there is no case law. There is only one decision of the Federal Labour Court confirming that pregnant self-employed workers are not entitled to maternity allowances.<sup>275</sup>

### 5.2.4 Implementation of protective measures (Articles 4-6 of Directive 92/85)

The protective measures mentioned in Articles 4-7 of Directive 92/85 are implemented in German law. 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, several forms of work are prohibited. Night work (as well as night training or night studies) is prohibited between 10 pm and 6 am independently 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 workplaces and work that it requires in order to determine whether or not they are potentially dangerous for pregnant or breastfeeding workers under Section 11 of the new Maternity Protection Act. 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.

In a paradigm shift, 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.<sup>276</sup> 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 specific workplace. 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 EU law requirements). A newly established Commission for Maternity Protection will further develop guidelines concerning risk assessment, technical safety, occupational medicines and hygiene.

<sup>275</sup> Federal Labour Court, judgment of 23 May 2018, 5 AZR 263/17, concerning a day-care mother (childminder).

<sup>276</sup> Although not discussed in the legislative process, there are some considerable links to the concept of reasonable accommodation.

This 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.<sup>277</sup> 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 the Bundestag in May 2017 but most of its regulations entered into force on 1 January 2018.

#### 5.2.5 Case law on issues addressed in Article 4 and 5 of Directive 92/85

Due to the recent entry into force of the thoroughly amended legislation, there is no case law. The necessary assessment procedures are laborious. The Federal Ministry for Family, Senior Citizens, Women and Youth published guidelines for employers informing them about the new maternity protection.<sup>278</sup> However, many employers still need advice.

#### 5.2.6 Prohibition of night work

Under Section 5 of the new Maternity Protection Act, night work (as well as night training or night studies) is prohibited between 10 pm and 6 am independently 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.

#### 5.2.7 Case law on the prohibition of night work

Due to the recent entry into force of the thoroughly amended legislation and due to the strict statutory prohibition, there is no case law.

#### 5.2.8 Prohibition of dismissal

Pregnant workers must not be dismissed during their pregnancy and four months after childbirth (exceeding the time of maternity leave), except under exceptional circumstances not related to the pregnancy, 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 12<sup>th</sup> week of pregnancy.

In the case of pregnancy due to fertilisation outside the body (in vitro fertilisation), the prohibition of dismissal under the Maternity Protection Act applies from the time a fertilised egg is inserted into the uterus (embryo transfer).<sup>279</sup> Pregnancy is to be regarded as the main reason for dismissal if a worker is dismissed due to leave of absence resulting from her inability to work as a result of pregnancy, and the same applies to leave of absence due to in vitro fertilisation.<sup>280</sup>

#### 5.2.9 Redundancy and payment during maternity leave

Under the prohibition of dismissal during the pregnancy and four months after childbirth, employees cannot be made redundant during their maternity leave. In case of invalid dismissal or redundancy during maternity leave, the pregnant employee is entitled to

<sup>277</sup> German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K1/st16-05/>.

<sup>278</sup> See <https://www.bmfsfj.de/bmfsfj/service/publikationen/arbeitsgeberleitfaden-zum-mutterschutz/121860>.

<sup>279</sup> Federal Labour Court, judgment of 26 March 2015, 2 AZR 237/14.

<sup>280</sup> State Labour Court of Cologne, judgment of 3 June 2014, 12 Sa 911/13.

maternity allowances and the employer has to pay his\*her contributions under the general statutory rules.

#### 5.2.10 Employer's obligation to substantiate a dismissal

Under Section 17(2) of the Maternity Protection Act, the employer is obliged to indicate substantiated grounds for the dismissal during a pregnancy and until four months after childbirth in writing. This is in full compliance with Article 10(2) of Directive 92/85.

#### 5.2.11 Case law on the protection against dismissal

In 2012, the Administrative Court of Darmstadt decided upon the high standards of protection against dismissal during pregnancy and maternity leave.<sup>281</sup> The court explained that the protection against dismissal during pregnancy and four months after childbirth is based upon the implementation of Article 10 of Directive 92/85/EEC and is very strict. Therefore, the dismissal could only be justified with the special approval of the supervising authority and under extraordinary circumstances not related to the pregnancy, e.g. in case of particularly serious violations of employment contract obligations by the pregnant employee, which make it indeed unacceptable for the employer to maintain the employment relationship, at least until the end of the pregnancy or maternity leave.<sup>282</sup> The repeated acceptance of significant overpayments by the pregnant employee due to an error of the employer would not suffice. The court emphasised that, during pregnancy and maternity leave, a dismissal procedure according to legal standards with a lower scope of protection (e.g. paternal leave protection, see below) may neither be carried out nor even be prepared to be carried out after the end of the maternity leave.

In 2015, the State Labour Court of Berlin and Brandenburg decided that the dismissal of a pregnant woman without the consent of the supervising authority may constitute a prohibited discrimination on grounds of sex and may oblige the employer to pay monetary compensation under the General Equal Treatment Act.<sup>283</sup> What is surprising is the cautious assessment of the court because the statutory prohibition of discrimination under the Maternity Protection Act is as clear as the statutory definition that discrimination on the grounds of pregnancy constitutes discrimination on the grounds of sex under the General Equal Treatment Act. In 2013, the Federal Labour Court decided that dismissal in violation of the Maternity Protection Act constitutes discrimination on grounds of sex and may trigger a claim for compensation.<sup>284</sup>

The Labour Court of Berlin decided that in the case of a clause in the employment contract that provides for the termination of the employment relationship (training relationship) if the training is interrupted (here: by pregnancy and maternity protection), there is direct discrimination on the grounds of sex and entitlement to compensation.<sup>285</sup> The court held the dismissal to be invalid and awarded compensation in the amount of three months' salary (gross). The court explained that the employer obviously wanted to evade the gender-specific obligations under the Maternity Protection Act and disregarded the special need for protection of his/her pregnant employee. The court found this all the more serious as pregnant women usually find themselves in a stressful situation and in fear for their economic livelihood, which is why they are granted special maternity protection.

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<sup>281</sup> Administrative Court of Darmstadt, judgment of 26 March 2012, 5 K 1830/11.DA, <https://openjur.de/u/433574.html>.

<sup>282</sup> Confirmed by the Administrative Court of Frankfurt, judgment of 28 January 2015, 7 K 4016/14.F, and the State Administrative Court of Bavaria, judgment of 8 October 2014, 12 ZB 13.1087.

<sup>283</sup> State Labour Court of Berlin and Brandenburg, judgment of 16 September 2015, 23 Sa 1045/15.

<sup>284</sup> Federal Labour Court, judgment of 12 December 2013, 8 AZR 838/12. The claimant who was dismissed while suffering a miscarriage was awarded compensation in the amount of EUR 3 000.

<sup>285</sup> Labour Court of Berlin, judgment of 13 October 2017, 6 Ca 2270/17.

A 2017 decision of the Administrative Court of Mainz suggests problems with the double structure of access to court in case of dismissal during maternity protection.<sup>286</sup> Due to the fact that employees enjoying maternity protection can only be dismissed with the special approval of the supervising authority, pregnant employees have to challenge their dismissal before the labour courts and to challenge the approval before the administrative courts. The claimant took legal action against the approval before the administrative court and failed to take legal action against the dismissal before the labour court simultaneously. Although the administrative court stated that she would have lost her case anyway because the dismissal was justified, this raises concerns about access to justice. The special protection may turn into a special barrier to accessing justice.

In 2019, the State Labour Court of Hesse decided that the protection against dismissal under Section 17 of the Maternity Protection Act enters into effect with the effective conclusion of the employment contract and not as late as the contractually agreed date for the beginning of the work or the actual start of the performance of the work.<sup>287</sup>

### **5.3 Maternity leave**

#### **5.3.1 Length**

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.

#### **5.3.2 Obligatory maternity leave**

There is an obligatory period of maternity leave after birth. The prohibition of work in the eight or twelve weeks' postnatal protection period under Section 3(2) of the new Maternity Protection Act has only 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.

#### **5.3.3 Legal protection of employment rights (Article 5, 6 and 7 of Directive 92/85)**

There are legal provisions guaranteeing 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. A 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 Maternity Protection Act, and her holiday entitlement is completely preserved under Section 24. In 2019, the State Administrative Court of Bremen decided that a female civil servant who was temporarily unable to occupy a higher grade post because of a medical prohibition under the Maternity Protection Act must not be treated less favourably in

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<sup>286</sup> Administrative Court of Mainz, judgment of 26 October 2017, 1 K 1061/16.MZ.

<sup>287</sup> State Labour Court of Hesse, judgment of 13 June 2019, 5 Sa 751/18.

respect of the length of the probationary period than a civil servant who was temporarily unable to occupy the higher grade post because of illness.<sup>288</sup>

#### 5.3.4 Legal protection of rights ensuing from the employment contract

The employment rights relating to the employment contract (including pay or an adequate allowance) are ensured because the employment relationship remains totally unaffected during this leave. 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.

#### 5.3.5 Level of pay or allowance

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).<sup>289</sup> The Federal Constitutional Court has decided that this unequal treatment of self-employed persons is compatible with the constitutional principle of equality.<sup>290</sup> 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.<sup>291</sup>

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 statutory health insurance scheme and even then the allowance is no more than EUR 13 per day and EUR 210 in total.<sup>292</sup> With regard to the criteria for a comparable need for social protection, these mothers (to be) should be equally covered.

#### 5.3.6 Additional statutory maternity benefits

Statutory maternity benefits are supplemented by all employers and these supplements are reimbursed. The statutory health insurance 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 employer of the pregnant or breastfeeding worker until the Federal Constitutional Court declared that this regulation was unconstitutional due to its gender-discriminatory effects.<sup>293</sup>

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<sup>288</sup> State Administrative Court of Bremen, judgment of 9 September 2019, 2 LA 110/19.

<sup>289</sup> Concerning the problems involved see Social Court of Reutlingen, judgment of 24 June 2010, S 14 KR 3892/09.

<sup>290</sup> Federal Constitutional Court, judgment of 3 April 1987, 1 BvR 1240/86.

<sup>291</sup> See German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K1/st16-05/>.

<sup>292</sup> The Federal Social Court, judgment of 26 September 2017, B 1 KR 31/16 R, decided that public broadcasters are obliged to contribute to the funding of maternity allowances for all persons for whom they pay social security contributions, even if they classify these persons as 'freelancers' under labour law.

<sup>293</sup> 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.

### 5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

There are no further conditions for eligibility for benefits applicable in German legislation. 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.

### 5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

A special provision that guarantees the right of a woman to return to her job or to an equivalent job after maternity leave, 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 is not necessary under German law.

Due to the German conception 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.<sup>294</sup>

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 that have been contractually agreed upon.

### 5.3.9 Legal right to share maternity leave

German law does not provide for a legal right to share (part of) maternity leave.

### 5.3.10 Case law

There is very little case law relating to maternity leave and the courts are either dealing with questions relating to the deportation of pregnant women or the fine-tuning of parental leave and maternity leave. In 2016, the Federal Court of Justice had to decide that a criminal court was illegally constituted because a female judge was involved in the decision-making process during her obligatory period of maternity leave after birth.<sup>295</sup> The problem was that comprehensive criminal proceedings may not be suspended for more than six weeks, while the obligatory maternity leave is for eight weeks.

In 2016, the State Labour Court of Berlin and Brandenburg decided that an entitlement to maternity allowances can also be claimed if an employment prohibition pursuant to Section 3 of the Maternity Protection Act already exists from the first day of the employment relationship, and that in this case, the regular remuneration for the agreed working hours must be taken as a basis.<sup>296</sup>

## 5.4 Adoption leave

### 5.4.1 Existence of adoption leave in national law

German legislation provides for adoption leave. The provisions of the 2007 Federal Parental Allowance and Parental Leave Act (see below) apply directly and without special regulations to adoptive parents.

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<sup>294</sup> Labour Court of Wiesbaden, judgment of 18 December 2008, 5 Ca 46/08.

<sup>295</sup> Federal Court of Justice, judgment of 7 November 2016, 2 StR 9/15.

<sup>296</sup> State Labour Court of Berlin and Brandenburg, judgment of 30 September 2016, 9 Sa 917/16.

#### 5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

This legislation partly provides for protection against dismissal of workers who take adoption leave and/or specifies their rights after the end of adoption leave (see below).

#### 5.4.3 Case law

To the author's knowledge, there is no case law on adoption leave.<sup>297</sup>

### 5.5 Parental leave

#### 5.5.1 Implementation of Directive 2010/18

Directive 2010/18 has not been explicitly implemented in Germany. In January 2007, the Federal Parental Allowance and Parental Leave Act entered into force. The Act 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*.

#### 5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

The German legislation is applicable to both the public and the private sector and the regulations are mandatory: the entitlement to parental leave must not be restricted by collective agreements or individual labour contracts.

#### 5.5.3 Scope of the transposing legislation

The scope of the Federal Parental Allowance and Parental Leave Act 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.

#### 5.5.4 Length of parental leave

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

#### 5.5.5 Age limits

Parental leave can be taken until the child reaches the age of three, but a period of up to 24 months may be taken between the child's third birthday and the age of eight under Section 15(2) of the Federal Parental Allowance and Parental Leave Act.

#### 5.5.6 Individual nature of the right to parental leave

The entitlement to parental leave is an individual right for each parent.

#### 5.5.7 Transferability of the right to parental leave

As an individual right for each parent, parental leave 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.

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<sup>297</sup> The Labour Court of Berlin, judgment of 11 November 2015, 60 Ca 10222/15, decided on an adoptive mother's request for part-time work during parental leave but the adoption played no role.



### 5.5.8 Form of parental leave

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 Parental Leave and Parental Allowances Act. Special bonus systems in parental allowances (see below) try to encourage parents, especially mothers, to work part-time during parental leave, e.g. 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.

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, must be approved by the employer.

Civil servants can request a reduction of their working time in the amount of at least half of the regular working time for a defined period of time without further conditions under Section 91 of the Federal Civil Service Act (*Bundesbeamtengesetz*, BBG)<sup>298</sup> or under the states' civil service legislation unless there are opposing operational reasons. After that period, the civil servant can return to full-time work or request another period of part-time work. 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 *compelling* opposing operational reasons (Section 92 BBG). A caring civil servant is entitled to a reduction according to his or her needs, but all periods of part-time work in the amount of less than half of the regular working time together must not exceed fifteen years. During parental leave, civil servants are entitled to work part time for up to 30 hours per week.

Under Sections 15-17 of the Federal Equality Act (*Bundesgleichstellungsgesetz*, BGIG),<sup>299</sup> every department within the civil service has to further reconciliation, has to approve requests for part-time work due to care duties unless there are compelling opposing operational reasons, explicitly including requests by civil servants with supervising or management responsibilities, and has to prefer equally qualified members of the civil service working part-time due to care duties when filling full-time vacancies.

### 5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

There is no work and/or length of service requirement in order to benefit from parental leave. 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.

### 5.5.10 Notice period

Under Section 16(1) of the Federal Parental Leave and Parental Allowances Act, 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 is at least 13 weeks

<sup>298</sup> Federal Civil Service Act (*Bundesbeamtengesetz*) of 5 February 2009, Official Journal (*Bundesgesetzblatt*, BGBl.), part I, p. 160, [http://www.gesetze-im-internet.de/bbg\\_2009/BJNR016010009.html](http://www.gesetze-im-internet.de/bbg_2009/BJNR016010009.html).

<sup>299</sup> Federal Equality Act (*Bundesgleichstellungsgesetz*) of 24 April 2015, Official Journal (*Bundesgesetzblatt*, BGBl.), part I, p. 642, [http://www.gesetze-im-internet.de/bgleig\\_2015/BJNR064300015.html](http://www.gesetze-im-internet.de/bgleig_2015/BJNR064300015.html).

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, 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.

#### 5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

There are situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation. 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.

#### 5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

There are special arrangements for small firms. 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 Parental Leave and Parental Allowances Act.

#### 5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18)

There are no special rules/exceptional conditions for access and modes of application of parental leave to the needs of parents of children with a disability or a long-term illness under the Federal Parental Leave and Parental Allowances Act. 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 take special care leave under other regulations instead.

#### 5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

There are no special 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.

#### 5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

There are provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave. From the moment of applying for parental leave (but not more than eight, or – if the child is 3 or older – 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 Parental Leave and Parental Allowances Act: they may not be dismissed except under special circumstances such as a threat to the employing company's existence or its (partial) closure<sup>300</sup> and with the approval of the supervising authority. Dismissal at the end of the parental leave can

<sup>300</sup> Due to the Administrative Court of Oldenburg's 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.

become effective when the notice of termination is given at least three months before the dismissal is to become effective.

However, the Federal Anti-Discrimination Agency reported a case in which a female employee received her dismissal on the first day of returning to work after her parental leave.<sup>301</sup> As the employer would not agree upon an out-of-court settlement, the case was brought before a court, which awarded compensation in the amount of three months' salary (gross). What is disturbing, though, is the fact that the Federal Anti-Discrimination Agency when reporting this case expresses concern about the great number of cases of discrimination against employees due to their pregnancy, maternity protection or parental leave but does not present any more cases, studies, fact sheets or other information on this topic. Even when dealing with pay discrimination, time and again the agency suggests that discrimination on the grounds of pregnancy, maternity protection or parental leave plays an important role in the gender pay gap but these suggestions are neither researched nor substantiated.

#### 5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

The Federal Parental Leave and Parental Allowances Act does not explicitly cover the right to return to one's former job or to an equivalent post.<sup>302</sup> The German Women Lawyers' Association points out that the lack of a right to return to work after parental leave violates Directive 2010/18.<sup>303</sup>

#### 5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

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.<sup>304</sup> Childcare periods of federal civil servants for up to three years as well as parental leave count as periods of experience.

#### 5.5.18 Status of the employment contract or relationship during parental leave

During parental leave, the employment relationship is suspended.

#### 5.5.19 Continuity of entitlement to social security benefits

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.

#### 5.5.20 Remuneration

Parental leave is not remunerated by the employer.

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<sup>301</sup> See [http://www.antidiskriminierungsstelle.de/DE/Beratung/Der\\_aktuelle\\_Fall/Geschlecht/Geschlecht\\_inhalt\\_Kindlos.html](http://www.antidiskriminierungsstelle.de/DE/Beratung/Der_aktuelle_Fall/Geschlecht/Geschlecht_inhalt_Kindlos.html).

<sup>302</sup> See Nassibi, G. et al. (2012), 'Geschlechtergleichstellung durch Arbeitszeitsouveränität' (Gender Equality and Working Time Sovereignty), *Zeitschrift des Deutschen Juristinnenbundes*, pp. 111-116.

<sup>303</sup> See German Women Lawyers Association (2014), 'Stellungnahme vom 26.06.2014 zum Entwurf eines Gesetzes zur Einführung des Elterngeld Plus mit Partnerschaftsbonus und einer flexibleren Elternzeit im BEEG', <https://www.djb.de/verein/Kom-u-AS/K4/st14-10/>.

<sup>304</sup> 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.

#### 5.5.21 Social security allowance

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,<sup>305</sup> 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').

#### 5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

To a rather significant extent, German legislation goes far beyond the provisions of Directive 2010/18: 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.

#### 5.5.23 Case law

In 2012, the Administrative Court of Darmstadt decided upon the protection against dismissal during parental leave.<sup>306</sup> The court explained that the protection against dismissal during parental leave was not as strong as the protection against dismissal during maternity leave but stronger than the general protection against dismissal. The interests of the employee taking parental leave are regarded by law as taking priority. Therefore, it would need exceptional circumstances for the employee's interests to come after the employer's interests in the termination of the employment relationship suspended during parental leave. This would require serious breaches of duty, such as operational offences or repeated serious breaches of employment contract obligations.<sup>307</sup>

On 8 June 2016, the Federal Constitutional Court decided that a decision of the Federal Labour Court applying the Federal Parental Leave and Parental Allowances Act instead of the regulations on special dismissal protection in case of collective redundancies had put the female claimant at a disadvantage and thus, violated the constitutional prohibition of sex discrimination under Article 3(2) of the German Basic Law.<sup>308</sup> While the regulations on parental leave are gender neutral, it is evident that a much greater proportion of mothers compared to fathers, take parental leave (2014: 41.5 % of working mothers but only 2 % of working fathers). Thus, the non-application of the regulations on special dismissal protection detrimental to parents taking parental leave in fact put female parents at a disadvantage compared to male parents and constituted indirect sex discrimination. This discrimination was not compatible with the German Constitution. The competent authorities were obliged to apply the advantageous dismissal protection.

The State Administrative Court of North Rhine-Westphalia decided in 2017 that severe operational reasons such as the closure of a medical practice could justify a dismissal

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<sup>305</sup> The minimum allowances are not awarded to every parent, because parental allowances are offset against unemployment assistance and social assistance, which means in practice that parents receiving unemployment or social assistance do not get any parental allowances.

<sup>306</sup> Administrative Court of Darmstadt, judgment of 26 March 2012, 5 K 1830/11.DA, <https://openjur.de/u/433574.html>.

<sup>307</sup> Confirmed by the State Administrative Court of Bavaria, judgment of 7 October 2015, 12 ZB 15.239, setting the requirements very high.

<sup>308</sup> Federal Constitutional Court, judgment of 8 June 2016, 1 BvR 3634/13: [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/06/rk20160608\\_1bvr3634\\_13.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/06/rk20160608_1bvr3634_13.html).

during parental leave.<sup>309</sup> The State Administrative Court of Bavaria confirmed that reasons for dismissal during parental leave must be exceptional and that suspicion of an offence or even crime would not be sufficient.<sup>310</sup>

## **5.6 Paternity leave**

### **5.6.1 Existence of paternity leave in national law**

German legislation does not provide for paternity leave.

Civil servants can take one day off at the day of the birth. Every male parent can take parental leave from the birthday of the child.

### **5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)**

As there is no paternity leave under German law, there is no protection against unfavourable treatment and/or dismissal either.

### **5.6.3 Case law**

As there is no paternity leave under German law, there is no case law on this topic.

## **5.7 Time off for *force majeure***

### **5.7.1 Time off for *force majeure***

German legislation entitles workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident.

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 10 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 Home Care Leave Act, employees are entitled to up to 10 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.

### **5.7.2 Case law**

In 2016, the State Labour Court of Rhineland-Palatinate held that a dismissal by the employer on the grounds of exercising the right to be absent from work under the conditions of Section 45 of Social Code No. 5 constitutes unlawful victimisation.<sup>311</sup> Such a dismissal would be invalid as, in the event of unlawful refusal, the entitlement to emergency care leave includes the right to remain absent from work without authorisation.

<sup>309</sup> State Administrative Court of North Rhine-Westphalia, judgment of 12 January 2017, 12 E 896/16.

<sup>310</sup> State Administrative Court of Bavaria, judgment of 5 November 2019, 12 ZB 19.1222.

<sup>311</sup> State Labour Court of Rhineland-Palatinate, judgment of 8 November 2016, 8 Sa 152/16, nevertheless confirming the validity of the dismissal because the applicant was still in probation.

## 5.8 Care leave

### 5.8.1 Existence of care (or carers') leave in national law

On 1 January 2015, the Act on the better reconciliation of family, home care and work (*Gesetz zur besseren Vereinbarkeit von Familie, Pflege und Beruf*)<sup>312</sup> entered into force. It covers several amendments to the 2008 Home Care Leave Act (*Pflegezeitgesetz, PflZG*)<sup>313</sup> and the 2012 Family Home Care Leave Act (*Familienpflegezeitgesetz, FamPflZG*)<sup>314</sup>. The laws provided for emergency care leave for up to 10 working days and part-time or full-time home care leave for up to 6 months. Further, the laws provided for a reduction of working time to no less than 15 hours per week, in agreement with the employer, for up to 2 years to care for a close relative in need of home care. Due to the latest amendments, employees taking emergency care leave are entitled to 'home care support benefit' as a means of earnings replacement benefits. The entitlement to part-time or full-time (home) care leave is extended to care leave for a close relative under the age of 18 for up to 6 months whether in need of care or home care, and to end-of-life care of a close relative for up to 3 months. The entitlement to family home care leave by reducing working time is extended to care leave for close relatives who are minors for up to 24 months.

Neither the Home Care Leave Act nor the Family Home Care Leave Act contain any explicit prohibition of discrimination or unfavourable treatment due to taking carer's leave. The experts of the Second Equality Report of the Federal Government criticised the complexity and lack of transparency of the regulations of the Home Care Leave Act and the Family Home Care Leave Act and the small number of persons taking care leave under these laws.<sup>315</sup> They recommended consolidating both laws, with amendments to make them more concise and manageable. The fact that the experts pointed out that employees taking care leave must not suffer any disadvantages suggests that the opposite is the case. The experts strongly recommended the introduction of a flexible time budget of 120 days in total to take carer's leave (for days or weeks or months over several years) while being reimbursed by compensation of payment in an amount comparable to parental allowances.<sup>316</sup> The statutory entitlement to 120 days of carer's leave in total and carer's allowances would be financed by taxes.

Instead, on 11 December 2018, the Act on the further development of part-time work – introduction of a bridge part-time work was passed by the Bundestag, amending the Part-Time and Fixed-Term Employment Act (see Section 5.10 below), and entering into force on 1 January 2019.<sup>317</sup>

### 5.8.2 Case law

There is no case law concerning sex/gender discrimination in the application of the Home Care Leave Act or the Family Home Care Leave Act.

## 5.9 Leave in relation to surrogacy

There is no parental leave available in case of surrogacy as surrogacy is prohibited in Germany.

<sup>312</sup> More information available at: <http://www.wege-zur-pflege.de/neu-seit-112015.html>.

<sup>313</sup> *Gesetz über die Pflegezeit (Pflegezeitgesetz)* of 28 May 2008, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 874, 896, <http://www.gesetze-im-internet.de/pflegezg/BJNR089600008.html>.

<sup>314</sup> *Gesetz über die Familienpflegezeit (Familienpflegezeitgesetz, FPfZG)* of 6 December 2011, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 2564, <http://www.gesetze-im-internet.de/fpfzg/BJNR256410011.html>.

<sup>315</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin, p. 113, available at: <https://www.gleichstellungsbericht.de/>.

<sup>316</sup> Federal Government (2017), *Second Gender Equality Report*, Berlin, pp. 113-114.

<sup>317</sup> Act on the further development of part-time work – introduction of a bridge part-time work of 11 December 2018, Official Journal 2018, p. 2384, <https://www.bmas.de/DE/Service/Gesetze/brueckenteilzeit.html>.

## 5.10 Flexible working time arrangements

### 5.10.1 Right to reduce or extend working time

German law provides workers with legal rights to reduce working time on request.

Employees may request a reduction of their working time under Section 8 of the Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz*).<sup>318</sup> 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 in proving that the organisational arrangement 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 for part-time work and explicitly mentions workers in higher management positions. Possibilities for individually agreed job sharing are covered by Section 13 of the Act.

A recent study shows that the desire for the option 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.<sup>319</sup>

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 Parental Leave and Parental Allowances Act. 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 Act 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 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.

The problem was that there was no legal right to extend working time on request, especially after having taken some form of family or care-related leave. On 11 December 2018, the Act on the further development of part-time work – introduction of a bridge part-time work was passed by the Bundestag, amending the Part-Time and Fixed-Term Employment Act, and entered into force on 1 January 2019.<sup>320</sup>

Under the newly introduced Section 9a of the amended Part-Time and Fixed-Term Employment Act, employees are entitled to a temporary reduction of working time. They can demand that their contractually agreed working time be reduced for a period to be determined in advance. The desired period must be at least one year and at most five years. The conditions for a reduction are that the employer employs more than 45 persons,

<sup>318</sup> Part-Time and Fixed-Term Employment Act of 21 December 2000, Official Journal 2000, p. 1966, <https://www.gesetze-im-internet.de/tzbfq/BJNR196610000.html>.

<sup>319</sup> Holst, E. & Bringmann, J. (2016), *Arbeitszeitrealitäten und Arbeitszeitwünsche in Deutschland* (Realities of working time and wishes regarding working time in Germany), DIW: Berlin.

<sup>320</sup> Act on the further development of part-time work – introduction of a bridge part-time work of 11 December 2018, Official Journal 2018, p. 2384, <https://www.bmas.de/DE/Service/Gesetze/brueckenteilzeit.html>.



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, or when in a company with no more than 200 employees, one out of 15 employees is already using the option for temporary part-time work. This new provision aims at improving the situation of persons (mostly female) who reduce their working time due to the upbringing of children or necessary care work for relatives and then face the problem of having no chance to return to full-time work or to extend their working time. The competent Ministry for Labour and Social Affairs has talked about the introduction of a 'return to full-time work'.<sup>321</sup> It has to be noted that care duties are no requirement for the entitlement to temporary part-time work; the employee is not expected to give any reason for her\*his wish to reduce working time but must request the reduction in writing at least three months in advance.

There are still shortcomings in the amended law: even under the amended Part-Time and Fixed-Term Employment Act, there is still no right to extend working time on request or to work full time. At least, the amended Section 9 provides for an entitlement of employees working part-time to be given preferential consideration by the employer when filling a vacant or newly created position. In advance, the employee has to notify the employer of his\*her wish to extend the contractually agreed working time. Preferential consideration is to be given unless it is not a corresponding vacant job, or the part-time employee is not at least as suitable as another candidate preferred by the employer, or there are working time requests by other part-time employees or there are *urgent* operational reasons to the contrary. For each of these obstacles to preferable consideration, the employer bears the burden of proof.

#### 5.10.2 Right to adjust working time patterns

There is no general legislation providing workers with a legal right to adjust working time patterns (temporarily or otherwise) on request. However, under Section 7(2) of the amended Part-Time and Fixed-Term Employment Act, the employer is obliged to discuss an employee's wish to change the duration and/or situation of the existing contractual working time. This obligation applies regardless of the amount of working time and the number of employees in the company. The employee may call in a member of the employee representative body for support or mediation. In addition, the employer must inform the employee representatives of any request for changes in working time that has been notified.

Generally, 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 finishing 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) and (5) of the Works Constitution Act. Thus, 90 % of the collective and 13 % of the works agreements cover measures to further work-life balance.<sup>322</sup> Some of the agreements deal with the details of taking parental leave only, while others 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 leave are generally accepted, reductions or increases of working time are far

<sup>321</sup> See <https://www.bmas.de/DE/Themen/Arbeitsrecht/Teilzeit/brueckenteilzeit-artikel.html>.

<sup>322</sup> 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](http://www.boeckler.de/pdf/p_wsi_disp_184.pdf).

more difficult to achieve, especially depending on sex/gender and the position within the organisational hierarchy.<sup>323</sup>

### 5.10.3 Right to work from home or remotely

Under Section 16 of the Federal Equality Act, federal public employers have to offer their civil servants with family or care responsibilities teleworking jobs or mobile workplaces within the scope of possibilities concerning the service performed. Rejection of applications for telework or mobile working must be justified in detail in writing. This is a regulation to further the reconciliation of work and family but the possibility to apply<sup>324</sup> for work from home or remotely only covers the very small group of federal civil servants, not to the vast majority of civil servants of the states (*Länder*) or employees under private employment contracts.

There is no statutory entitlement to work from home or remotely.<sup>325</sup> Since November 2016, the amended Workplace Ordinance<sup>326</sup> legally acknowledges the possibility of 'tele-working' (*Telearbeit*), meaning working from home, and further states that general regulations upon safety and health and data protection are to be applied.<sup>327</sup> In the absence of statutory regulations, working from home or remotely is subject to collective and works agreements. Due to the digitalisation of working life, there are more and more such agreements. It has to be noted, however, that there are problems with rejections of requests to work from home or remotely on the one hand and, on the other, problems with certain pressures that employers put on their employees to work from home.<sup>328</sup> Working from home can further the reconciliation of work with family life for employees but it can be used by employers who wish to evade their obligations of maintaining an appropriately equipped, safe and healthy workplace as well.

On 10 October 2018, the State Labour Court of Berlin and Brandenburg decided that the employer is not entitled to oblige the employee to work from home solely because of the employer's general right to issue instructions under the employment contract.<sup>329</sup> If the employee refuses to carry out work from home, this cannot be considered to be a persistent refusal to work. A dismissal for this reason is therefore invalid. The court explained that the circumstances of work to be carried out exclusively in one's own home could not be compared with work to be carried out in a permanent establishment together with other employees of the same company. The employee would lose direct contact with his colleagues, and the opportunity to exchange information with them was significantly reduced. The boundaries between working time and free time would become fluid. The employee would be more difficult to reach for the works council as well as the trade unions represented in the company. The fact that employees could nevertheless be interested in working from home, e.g. to better reconcile family and career, did not change the fact that

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<sup>323</sup> 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.

<sup>324</sup> The possibility to apply under the Federal Equality Act means not an individual right to work from home, see Federal Administrative Court, judgment of 31 January 2008, 2 C 31/06.

<sup>325</sup> See Schöllmann, I. (2019), 'Mobile Working, Telearbeit, Desksharing' (Mobile working, tele-working, desk sharing), *Neue Zeitschrift für Arbeitsrecht – Beilage*, pp. 81-86.

<sup>326</sup> Federal Workplace Ordinance of 12 August 2004 (Arbeitsstättenverordnung), [https://www.gesetze-im-internet.de/arbst\\_ttv\\_2004/BJNR217910004.html](https://www.gesetze-im-internet.de/arbst_ttv_2004/BJNR217910004.html).

<sup>327</sup> See Wissenschaftliche Dienste des Bundestages (2017), *Telearbeit und Mobiles Arbeiten. Voraussetzungen, Merkmale und rechtliche Rahmenbedingungen* (Tele-working and mobile working—Requirements, definitions and legal framework), <https://www.bundestag.de/resource/blob/516470/3a2134679f90bd45dc12dbef26049977/WD-6-149-16-pdf-data.pdf>.

<sup>328</sup> These topics are broadly discussed among employers, employees, union, labor lawyers, media and others, example given at: <https://www.dgb.de/themen/++co++08975c98-53f8-11e6-bd89-525400e5a74a>, and the State Labour Court of Berlin and Brandenburg, judgment of 10 October 2018, 17 Sa 562/18, takes up some of these arguments.

<sup>329</sup> State Labour Court of Berlin and Brandenburg, judgment of 10 October 2018, 17 Sa 562/18.

this form of work could not generally be assigned to an employee unilaterally by the employer.

#### 5.10.4 Other legal rights to flexible working arrangements

Flexible working arrangements are subject to collective and works agreements. There are no statutory rights. However, 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.<sup>330</sup> 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, and the lack of action models.<sup>331</sup>

The authors of a 2014 study have critically evaluated operationally induced flexibility and the intensification of work in shorter periods, and have demanded measures to protect employees against both, to tackle the 'gender time gap' and to develop new models of life-course-oriented working time organisation.<sup>332</sup> The full potentials of life-course-oriented working time policies and the possibilities for individually designed working times are yet to be explored.<sup>333</sup>

Under Section 16 of the Federal Equality Act, federal public employers are obliged to offer family-friendly working hours and to comply with the wishes of employees performing family or care tasks for family or care-related part-time employment or leave of absence, insofar as this is not contrary to *mandatory* official requirements. This also applies to workplaces with supervisory or management tasks, irrespective of the hierarchical level. As far as possible, the department must also offer teleworking jobs, mobile workplaces or family-friendly or care-friendly work and attendance models. Unfortunately, federal civil servants form a very small part of the workforce.

Digitalisation and the transformation of working life demand new models and structures of working time arrangements. Digitalisation is mainly managed by technical experts commissioned by the Federal Government while others, such as experts on protection at work, try to point out that human beings are involved.

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<sup>330</sup> Federal Government (2012) *Eighth Family Report* 15 March 2012, available at: <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*, published by the Federal Ministry for Family, Senior Citizens, Women and Youth (2015), <https://www.bmfsfj.de/blob/93784/e1e3be71bd501521ba2c2a3da2dca8bc/familienreport-2014-data.pdf>. The *Family 2030 Future Report* 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](https://www.prognos.com/uploads/tx_atwpubdb/160928_Langfassung_Zukunftsreport_Familie_2030_final.pdf).

<sup>331</sup> OECD (2016), *Dare to Share – Deutschlands Weg zur Partnerschaftlichkeit in Familie und Beruf*, OECD Publishing: Paris.

<sup>332</sup> 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](http://www.boeckler.de/pdf/p_wsi_report_19_2014.pdf).

<sup>333</sup> 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., Wenkebach, J., Zimmer, B. (2013), *Das Recht auf eine selbstbestimmte Erwerbsbiografie* (The right to a self-determined employment biography), Baden-Baden: Nomos.

#### 5.10.5 Case law

On 10 October 2018, the State Labour Court of Berlin and Brandenburg decided that the employer is not entitled to oblige an employee to work from home solely because of the employer's general right to issue instructions under the employment contract.<sup>334</sup>

### 5.11 Evaluation of implementation

The Maternity Protection Act as well as the Federal Parental Leave and Parental Allowances Act (materially) implementing EU law exceed the European requirements. Maternity protection is comprehensive, maternity leave is longer than necessary and maternity allowances granted in the amount of the last net income are superb. The regulations on parental leave avoid some of the well-known traps, thanks to the individual nature of the right and non-transferability. The duration of parental leave is extensive: parental allowances are awarded for up to 14 months and there are special incentives for fathers to take parental leave and perform care work and for mothers to return to (part-time) work before or on the first birthday of the child.

Despite this sufficient and even satisfactory statutory legal framework, discrimination on the grounds of pregnancy, maternity protection and parental or carer's leave is still widespread and poses a real obstacle to gender equality, given that it is so hard to prove and so difficult to end. Traditional role models like that of a male breadwinner and a female care giver persist in the daily life of younger couples as statistics on working time and the gender care gap illustrate. To the author's (informal) knowledge, discrimination on grounds of pregnancy, maternity and family-related leave is still widespread in the civil service, especially in male-dominated areas of work, although the state has to set a positive example to further gender equality in all fields.

It has long been demanded that the number of months to be taken by the other parent (generally the father) to receive parental allowances should be increased up to six months. There is a considerable proportion of young men reporting that they wish to take longer parental leave but their employers would not accept their request. Moreover, single parents need more support when bringing up children, especially when trying to work simultaneously. Non-discrimination in relation to family related leave can be furthered by institutional childcare, pay transparency, more flexible working times or financial incentives. One more thing that could be done about the immense gap between the innovative framework and the gendered reality of caring tasks and unpaid work is the removal of spousal splitting in tax law and a campaign for the individual security of female livelihood whether inside or outside marriage.

### 5.12 Remaining issues

There are no remaining issues to report.

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<sup>334</sup> State Labour Court of Berlin and Brandenburg, judgment of 10 October 2018, 17 Sa 562/18.

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

### 6.1 General (legal) context

#### 6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

Female poverty in old age is a widespread problem in wealthy Germany and the reasons lie deep into the structure of the labour market and the gender-based division of paid work and unpaid care work. The overall gender pension gap is 57 %. According to a 2016 interview study<sup>335</sup> conducted by the Federal Ministry for Family, Senior Citizens, Women and Youth, only 10 % of women between the ages of 30 and 50 have a net income of more than EUR 2 000, compared to 42 % of men the same age. The study found that 31 % of women between the ages of 30 and 50 would like a partnership in which the man and woman share household and child responsibilities equally, but this is only the case for 14 % of women. An overwhelming 96 % of women surveyed called for equal pay.

#### 6.1.2 Other issues related to gender equality and social security

The pension insurance system for dependent employees is based on three pillars: the statutory pension schemes, the occupational pension schemes and private retirement provisions. Women are significantly worse off in all three areas. The reasons for female disadvantages within the statutory pension schemes are well known: the gender pay gap of more than 20 %, the gender-segregated labour market, the high number of female employees working part-time and the interruptions to female working life due to periods of family or care-related leave.

Because of their lower employment rate, women are also less likely to benefit from occupational pension schemes. Furthermore, female employees subject to social insurance contributions in the private sector are less likely to be covered by occupational pension schemes due to the fact that women are more likely to work in small companies and sectors without collective bargaining agreements in which there are no occupational pension schemes. In addition, women often work in marginal jobs. Despite the prohibition of indirect discrimination, the inclusion of part-time employees in occupational pension schemes has not been secured. In 2016, the trade union for the civil service, ver.di, lodged a complaint before the Federal Labour Court with the aim of *excluding marginal employees* from the union's occupational pension scheme, arguing that the administrative burden was disproportionately high in view of the low contributions of marginal employees. Only on the day before the oral hearing before the third senate of the Federal Labour Court, did ver.di withdraw the appeal.<sup>336</sup>

Due to the gender pay gap, lower contributions and smaller savings, female workers very seldom profit from the tax exemptions for occupational pension contributions or the tax incentives for private retirement provisions. Legislative activities to expand and strengthen the systems of occupational pension schemes focus on the increase of tax incentives. However, these tax incentives are indirect subsidies that increase with income and, in addition, disadvantage women on account of their income. Instead of encouraging the spread of occupational pension schemes to higher income groups, more appropriate alternatives, such as setting maximum amounts, which women can exhaust just as well as men, negative taxes or direct benefits, should have been considered.<sup>337</sup>

<sup>335</sup> Federal Ministry for Family, Senior Citizens, Women and Youth (2016), *Mitten im Leben. Wünsche und Lebenswirklichkeiten von Frauen zwischen 30 und 50 Jahren* (In the middle of life. Wishes and daily realities of women between 30 and 50 years of age), <https://www.bmfsfj.de/bmfsfj/service/publikationen/mitten-im-leben/83860>.

<sup>336</sup> See <https://community.beck.de/2017/10/25/anspruch-geringfuegig-beschaeftigter-auf-betriebliche-altersversorgung>.

<sup>337</sup> See German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K4/st17-06/>.

### 6.1.3 Political and societal debate and pending legislative proposals

A highly controversial topic was and remains the question of the duty to pay social security contributions when receiving payments from an occupational pension scheme. Since 2004, recipients of occupational pensions and direct insurance have to pay sickness and long-term care insurance contributions for a payout amount of more than EUR 150 per month, and moreover, they have to pay the contributions both for employees and for employers. The governing parties have considered ending the duty to pay these contributions but drew back because of the costs involved.<sup>338</sup>

In November 2018, the Act on performance improvement and stabilisation in the statutory pension schemes entered into force.<sup>339</sup> The crediting of child-raising periods for children born before 1992 was slightly improved and low-income earners will be better off. Until now, there has been a transitional period for low-income earners between EUR 450.01 and EUR 800 (known as 'midijobs'), in which reduced employee contributions were paid. The range will be extended to EUR 450.01 to EUR 1 300 and the reduced contributions will no longer lead to lower pension benefits. The German Women Lawyers Association rightly points out that the authors of the *Second Gender Equality Report* recommended both the abolition of marginal employment and the abolition of midijobs.<sup>340</sup> The lower social security contributions make it easier to take up gainful employment, but at the same time the steep rise in social security contributions in midijobs as well as the decline in the household income of married couples due, among other things, to the combination of spousal splitting,<sup>341</sup> wage tax class V and non-contributory health insurance set incentives that lead to the opposite of the expansion of female working time. Thus, structural problems of female poverty in old age are not tackled.

## 6.2 Direct and indirect discrimination

Direct and indirect discrimination on the ground of sex in occupational social security schemes is not explicitly prohibited in German law.

Occupational social security schemes in Germany cover benefits for retirement, invalidity, or for surviving family members. The respective Occupational Pension Schemes Act does not contain a prohibition on gender discrimination. However, the constitutional principle of gender equality may be invoked and, moreover, not only does the General Equal Treatment Act apply by way of subsidiarity (especially on equal pay), but since 2011 the courts have also monitored the compliance of the Occupational Pension Schemes Act with the relevant directives.<sup>342</sup>

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.<sup>343</sup> 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

<sup>338</sup> See <https://www.spiegel.de/wirtschaft/soziales/betriebsrentner-cdu-will-doppelbeitraege-in-krankenversicherung-abschaffen-a-1242682.html>.

<sup>339</sup> Act on performance improvement and stabilisation in the statutory pension schemes of 28 November 2018, Official Journal 2018, p. 2016.

<sup>340</sup> German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K4/st18-12/>.

<sup>341</sup> Despite severe and persistent criticism, the German tax law system strongly encourages the male breadwinner model by favouring high income differences between spouses – the larger the difference, the higher the tax benefit for married couples.

<sup>342</sup> 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.

<sup>343</sup> Federal Labour Court, judgment of 15 February 2011, 9 AZR 750/09.



of workers according to their working hours.<sup>344</sup> The Federal Constitutional Court has found that lower pension schemes for part-time civil servants amount to indirect sex discrimination and are incompatible with the Constitution.<sup>345</sup>

In December 2016, the Federal Government presented a draft law on the expansion and strengthening of occupational pension schemes,<sup>346</sup> which did not include reflections on gender aspects such as the gender pension gap (57 %) or a gender-specific legislation impact assessment.<sup>347</sup> On 17 August 2017, the Bundestag passed the Act on the strengthening of occupational pension schemes. The Act entered into force on 1 January 2018 without any major amendments.<sup>348</sup>

### 6.3 Personal scope

The personal scope of German law relating to occupational social security schemes cannot be easily compared to the scope specified in Article 6 of Directive 2006/54 because there are several regulations with varying scopes.

The personal scope of the Occupational Pension Schemes Act is restricted to (former) employees with an employer that 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*), which are internally regulated by their own chambers and boards with the right to self-regulate, as well as by some state framework regulation.

A major problem for members of the liberal professions was that child-raising periods were not taken into account by every professional pension fund. In 2005, the Federal Constitutional Court 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.<sup>349</sup> Amendments to Section 56 of Social Code No. 6 in 2009 introduced a statutory entitlement to the recognition of child-raising periods within the statutory pension scheme for persons who generally are covered by a professional pension fund<sup>350</sup> (the requirement was that the professional pension fund did not offer an adequate recognition of child-raising periods compared with the statutory pension scheme which is, unfortunately, true for every one of the 89 professional pension funds in Germany). The recognition of each child is credited with a 12-month contribution period. To receive pensions under the statutory pension scheme, the persons insured have to meet a minimum contribution period of 60 months in total, but parents can pay the missing contributions voluntarily when reaching the retirement age. There is no research on whether this approach works well in practice.

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<sup>344</sup> 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.

<sup>345</sup> Federal Constitutional Court, judgment of 18 June 2008, 2 BvL 6/07.

<sup>346</sup> Available at: [https://www.bmas.de/SharedDocs/Downloads/DE/Thema-Rente/entwurf-gesetz-staerkung-betriebliche-altersversorgung.pdf?\\_\\_blob=publicationFile&v=1](https://www.bmas.de/SharedDocs/Downloads/DE/Thema-Rente/entwurf-gesetz-staerkung-betriebliche-altersversorgung.pdf?__blob=publicationFile&v=1).

<sup>347</sup> The draft was therefore heavily criticised by the German Women Lawyers Association, <https://www.djb.de/verein/Kom-u-AS/K4/st17-06/>.

<sup>348</sup> Act on the strengthening of occupational pension schemes of 17 August 2017, Official Journal 2017, p. 3214; related documents see <http://dipbt.bundestag.de/extrakt/ba/WP18/788/78841.html>.

<sup>349</sup> The Federal Constitutional Court, judgment of 5 April 2005, 1 BvR 774/02.

<sup>350</sup> Following a landmark decision by the Federal Social Court, judgment of 31 January 2008, B 13 R 64/06 R, stating that the non-recognition of child-raising periods was incompatible with the Constitution.



## 6.4 Material scope

The material scope of the Occupational Pension Schemes Act is more restricted than specified in Article 7 of Directive 2006/54 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.

## 6.5 Exclusions

As the German legislature did not implement Directive 2006/54 with regard to occupational social security schemes directly, the law has not applied the exclusions from the material scope as specified in Article 8.

## 6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

The law no longer permits different retirement ages for men and women. However, there are still examples of sex discrimination as mentioned in Article 9 of Directive 2006/54 as 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.<sup>351</sup> 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.<sup>352</sup> The Federal Labour Court explicitly rejected the addition of (interrupted) periods of service for the same employer.<sup>353</sup>

## 6.7 Actuarial factors

To some extent, sex was previously used as an actuarial factor in occupational social security schemes. Since 2005, unisex tariffs are mandatory under the Occupational Pension Schemes Act. However, 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 ended this practice.<sup>354</sup> 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 funds.<sup>355</sup> For a considerable time, German courts have raised doubts as to whether national and European anti-discrimination law can be applied to professional pension funds at all.<sup>356</sup>

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<sup>351</sup> Federal Labour Court, judgment of 20 April 2010, 3 AZR 370/08.

<sup>352</sup> Federal Labour Court, judgment of 12 February 2013, 3 AZR 100/11.

<sup>353</sup> Confirmed by the Federal Labour Court, judgment of 9 October 2012, 3 AZR 477/10.

<sup>354</sup> After the intervention of the relevant 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 bylaw 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.

<sup>355</sup> 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 also one of gender equality.

<sup>356</sup> The Federal Administrative Court, judgment of 25 July 2007, 6 C 27/06, decided that professional pension funds are not covered by the concept of remuneration as employed in Article 141 EC Treaty or by the scope

In 2008, the Federal Labour Court determined that actuarial deductions for male employees claiming early occupational pensions were incompatible with Article 141 EC Treaty.<sup>357</sup> At that time and some years later, lawyers were still discussing whether the *Test-Achats* ruling should be applied to occupational pension schemes.<sup>358</sup> In 2013, the Higher Regional Court of Celle decided that the state pension agency (covering around four million employees in the public sector) was obliged to employ gender-neutral actuarial factors under constitutional and European equality law.<sup>359</sup> The Higher Regional Court of Cologne disagreed.<sup>360</sup> In 2017, the Federal Court of Justice decided that the use of different gender-based actuarial factors by the state pension agency, whether organised under private law or not, is incompatible with the prohibition of sex/gender discrimination under the German Constitution as well as the general spirit of Directive 2006/54 and the *Test Achats* ruling.<sup>361</sup>

## 6.8 Difficulties

It is hard to identify and explain specific difficulties in Germany in relation to occupational social security schemes. One reason for this is that some security schemes in Germany are not comparable to either statutory social security schemes or occupational social security schemes - the classification of the widespread self-regulated professional pension schemes is especially doubtful. Most liberal professions and many self-employed persons and freelancers are organised in self-governed and regulated bodies (mostly chambers) including self-governed, regulated and financed professional pension schemes (*berufsständische Versorgungswerke*). The states provide a very modest legal framework for and oversight of these professional pension schemes.

## 6.9 Evaluation of implementation

As the Occupational Pension Schemes Act does not contain a prohibition of gender discrimination, courts are called upon to implement and mobilise the prohibition of direct and indirect sex/gender discrimination. Thus, some structural problems remain unsolved, among them the fundamental question of distributive justice in light of the considerable tax-funded subsidies to occupational pension schemes paid by the working general public, although the system benefits men disproportionately. As there are no gender impact assessments or gender budgeting procedures, the Bundestag has no way of knowing whether the Act on the strengthening of occupational pension schemes will contribute to further gender justice and gender equality.

## 6.10 Remaining issues

There are no remaining issues to report.

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of application of Directive 2000/78; confirmed by the State Administrative Court of Rhineland Palatinate, judgment of 26 May 2010, 6 A 10320/10.

<sup>357</sup> Federal Labour Court, judgment 19 August 2008, 3 AZR 530/06.

<sup>358</sup> 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.

<sup>359</sup> Higher Regional Court of Celle, judgment of 24 October 2013, 10 UF 195/12.

<sup>360</sup> Higher Regional Court of Cologne, judgment of 6 January 2015, 12 UF 91/14.

<sup>361</sup> Federal Court of Justice, judgment of 8 March 2017, XII ZB 663/13, with further references.

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

### 7.1 General (legal) context

#### 7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

Despite controversial debates on gender and social security, there has been no recent comprehensive study on the issue. However, it has to be assumed that indirect discrimination on the grounds of sex/gender still shapes the statutory schemes of social security, especially the pension schemes.<sup>362</sup> The gender pension gap has been decreasing over the last years but in 2015 was still 58 % in Western Germany and 28 % in Eastern Germany.<sup>363</sup>

#### 7.1.2 Other relevant issues

Social security systems are strongly linked to the level of pay for gainful employment: inactive spouses (wives doing unpaid care work) are mainly indirectly insured with the employed spouse (husbands performing paid work). The question of the adequate legal recognition of childcare periods within the statutory pension schemes has been at the heart of the legal discourse for a long time. Now, using the most laborious and small steps, the legislature has approached legal recognition for such periods, although, for cost reasons the coverage of such recognition is not expected to be further extended. However, this recognition, important though it is, only addresses a small part of the underlying problems of the discrimination evident in the gender pension gap. The statutory pension schemes reflect the gender-segregated labour market and the unequal distribution of paid work and unpaid care work as well the gender pay gap with all the discriminatory roots of its own. All Governments have been and still are reluctant to undertake the task of comprehensively reforming the statutory pension schemes although there is an obvious need to do so for several reasons.

#### 7.1.3 Overview of national acts

The different branches of the statutory schemes of social security are covered by different books of the Social Code.

#### 7.1.4 Political and societal debate and pending legislative proposals

For some months, the governing parties have been debating the introduction of a 'basic pension' (*Grundrente*) meaning that employees who had been working or bringing up children or caring for dependent relatives would be entitled to subsidies to their pension payments guaranteeing that these payments are above the basic social security. The main point of dispute is the question of whether the 'basic pension' requires a means test or whether the entitlement to a 'basic pension' should be independent of other income, in particular the spouse's.<sup>364</sup> The 'basic pension' without means testing could guarantee a sufficient and independent income for women in old age but it would not tackle the foundations of female poverty in old age such as structural discrimination of women in working life and the unjust division of paid work and unpaid care work between the sexes.

For many years, the diversity of pension schemes has been criticised and there have been repeated demands to include civil servants as well as self-employed persons in the

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<sup>362</sup> See Brauer, B. (2004), *Das Verbot der mittelbaren Diskriminierung und seine Anwendung auf die gesetzliche Rentenversicherung* (The prohibition of indirect discrimination and its application to statutory pension schemes), Baden-Baden: Nomos.

<sup>363</sup> See <https://www.boeckler.de/112210.htm>.

<sup>364</sup> See the women's chapter of the trade union ver.di, <https://frauen.verdi.de/themen/rente/++co++1fd0e30c-4f04-11e9-8e43-525400f67940>.

statutory pension schemes – if only to safeguard the financial stability of the system. Civil servants enjoy special protection and special pension schemes. Many self-employed persons, especially solo entrepreneurs (self-employed without employees), have no money spared to engage in any kind of pension scheme. The governing parties more or less agree that the self-employed will be obliged to either contribute to professional pension schemes or to have some private retirement provisions or to contribute to the statutory pension schemes.<sup>365</sup> As yet, no draft law on this topic has been presented.

## **7.2 Implementation of the principle of equal treatment for men and women in matters of social security**

The principle of equal treatment for men and women in matters of social security is not really implemented in German law. 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.

## **7.3 Personal scope**

The personal scope of German law relating to statutory social security schemes cannot be easily compared to the scope specified in Article 2 of Directive 79/7 because the national law is diverse and most self-employed persons are covered by self-regulating bodies. 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 'minijobs' 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.

## **7.4 Material scope**

The material scope of German law is broader than specified in Article 3 (1) and (2) of Directive 79/7 (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.

## **7.5 Exclusions**

It is hard to say whether German law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7, 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 began between 1989 – 1992 because the average retirement age was falling sharply and, thus, the relationship between contributors and beneficiaries within the statutory pension system was constantly deteriorating.<sup>366</sup> The equalisation process was accelerated in 1996 and the transitional

<sup>365</sup> See <https://www.sueddeutsche.de/wirtschaft/rentenpflicht-selbststaendige-kommentar-1.4399849>.

<sup>366</sup> For the legislative history, see Federal Constitutional Court, judgment of 3 February 2004, 1 BvR 2491/97, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/02/rk20040203\\_1bvr249197.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/02/rk20040203_1bvr249197.html).

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 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.

## **7.6 Actuarial factors**

Generally, sex is not used as an actuarial factor in statutory social security schemes. However, in civil servants' pension schemes, the administrative bodies use gender-specific mortality tables to identify the average life expectancy of men and women and make calculations (among other things) on this basis. In 2013, the Federal Administrative Court queried whether this method of 'pure statistical gender equality' was compatible with the EU law principle of equal pay and expressed its interest in a clarifying decision of the CJEU.<sup>367</sup> In 2019, the State Administrative Court of Bavaria confirmed that the use of gender-specific mortality tables violated Article 157 TFEU.<sup>368</sup>

## **7.7 Difficulties**

It is hard to identify specific difficulties in relation to implementing Directive 79/7 in Germany, as the Directive has never been explicitly implemented. Aside from the lack of unequivocal prohibitions of sex/gender discrimination as well as the lack of gender impact assessments of highly complicated regulations and amendments, the classification of the widespread professional pension schemes under self-regulation is questionable. Most liberal professions, self-employed persons and freelancers are organised in self-governed and regulated bodies (mostly chambers) including self-governed, regulated and financed professional pension schemes (*berufsständische Versorgungswerke*). The states offer a very modest legal framework and oversight of these professional pension schemes.

## **7.8 Evaluation of implementation**

As Directive 79/7 has never been explicitly implemented, it is hard to evaluate the implementation. Unequivocal prohibitions of sex/gender discrimination are lacking as well as gender impact assessments of highly complicated regulations and amendments. The pension system is confusing and, due to its complexity, lack of reserves and its fragmentation, difficult to reform.

One recent example for reform, however, was the levelling of the pensions (and pension entitlements) of the male and female members of the professional pension scheme for old-age, occupational disability and survivors' insurance of the Chamber of Dentists of Lower Saxony.<sup>369</sup> For many years, male members enjoyed significantly preferential treatment to the detriment of female members. When the chamber was forced to end this discrimination on the grounds of sex, financial considerations ruled out increasing the pensions and pension entitlements of female members to male standards. Therefore, the pensions (and pension entitlements) of the male and female members were levelled. Male members claiming severe violations of their property rights as well as the prohibition of retroactive effect and protection of confidence were told by the courts that, taking into account Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, they could no longer (at least from 1985 onwards) establish a legitimate

<sup>367</sup> Federal Administrative Court, judgment of 5 September 2013, 2 C 47/11.

<sup>368</sup> State Administrative Court of Bavaria, judgment of 14 August 2019, 14 BV 18.671.

<sup>369</sup> See Administrative Court of Hannover, judgment of 10 December 2019, 5 A 5662/18.

expectation to be better off and, moreover, that the equality of women in social security was an overriding reason of common good.

### **7.9 Remaining issues**

There are no remaining issues to report.

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

### **8.1 General (legal) context**

#### **8.1.1 Surveys and reports on the specific difficulties of self-employed workers**

A 2016 study on solo entrepreneurs in Germany used sex/gender as one of several socio-demographic criteria but nevertheless, offers some interesting insights.<sup>370</sup> At the beginning of the century, the number of solo entrepreneurs was steadily rising for several reasons, including the strong growth of the creative sector, the privatisation of Government tasks, EU enlargement, lack of dependent employment and strong financial incentives. Since 2012, the number of solo entrepreneurs has been declining. This group of working persons is very diverse in relation to their education or income (among other things), but there is one similarity: old-age provision in the form of regular insurance payments, whether contributing to the statutory pension schemes or to a private life insurance, has lost much of its significance. Women are underrepresented: 38 % of solo entrepreneurs are female and only 25 % of those who are self-employed with employees; 19 % of all solo entrepreneurs are women working full time and 13 % are men working part time. The gender pay gap is considerable but still less pronounced than in dependent employment.

#### **8.1.2 Other issues**

Women face several problems when deciding to become self-employed, including, in particular, family and care duties, lack of financial capital, gender stereotypes, low profits, and lack of mental support by family members.<sup>371</sup> Many female start-ups only provide for subsidiary or additional income.<sup>372</sup> Due to family and care duties, half of all female solo entrepreneurs work part time.<sup>373</sup> Many female start-ups are established as means of return to work after periods of childcare.<sup>374</sup> The better reconciliation of working and family life by part-time work and mainly self-determined flexible working times is a strong incentive for women to be self-employed.<sup>375</sup> However, part-time solo self-employment comes with considerable risks: the average earnings of solo entrepreneurs are less than those of employed people; 35 % of all solo entrepreneurs work in the low-pay sector with incomes of less than EUR 1 100 per month;<sup>376</sup> and 3 % of all self-employed persons receive social assistance although working, with women being particularly affected.<sup>377</sup>

#### **8.1.3 Overview of national acts**

Concerning the implementation of the anti-discrimination directives, 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. There are various laws and internal regulations covering self-employment but these have no connection to the anti-discrimination directives.

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<sup>370</sup> Brenke, K. & Beznoska, M. (2016), *Solo-Selbständige in Deutschland – Strukturen und Erwerbsverläufe* (Solo entrepreneurs in Germany—structures and career paths), Berlin: DIW, <https://www.bmas.de/DE/Service/Medien/Publikationen/Forschungsberichte/Forschungsberichte-Arbeitsmarkt/fb-465-solo-selbstaendige.html>.

<sup>371</sup> Boll, C. et al. (2014), *Female Entrepreneurship—Evidence from Germany and the Baltic Sea Region* p. 90 et seq., Baltic Sea Academy, Hamburg.

<sup>372</sup> Agentur für Gleichstellung im ESF (2010), *Gender-Aspekte in der Existenzgründung* p. 7 et seq., Berlin.

<sup>373</sup> Mai, C.-M. & Marder-Puch, K. (2013), 'Selbständigkeit in Deutschland', in *Wirtschaft und Statistik* p. 494, Federal Statistical Office, Wiesbaden.

<sup>374</sup> Agentur für Gleichstellung im ESF (2010), *Gender-Aspekte in der Existenzgründung* pp. 12-13, Berlin.

<sup>375</sup> Federal Ministry of Economics (2013), 'Existenzgründungen durch Frauen' *GründerZeiten* 03. p. 2, Berlin.

<sup>376</sup> Brenke, K. (2013), 'Allein tätige Selbständige: starkes Beschäftigungswachstum, oft nur geringe Einkommen', in *DIW Wochenbericht* No. 7.

<sup>377</sup> May-Strobl, E. et al. (2011), *Selbständige in der Grundsicherung* Institut für Mittelstandsforschung, Bonn.



#### 8.1.4 Political and societal debate and pending legislative proposals

There is current debate on the inclusion of self-employed persons in the statutory pension schemes or at least the professional or occupational pension schemes.<sup>378</sup> Many self-employed persons, especially solo entrepreneurs (self-employed without employees), have no money to spare to engage in any kind of pension scheme. The debate is vigorous but, as yet, no draft law has been presented.

### 8.2 Implementation of Directive 2010/41/EU

Directive 2010/41/EU has not been explicitly implemented in German law. 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.<sup>379</sup> 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.<sup>380</sup> 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.

### 8.3 Personal scope

#### 8.3.1 Scope

Self-employed persons are only covered by Section 6(3) of the General Equal Treatment Act which states that, insofar as the conditions for access to gainful employment and promotion are affected, the provisions under Part 2 shall apply, *mutatis mutandis*, to the self-employed and to members of an organ of an enterprise, in particular directors and board members.

In 2012, the Federal Court of Justice decided that a managing director with a fixed-term contract who re-applied for the post was protected against discrimination in their access to a self-employed activity under the General Equal Treatment Act.<sup>381</sup> This decision was partly misunderstood as an extension of the special employees' protection against dismissal to self-employed persons. The majority of legal commentaries continues its adherence to the applicability of the General Equal Treatment Act to self-employed persons only within the limited scope of access and promotion not covering working conditions, equal pay or the termination of contracts.<sup>382</sup>

However, in 2019, the Federal Court of Justice decided that, in conformity with European law and taking into account the concept of employee coined by the CJEU, a third-party managing director of a company with limited liability is to be regarded as an employee to the extent that the General Equal Treatment Act is applicable concerning the termination of his management service contract.<sup>383</sup>

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<sup>378</sup> See <https://www.sueddeutsche.de/wirtschaft/rentenpflicht-selbststaendige-kommentar-1.4399849>.

<sup>379</sup> See Parliamentary Documents 16/13830 of 20 July 2009, p. 149, <http://dipbt.bundestag.de/dip21/btd/16/138/1613830.pdf>.

<sup>380</sup> 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>.

<sup>381</sup> Federal Court of Justice, judgment of 23 April 2012, II ZR 163/10.

<sup>382</sup> See Bauer, J. H. et al. (2011) 'Section 6 Paragraphs 35 et seq' *Allgemeines Gleichbehandlungsgesetz. Kommentar*, München 3rd ed; Schubert J. & Schrader, P. (2013) 'Section 6 Paragraphs 31c et seq' in Däubler, W. & Bertzbach, M. (ed.) *Allgemeines Gleichbehandlungsgesetz. Handkommentar*, Baden-Baden 3rd ed.

<sup>383</sup> Federal Court of Justice, judgment of 26 March 2019, II ZR 244/17.

### 8.3.2 Definitions

Under German law, self-employed persons are persons who pursue a gainful activity without instructions by others and for their own account. Differentiating 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.<sup>384</sup> 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.

### 8.3.3 Categorisation and coverage

Legal commentaries disagree on the question of which groups of self-employed persons are covered by the General Equal Treatment Act. There are hundreds of professions in the field of self-employment and many of them are organised in associations that have the right of self-regulation and their own social security systems. Generally, the opinion seems to be that organised self-employed persons would not need the protection of the General Equal Treatment Act although there is no indication that the internal regulations of professions were amended to implement the provisions of Directive 2010/41. Some commentaries restrict the scope of the General Equal Treatment Act to managing directors,<sup>385</sup> members of company boards and freelancers,<sup>386</sup> while some commentaries suggest a broad scope including consultants, franchisees, commercial agents, shareholders and others.<sup>387</sup>

The professional activities of most self-employed persons in Germany are covered by regulations set by their professional associations. Their social security is guaranteed by various professional pension funds (*berufsständische Versorgungswerke*) shaped by state law, by special federal regulations on social security (e.g. for the agricultural sector), or by the explicit extension of the statutory social security systems. Moreover, 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.

### 8.3.4 Recognition of life partners

In 2001, life partners were recognised in the federal laws on statutory social security systems and special federal laws concerning farmers. However, it was not until the 2009 Federal Constitutional Court decision on survivors' pensions<sup>388</sup> 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.<sup>389</sup> Since 2017, life partnerships have mainly been replaced by the option of same-sex marriage.

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<sup>384</sup> 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.

<sup>385</sup> With reference to the *Danosa* decision of the CJEU, managing directors are equated with dependent workers and enjoy the full protection of the AGG, see Kort, M. (2013) 'Sind GmbH-Geschäftsführer und Vorstandsmitglieder diskriminierungsschutzrechtlich Arbeitnehmer?' *Neue Zeitschrift für Gesellschaftsrecht* 16/2013, pp. 601-607.

<sup>386</sup> Bauer, J. H. et al. (2011), 'Section 2 paragraph 16', *Allgemeines Gleichbehandlungsgesetz. Kommentar*, München 3rd ed.

<sup>387</sup> Schmidt, M. (2007) 'Section 6 Paragraphs 12-15' in Schiek, D. (ed.) *Allgemeines Gleichbehandlungsgesetz. Kommentar aus europäischer Perspektive*, München 2007.

<sup>388</sup> Federal Constitutional Court, judgment of 7 July 2009, 1 BvR 1164/07. The judgment was based on the constitutional principle of equality.

<sup>389</sup> 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.

## 8.4 Material scope

### 8.4.1 Implementation of Article 4 of 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 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.

### 8.4.2 Material scope

As there was no implementation of Directive 2010/41/EU, the material scope cannot be compared to regulations specified in its Article 4.

## 8.5 Positive action

Germany has taken advantage of the power to take positive action. In 1994, the state of North Rhine-Westphalia established a master's foundation award 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.<sup>390</sup> 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.<sup>391</sup> Although it is controversial whether the advancement of women might be a condition for awarding public contracts, some states have set relevant regulations for contracts of a certain volume and larger contractors.

## 8.6 Social protection

There are highly differentiated social protection structures for self-employed persons. 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 a 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 and some work accidents, but 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.

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<sup>390</sup> Federal Administrative Court, judgment of 18 July 2002, 3 C 54/01. See Hinrichs, O. & Zimmer, R. (2013) 'Section 5 Paragraph 38' in Däubler, W. & Bertzbach, M. (eds.) *Allgemeines Gleichbehandlungsgesetz. Handkommentar* (Commentary on the General Equal Treatment Act), 3rd ed. Baden-Baden, on positive action through awarding subsidies.

<sup>391</sup> 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>.

The agricultural social security system covers helping spouses or life partners,<sup>392</sup> 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.

## **8.7 Maternity benefits**

Article 8 of Directive 2010/41/EU regarding maternity benefits for self-employed persons has not been implemented in German law. 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 Occupational social security**

### **8.8.1 Implementation of provisions regarding occupational social security**

German law implemented the provisions regarding occupational social security for self-employed persons only to a very small extent. Under Section 17(1) of the Occupational Pension Schemes Act, 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 and generally only for some sales representatives or managing directors.

### **8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)**

German law has not 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.

## **8.9 Prohibition of discrimination**

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 can 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.<sup>393</sup> The courts have not yet confirmed this possibility.

## **8.10 Evaluation of implementation**

Section 6(3) of the General Equal Treatment Act transposes Article 3(1)(a) of Directives 2000/78 and 2002/73. In breach of European law, there is no explicit implementation of Directive 2010/41/EU and, thus, no effective protection of self-employed women against discrimination on the grounds of sex/gender, sexual harassment, maternity discrimination, lower income, lesser social security coverage, and poverty in old age. It would be very much desirable if Germany finally implemented the directive.

## **8.11 Remaining issues**

There are no remaining issues to report.

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<sup>392</sup> 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.

<sup>393</sup> See Thüsing, G. (2007), *Arbeitsrechtlicher Diskriminierungsschutz*, Paragraph 94, Munich.

## 9 Goods and services (Directive 2004/113)<sup>394</sup>

### 9.1 General (legal) context

#### 9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

A 2017 study on gender pricing<sup>395</sup> came to the conclusion that access to goods is not impaired by gender pricing (because the gender pricing of goods is too rare to influence consumer behaviour or the market) but that women are discriminated against by gender pricing in the field of services and that the General Equal Treatment Act should be amended to fully implement EU anti-discrimination law dealing with this problem. The access to and supply of services is an important area for gender equality law that is often overlooked because working life is so much at the forefront.

#### 9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

There are lively legal discussions on regulating the collaborative economy, especially the platforms for new digital markets, and on the effects of platform-based peer provision in the housing market and local taxi markets. Questions of sex/gender discrimination are not under debate in either topic. The market concept of Uber has been prohibited in several German states due to unsolved issues in relation to the working conditions of the drivers, general safety and insurance problems for the customers. The market concept of Airbnb has been affected by local and regional regulation on the subleasing of living space or the renting of holiday apartments and its effects on the housing market. Neither the taxi nor the housing regulations deal with or even refer to questions of sex/gender discrimination.

It is obvious that sexual harassment might be a problem, especially in car sharing and room sharing, but this question has not been discussed in legal discourse, the media or in public debate. Gender-segregated work and the gender pay gap may also be problems in this area, but there is absolutely no available data about the German situation in relation to such issues.<sup>396</sup> In a 2017 paper on digital politics published by the Federal Government, the term 'discrimination' is employed but only in the context of consumer protection and data protection, whereas anti-discrimination law is not mentioned.<sup>397</sup>

However, there is one exception to the general lack of interest in gender discrimination in the digital economy: the inclusion of a discrimination perspective regarding the development of artificial intelligence, including the use of algorithms, can be seen in academic discourse, e.g. in a public lecture on 'Knowledge as a question of discrimination: European anti-discrimination law between implicit knowledge and self-learning algorithms'.<sup>398</sup> Some authors suggested amendments to the General Equal Treatment Act, expanding the scope of application to unequal treatment between private individuals based

<sup>394</sup> See e.g. Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

<sup>395</sup> An der Heiden, I. & Wersig, M. (2017), *Preisdifferenzierung nach Geschlecht in Deutschland* (Gender Pricing in Germany), ADS: Berlin, [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Preisdifferenzierung\\_nach\\_Geschlecht.html?nn=10312816](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Preisdifferenzierung_nach_Geschlecht.html?nn=10312816).

<sup>396</sup> One article in German that at least mentions the problem, although it refers to the USA situation, can be found here: <https://broadly.vice.com/de/article/j5eey4/ein-fremder-in-meinem-haus-wie-sicher-ist-die-sharing-economy-fuer-frauen>. There are a few articles that report findings on racist discrimination in room sharing—but again, not as a topic in Germany. An interesting analysis is given by Kullmann, M. (2018), 'Platform Work, Algorithmic Decision-Making and EU Gender Equality Law' *International Journal of Comparative Labour Law and Industrial Relations*, Vol 34 No 1, pp. 1-21.

<sup>397</sup> Paper on digital politics of June 2017, <http://www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/digitalpolitik.pdf>.

<sup>398</sup> See <https://www.rechtimkontext.de/en/events/event/wissen-als-diskriminierungsfrage-das-europaeische-antidiskriminierungsrecht-zwischen-implizitem-wiss/>.

on an algorithm-based data evaluation or an automated decision procedure, or the introduction of a 'digital General Equal Treatment Act', and politicians have pointed out that 'bans on discrimination in the analogue world must also apply in the digital world of algorithms'.

Some legal authors point out that algorithmic bias and discrimination is in fact the well-known discrimination by humans using digital devices, suggesting that a change in anti-discrimination thought is needed as well as effective enforcement of anti-discrimination law.<sup>399</sup> A study on 'Algorithmic Accountability', funded by the Federal Ministry for Education and Research, was published in October 2018.<sup>400</sup> Under the heading 'non-discrimination law', the author points out that the obligation of equal treatment is a state obligation and only exceptionally an obligation for private parties (who use algorithm decision-making – ADM – procedures). The author goes on to reflect upon the deficiencies of the General Equal Treatment Act concerning goods and services as well as enforcement of the law, but then simply stops without any further analysis. In his concluding remarks, he asks for European legislation on decision support systems, rejects amendments to or changes in anti-discrimination law and suggests the introduction of mandatory labelling of ADM procedures, accountability by design, algorithmic impact assessment, algorithm auditing and self-regulation.

Further studies are on their way, which will hopefully take questions of discrimination into serious consideration and offer legal, political and technical solutions.

### 9.1.3 Political and societal debate

Since 2017, activists against gender stereotyping have been awarding the Golden Fence Post, a negative prize for gender marketing, to highlight the worst outgrowths of this widespread advertising strategy.<sup>401</sup> The strategy of gender marketing (with EUR 45 billion annual turnover) sells a world in which not only colours, but also interests, behaviours and characteristics are strictly separated by gender. This is especially aimed at children. There is nearly nothing that is not sold in a version for boys and another one for girls (toys, children's clothing, books, bibles, baby pacifiers, drinking water, cucumbers, salt, crisps, sweets, globes, wellington boots etc). Goods sold in two separate markets mean double profit, but the harmful gender stereotypes are part of the package. The proportion of girls and boys with eating disorders and body image disturbance is rising, and the increasing gender-segregation of the labour market has many reasons, including the discriminatory images that we see everywhere. Some legal authors and politicians have called for the prohibition of sexist, misogynist and discriminatory advertisements.<sup>402</sup>

## 9.2 Prohibition of direct and indirect discrimination

Direct and indirect sex/gender discrimination in access to, and the supply of, goods and services is explicitly prohibited under Sections 2(1)(8) and 19 of the General Equal Treatment Act.

There is nearly no case law concerning sex/gender discrimination. The District Court of Berlin awarded compensation of EUR 300 for the non-pecuniary damage suffered by an applicant who had been prevented from entering a club by a doorman who said: 'You are

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<sup>399</sup> Fröhlich, W. & Spiecker genannt Döhmann, I. (2018), *Können Algorithmen diskriminieren?* (Are algorithms able to discriminate?), <https://verfassungsblog.de/koennen-algorithmen-diskriminieren/>.

<sup>400</sup> Busch, C. (2018), *Algorithmic Accountability*, [https://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2018/nl\\_04\\_2018/nl\\_04\\_studie\\_n\\_und\\_veroeffentlichungen\\_5.html](https://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2018/nl_04_2018/nl_04_studie_n_und_veroeffentlichungen_5.html).

<sup>401</sup> See <https://goldener-zaunpfahl.de/>.

<sup>402</sup> Fundamental: Völzmann, B. (2015), *Geschlechtsdiskriminierende Wirtschaftswerbung. Zur Rechtmäßigkeit eines Verbots geschlechtsdiskriminierender Werbung im UWG* (Gender-Discriminatory Economic Advertising. The Legality of a Prohibition of Gender Discriminatory Advertising in the Unfair Competition Act), Baden-Baden: Nomos.

too many men.<sup>403</sup> The court rejected the alleged justification of the operator that he just preferred a sex/gender-heterogeneous clientele. This is a rather singular decision as, generally, in the so-called 'disco cases' the courts award compensation to young men of *colour* who were denied access to clubs, bars or discos. Thus, the background is a specific gender-related racism or racist sexism of operators and owners and their doormen imagining young men of colour as 'dangerous' and 'oversexed' and young women of colour as 'exotic' – a widespread intersectional discrimination issue in Germany.

### 9.3 Material scope

The material scope of the General Equal Treatment Act concerning goods and services is significantly restricted in comparison to Article 3 of Directive 2004/113.

First, 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 harassment and sexual harassment are not considered to be discrimination in this area<sup>404</sup> and the special rules on support by anti-discrimination organisations do not apply.

Secondly, 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,<sup>405</sup> 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.

Thirdly, 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.<sup>406</sup>

### 9.4 Exceptions

German law has 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 specific claims in this field, probably due to the fact that state law on this topic is various but exhaustive.

On 26 February 2014, the council of the Berlin district Friedrichshain-Kreuzberg decided on the prohibition of discriminatory, sexist and misogynist advertisements on public advertisement panels.<sup>407</sup> The district council followed the example of the city councils of Bremen and Ulm. The definition of a prohibited advertisement was mainly adopted from

<sup>403</sup> District Court of Berlin, judgment of 24 February 2011, 6 C 544/09.

<sup>404</sup> 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.

<sup>405</sup> Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, p. 116.

<sup>406</sup> 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 in order to be consistent with the directives.

<sup>407</sup> See [https://www.berlin.de/ba-friedrichshain-kreuzberg/politik-und-verwaltung/beauftragte/gleichstellung/a-z/drucksache\\_1013-01\\_iv.pdf](https://www.berlin.de/ba-friedrichshain-kreuzberg/politik-und-verwaltung/beauftragte/gleichstellung/a-z/drucksache_1013-01_iv.pdf) and <https://www.berlin.de/ba-friedrichshain-kreuzberg/politik-und-verwaltung/beauftragte/gleichstellung/frauenfeindliche-werbung/broschuere-sexism-shouldn-t-sells.pdf>.



the guidelines of the Austrian Advertising Council.<sup>408</sup> The district council intended to persuade the town council / state Parliament to adopt this prohibition for the whole city of Berlin. Sexualized and sexist advertisements are widespread in public and especially urban spaces and hard to tackle, not only due to the legal anti-discrimination framework but also because most public advertising spaces are owned and rented by private firms.

## 9.5 Justification of differences in treatment

Differences in treatment in the provision of the goods and services can be justified under German 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, these restrictions must be read into German law although legislative amendments would be preferable.<sup>409</sup>

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 at an all-time high: children in particular are confronted with two separate markets for boys and for girls, for clothes, toys, books, food and so on.<sup>410</sup>

There is one case of sex/gender discrimination that might fall under the question of justification of differences in treatment but was not decided as such. A savings bank customer, Marlies Krämer, filed a complaint to oblige her savings bank to address her using the female terms in all standardised forms. She lost in all instances. Most recently, the Federal Court of Justice ruled that the so-called 'generic masculine' was neutral and did not discriminate against her,<sup>411</sup> displaying a certain lack of familiarity with recent linguistic research. Marlies Krämer now wants to file a complaint before the Federal Constitutional Court and is currently collecting donations for the legal costs. What is special about this case is that there is a State Equality Act that obliges such savings banks, as institutions under public law, to use gender-neutral language, but the Federal Court of Justice assumed that Marlies Krämer was not entitled to a subjective, individual claim to the application of the law. The court might have overlooked Article 3(2) of the Basic Law covering an individual right to gender equality.<sup>412</sup>

## 9.6 Actuarial factors

Until 2013, German law did not 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 should not result in differences in the premiums and benefits of individuals.

Since the adoption of the General Equal Treatment Act in 2006, the German legislature has done nothing to fully implement Directive 2004/113/EC. The only exception to this legislative inactivity is the adoption of the Single Euro Payments Area (SEPA) accompanying Act to implement the *Test-Achats* ruling in 2012.<sup>413</sup> Since 21 December 2012, any sex/gender differentiation by private insurance companies is prohibited. Further

<sup>408</sup> See [http://www.werberat.at/show\\_4274.aspx](http://www.werberat.at/show_4274.aspx).

<sup>409</sup> 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](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG_Evaluation.html).

<sup>410</sup> See for example <http://ich-mach-mir-die-welt.de/goldener-zaunpfahl-fuer-absurdes-gendermarketing/>.

<sup>411</sup> Federal Court of Justice, judgment of 13 March 2018, VI ZR 142/17.

<sup>412</sup> See Grünberger, M. (2018), 'Das "generische Maskulinum" vor Gericht' (The generic masculine before the court), in *JuristenZeitung*, Vol. 73 No. 14, pp. 719-727.

<sup>413</sup> Amendment of Section 20 of the General Equal Treatment Act by the SEPA-accompanying Act (*SEPA-Begleitgesetz*) of 8 April 2013, Official Journal (*Bundesgesetzblatt* BGBl), part I p. 610.

necessary legislative amendments are not to be expected. Quite the contrary, the implementation of the *Test-Achats* ruling caused severe resentment among legal experts and practitioners and the call for a stronger consideration of private autonomy and entrepreneurial freedom.<sup>414</sup>

### **9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113**

In 2013, amendments to the SEPA accompanying Act implementing the *Test-Achats* ruling entered into force with the consequence of increasing insurance rates for both sexes. This is how the exception of Article 5(2) of Directive 2004/113 has been interpreted in Germany.

In 2012, the Federal Court of Justice had to decide on the classification of a transsexual member of a private health insurance scheme after her male-to-female gender reassignment.<sup>415</sup> The claimant entered the insurance contract as a male and was insured under the tariff conditions of a male. The claimant had undergone surgical male-to-female gender reassignment but did not file an application for legal recognition of her new sex because she was married. The insurance company classified the claimant as female and thus the claimant had to pay the higher insurance rates for women. The court decided that the insurance company was not entitled to make an amendment to the insurance contract under the applicable law. After the implementation of the *Test-Achats* ruling, such cases no longer needed any adjudication.

### **9.8 Positive action measures (Article 6 of Directive 2004/113)**

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.

The State Labour Court of Rhineland-Palatinate decided that the higher risk of (sexual) violence against women justifies the preference of female employees when awarding company parking spaces close to the workplace.<sup>416</sup> The District Court of Gießen held that the free membership of a dating portal for women (while men have to pay the full tariff) is justified by the intended gender balance of the members and the broader partner selection possibilities for the male members.<sup>417</sup>

### **9.9 Specific problems related to pregnancy, maternity or parenthood**

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 insurance policies terminate the membership of pregnant women<sup>418</sup> or exclude benefits for pregnancy and childbirth from the beginning.<sup>419</sup>

Moreover, breastfeeding mothers frequently report that they are denied certain services, e.g. in restaurants, when they bring their infants with them, and that they are thrown out of public institutions, such as museums, or private property, such as restaurants or cafés,

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<sup>414</sup> See Heese, M. (2012) 'Offene Preisdiskriminierung und zivilrechtliches Benachteiligungsverbot' *Neue Juristische Wochenschrift* 9/2012, pp. 572-577. Immediately after the adoption of the General Equal Treatment Act, jurists rejected the idea that sex-differentiated tariffs for haircutting or dating portals or agencies free of charge for women or 'ladies nights' might cause inconsistencies with the prohibition of sex/gender discrimination, see Rath, M. & Rütz, E. M. (2007) 'Ende der "Ladies Night", der "Ü-30-Parties" und der Partnervermittlung im Internet?' *Neue Juristische Wochenschrift* 21/2007, pp. 1498-1500.

<sup>415</sup> Federal Court of Justice, judgment of 9 May 2012, IV ZR 1/11.

<sup>416</sup> State Labour Court of Rhineland-Palatinate, judgment of 29 September 2011, 10 Sa 314/11.

<sup>417</sup> District Court of Gießen, judgment of 26 May 2011, 47 C 12/11.

<sup>418</sup> The Higher Regional Court of Hamm, judgment of 12 January 2011, 20 U 102/10, I-20 U 102/10, awarded compensation of EUR 2 000 for non-pecuniary harm.

<sup>419</sup> The District Court of Hannover, judgment of 26 August 2008, 534 C 5012/08, rejected a pregnant applicant's claim for compensation.

when breastfeeding there<sup>420</sup> or that they are harassed for (even the most discreet) breastfeeding in public until they decide to stay at home. Breastfeeding in public is not prohibited but it is generally acknowledged that the law enables owners or operators to exclude breastfeeding mothers. Thus, no case law on this problem can be found. In the expert's view, owners and operators have the right to exclude persons who severely annoy other guests, but discreet breastfeeding does not justify exclusion, quite the contrary: in many cases, such an exclusion is nothing but unjustified maternity discrimination in access to goods and services. It does not help that, in some areas, the local authorities started to identify and publicise 'breastfeeding-friendly' places,<sup>421</sup> strengthening the idea that maternity discrimination is likely to be the norm and non-discrimination the exception. Midwives have demanded legal clarification of the situation.

### **9.10 Evaluation of implementation**

Since the adoption of the General Equal Treatment Act in 2006, the German legislature has been doing nothing to fully implement Directive 2004/113/EC. National law still requires the element of fault, and does not cover sexual harassment, provisions by public authorities, the prohibition of victimisation, or the requirement of proportionality, and applies only to so-called 'mass contracts'. It is never too late for an unequivocal implementation of European anti-discrimination law.

### **9.11 Remaining issues**

There are no remaining issues to report.

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<sup>420</sup> See <http://www.eltern.de/baby/0-3-monate/stillen-in-der-oeffentlichkeit.html>.

<sup>421</sup> See <http://www.noz.de/deutschland-welt/gut-zu-wissen/artikel/461863/stillen-in-der-offentlichkeit-die-brust-des-anstosses>.

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

### 10.1 General (legal) context

#### 10.1.1 Surveys and reports on issues of violence against women and domestic violence

The competent Federal Ministry for Family, Senior Citizens, Women and Youth's webpage on the subject of violence begins with an entry from 2014, which does not reflect the legal or actual situation particularly well, and may well indicate the lack of importance that the ministry gives to the subject.<sup>422</sup> Further, one of the main obstacles to tackling gender-based violence is the lack of data. The Federal Government funded some thorough research at the beginning of the century but did not engage further in this field except for further interpretation of the collected data, the commissioning of a few small studies, and some slight improvements to the regulations on data collection by the police regarding gender-based violence, domestic violence and violence against women in (ex)partnerships. The study published in March 2014 by the European Fundamental Rights Agency on the extent of violence against women in Europe provides most of the more recent figures.

In 2004, a representative study on violence against women in Germany was published.<sup>423</sup> The study found that 40 % of all women reported that they had been victims of physical<sup>424</sup> or sexual violence at least once since their 15<sup>th</sup> birthday; 37 % reported physical violence, two thirds of them of a more serious nature and more than half of them with injuries and after-effects. The authors of the study decided to include only restricted understandings of rape or sexual coercion punishable under the criminal law at the time. Even so, 13 % of the women surveyed reported such forms of sexual violence (if severe forms of sexual harassment with subsequent physical or sexual violence or serious threat were taken into account as well, the percentage would have risen to 34 %).<sup>425</sup> Under the categories used by the study, 58 % of the women surveyed reported sexual harassment. The vast majority of perpetrators of physical or sexual violence were male and the violence mostly took place at the home of the victim or the perpetrator or both; 25 % of all women reported that the perpetrator was their (ex)husband or (ex)partner.

A 2009 study on violence against women in (ex)partnerships and domestic violence based upon a secondary analysis of the data from the 2004 representative study found that – contrary to widespread prejudices about violence as an exclusive problem of the poor – women with middle and high educational and social backgrounds are also victims of violence in (ex)partnerships and domestic violence.<sup>426</sup> In addition to separation/divorce or the intention to separate/divorce, risk factors also include experiences of violence in childhood and adolescence.

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<sup>422</sup> See <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/frauen-vor-gewalt-schuetzen>.

<sup>423</sup> Schröttle, M., Müller, U. et al. (2004), *Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland. Eine repräsentative Untersuchung zu Gewalt gegen Frauen in Deutschland* (Life situation, safety and health of women in Germany. A representative study on violence against women in Germany), Berlin: BMFSFJ, <https://www.bmfsfj.de/bmfsfj/studie--lebenssituation--sicherheit-und-gesundheit-von-frauen-in-deutschland/80694>.

<sup>424</sup> 42 % of all women reported psychological violence such as psychological terror, stalking, humiliation, aggressive shouting, threats or insults.

<sup>425</sup> GiG-net (ed.) (2008), *Gewalt im Geschlechterverhältnis. Erkenntnisse und Konsequenzen für Politik, Wissenschaft und soziale Praxis* (Gender-based violence. Findings and consequences for politics, science and social practice), p. 26, Opladen: Barbara Budrich.

<sup>426</sup> Schröttle, M. & Ansoorge, N. (2009), *Gewalt gegen Frauen in Partnerschaften. Eine sekundäranalytische Auswertung zur Differenzierung von Schweregraden, Mustern, Risikofaktoren und Unterstützung nach erlebter Gewalt* (Violence against women in intimate relationships. A secondary analytical evaluation to differentiate severity levels, patterns, risk factors and support after experienced violence), Berlin: BMFSFJ, <https://www.bmfsfj.de/bmfsfj/service/publikationen/gewalt-gegen-frauen-in-paarbeziehungen/80614>.

It was not until 2011 that the relationship between victims and perpetrators and thus intimate partner violence was documented in police crime statistics. Following this, a survey of reported cases showed that, in 2017, 113 965 women were affected by (ex)partnership violence including murder and manslaughter, physical assault, rape and sexual assault, threat, stalking and coercion, deprivation of liberty, trafficking and forced prostitution.<sup>427</sup> It is suggested that the reporting rate is less than 20 %. In 2017, 147 women were killed by their intimate (ex)partners and 223 women survived potentially lethal attacks (2016: 149 women were killed, 208 women survived an attack; 2015: 131 women were killed, 200 women survived an attack; 2014: 160 women were killed; 2013: 138 women were killed; 2012: 106 women were killed).<sup>428</sup>

There is a significant gap between legislation and legal practices concerning gender-based violence by (ex)partners. When a man kills or tries to kill his intimate (ex)partner because she terminated or wanted to terminate a (mostly abusive) relationship, judges, including some federal court judges, base their rulings on the idea that the perpetrator hurts himself by killing the person that 'he didn't want to lose' with very modest punishments as a result.<sup>429</sup> When it comes to sexual assaults or sexualised violence after prior intimacy, the effectiveness of prosecution particularly suffers from stereotyped victim blaming, minor penalties or the termination of the proceedings, and courts regularly impose lower sentences for acts of sexual assault committed within or after an intimate relationship.<sup>430</sup>

Although disabled persons' organisations and women's organisations correctly state that this possibility of sterilisation without the consent of the person involved severely violates human rights under the Convention on the Rights of Persons with Disabilities and the Istanbul Convention, German law still provides for women with so-called 'mental disability' to be sterilised on the decision of a care-giver and with collaboration of a court.<sup>431</sup> An unusually high number of women with disabilities, especially so-called mental disabilities, are sterilised in Germany (9-18 % compared with 2-6 % of the female population). There also seems to be a high number of undocumented cases. According to a study on the sterilisation of women with learning disabilities, half of the women surveyed explained that they consented to their sterilisation while for the other half the determining factors were persuasion by parents, physicians or nursing staff, a lack of knowledge about contraception or lack of prospects of living with a child.<sup>432</sup>

<sup>427</sup> Federal Criminal Police Office (2018), *Partnership violence. Survey on the reporting year 2017*, [https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Partnerschaftsgewalt/Partnerschaftsgewalt\\_2017.pdf](https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Partnerschaftsgewalt/Partnerschaftsgewalt_2017.pdf).

<sup>428</sup> Official reports published by the Federal Criminal Police Office are available under [www.bka.de](http://www.bka.de). To be noted: After not being able to provide data on violence by intimate (ex)partners, the FCPO proved to be unable to provide data differentiating between completed and attempted killings, which led to erroneous newspaper reports, subsequent public corrections and, thus, impaired successful discussions and consciousness raising concerning lethal gender-based violence.

<sup>429</sup> While so-called honour killings by Muslim or Arab perpetrators are severely punished (life-sentence), many white German perpetrators benefit from judges' empathy for 'abandoned' husbands/partners and a cultural understanding of spouse or partner killings as domestic tragedies rather than gender-based violence and the consequences of patriarchal culture. For a comparative analysis of German criminal court judgments on lethal domestic violence see Foljanty, L. & Lembke, U. (2014), 'Die Konstruktion des Anderen in der "Ehrenmord"-Rechtsprechung' (Judicial othering in case law on so-called honour killings), in *Kritische Justiz*, pp. 298-315.

<sup>430</sup> See German Women Lawyers Association, Detailed statement on the effective implementation of the Istanbul Convention of 29 January 2018, <https://www.djb.de/verein/Kom-u-AS/K6/st18-02/>.

<sup>431</sup> See e.g. State Coordination Body for the implementation of the CRPD (2017), *Positionspapier Zwangssterilisation* (Position Paper on Forced Sterilisation), [https://www.behindertenbeauftragter.de/DE/Koordinierungsstelle/ArbeitKO/Veroeffentlichungen/Veroeffentlichungen\\_node.html](https://www.behindertenbeauftragter.de/DE/Koordinierungsstelle/ArbeitKO/Veroeffentlichungen/Veroeffentlichungen_node.html).

<sup>432</sup> Zinsmeister, J. (2012), 'Zur Einflussnahme rechtlicher Betreuerinnen und Betreuer auf die Verhütung und Familienplanung der Betreuten' (On the influence of legal guardians on the contraception and family planning of those under their care), in *Betreuungspraxis*, pp. 227ff.

Sterilisation without informed consent was also one finding of a 2013 representative study on discrimination and violence against women with disabilities.<sup>433</sup> Moreover, the study found a high prevalence of violence against women with disabilities in all areas of life. About 60 % to 75 % of the women interviewed<sup>434</sup> were affected by physical violence and assaults in adult life – a proportion twice as high as the proportion of women in the population average of the 2004 study. Deaf and blind women were disproportionately affected; 41 % of deaf women experienced physical violence by their intimate partners. The proportion of women with disabilities who have become victims of sexual violence are three to four times larger than the proportion of women who are not disabled: 29 % to 43 %. The vast majority of perpetrators were intimate partners. Deaf women are disproportionately affected by sexual violence by intimate partners, but also by colleagues, friends or unknown perpetrators. Furthermore, 67 % to 87 % of all women interviewed experienced gender-based violence in the form of sexual harassment. A high number of women with disabilities reported psychological violence such as verbal violence (shouting, abuse, humiliation), threat, ridicule, oppression and harassment, slander, coercion, discrimination, exclusion and psychological terror in the area of public, education or work (50 % to 60 %), by authorities or institutions (40 % to 50 %), in healthcare (30 % to 40 %) or in private, by friends or family members (30 % to 50 %). Of all deaf women interviewed, 45 % were victims of psychological violence by their intimate partners.

#### 10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

There are several national acts on violence against women and domestic violence. The most important are:

- Protection Against Violence Act of 11 December 2001, entering into force on 1 January 2002, Official Journal 2001, p. 3513;
- Act on the establishment and operation of a state-wide telephone helpline 'Violence Against Women' of 7 March 2012, Official Journal 2012, p. 448;
- Fiftieth law on amendments to the Penal Code – improvement of the protection of sexual autonomy of 4 November 2016, Official Journal 2016, p. 2460;
- Act on the improvement of combating trafficking in persons of 11 October 2016, Official Journal 2016, p. 2226;
- Act on the improvement of the protection against stalking of 1 March 2017, Official Journal 2017, p. 386.

The 2002 Protection Against Violence Act provides the competent court with the power to order a perpetrator of domestic violence to vacate the residence where the victim lives, not to enter it again and not to contact the victim in any way. The courts can decide in summary proceedings. Further, there are police law regulations in all states to avoid protection gaps by authorising the police to set similar orders for up to 10 days to keep the perpetrator out of the residence and out of contact with the victim. When the victim applies for a court order, the police order can be extended for another 10 days and becomes invalid with the court's decision. Under Section 2 of the Protection Against Violence Act, the competent court can assign the residence of perpetrator and victim to the victim (and their children) alone. Further, the victims can apply for a restraining order before the civil courts under Section 1 of the Act, and if the perpetrator violates this order, he can be prosecuted under Section 4 of the Act.

The Protection Against Violence Act is an especially successful example of 'outsider jurisprudence', which focuses on the needs of the victims and reaches beyond the

<sup>433</sup> Schröttle, M., Hornberg, C. et al. (2013), *Lebenssituation und Belastungen von Frauen mit Behinderungen und Beeinträchtigungen in Deutschland* (Life situation and burdens of women with disabilities and impairments in Germany), Berlin: BMFSFJ, <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationsliste,did=199822.html>.

<sup>434</sup> The greater differences between the proportion is due to the fact that the prevalence of gender-based violence among women with disabilities differs considerably with regard to the kind of disability. Women with physical disabilities as well as blind and deaf women are disproportionately affected.



boundaries of different legal fields and competencies (such as civil law, criminal law, police law etc).<sup>435</sup> In addition to the legal provisions, the cooperation of various state and non-state actors such as courts, police, youth welfare office, counselling centres, women's organisations and support groups has been improved and institutionalised. Nevertheless, there are still severe obstacles to putting this law into practice, among them the everlasting question of resources as well as problems in dealing with particularly violent perpetrators, the lack of consideration of prior violence when granting child visiting rights to the (perpetrating) father, and the lack of monitoring systems and effective protection for women living in institutionalised accommodation (female refugees, women with disabilities).

In 2012, a law<sup>436</sup> set up state-wide, round-the-clock, free telephone helplines to provide advice and information in relation to all forms of violence covered by the scope of the IC. The helplines are confidential, easily accessible and multilingual. They are answered by female specialised staff and are supported by a website.<sup>437</sup> The problem remains that, in many cases, the helpline staff do not know where to refer victims to, as Germany fails to offer an adequate, comprehensive and accessible infrastructure on federal, state and local level, of support and counselling for victims of gender-based violence.

On 7 July 2016, the Bundestag adopted several amendments to the Penal Code, specifically implementing the 'no means no' concept into the criminal regulations on rape and sexual assault.<sup>438</sup> In compliance with the IC, sexual actions without the consent of the other person are now punishable without further requirements, while the use of force or threat or the exploitation of a vulnerable or defenceless position aggravates the punishment. Sexual harassment (by physical, not verbal assault) became a criminal offence. However, there are discouraging experiences concerning the effects of the last comprehensive amendments to the law on rape and sexual assault in 1997/98 introducing, inter alia, the criminal offence of marital rape, the extension of rape law to other forms of sexual assault, protection for male victims of rape and sexual assault and the criminal liability of rape and sexual assault by exploiting a victim in a vulnerable position. However, all these statutory amendments and protection concepts failed due to resentments of a majority of courts, state attorneys and police staff. The reporting rates rose slightly immediately after the reform, but still remain at the low level of 5 to 10 %, while the attrition rates have been rising in Germany since the 1980s.<sup>439</sup> As analysis shows, the case law of German courts (including the Federal Court of Justice) is still strongly influenced by gender stereotypes, rape myths and victim blaming and thus, criminal law on rape and sexual assault is not very likely to become effective outside the statute books.<sup>440</sup> It is an unfortunate and well-known phenomenon that improvements in the criminal law on rape and sexual assault lead to the rise of attrition rates as the police, state attorneys and

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<sup>435</sup> Baer, S. (2004), 'Effektiver Rechtsschutz durch das Gewaltschutzgesetz: Ein neues Regulierungsmodell für ein komplexes Problem' (Effective legal protection under the Protection Against Violence Act: a new regulatory model for a complex problem), in Barton (Hg.), *Beziehungsgewalt und Verfahren*, pp. 113-121, Baden-Baden: Nomos.

<sup>436</sup> Act on the establishment and operation of a state-wide telephone helpline 'Violence Against Women' of 7 March 2012, Official Journal I, p. 448.

<sup>437</sup> <https://www.hilfetelefon.de/aktuelles.html>.

<sup>438</sup> Fifth law on amendments to the Penal Code – improvement of the protection of sexual autonomy of 4 November 2016, Official Journal 2016, p. 2460, <https://www.bmiv.de/SharedDocs/Gesetzgebungsverfahren/DE/SchutzSexuelleSelbstbestimmung.html>.

<sup>439</sup> Seith, C., Lovett, J. & Kelly, L. (2009), *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries*, [https://www.researchgate.net/publication/228847968\\_Different\\_systems\\_similar\\_outcomes\\_Tracking\\_attrition\\_in\\_reported\\_rape\\_cases\\_in\\_eleven\\_countries](https://www.researchgate.net/publication/228847968_Different_systems_similar_outcomes_Tracking_attrition_in_reported_rape_cases_in_eleven_countries).

<sup>440</sup> Analysis of respective rulings of the Federal Court of Justice by Lembke, U. (2014), 'Vergebliche Gesetzgebung. Die Reform des Sexualstrafrechts 1997/98 als Jahrhundertprojekt und ihr Scheitern in und an der sog. Rechtswirklichkeit' ('Futile legislation. How the legislative reforms of sexual offences in 1997-1998 became a centennial project and failed in and due to legal reality'), *Zeitschrift für Rechtssoziologie*, Vol. 34, No. 1+2, pp. 253-283.



judges re-define, negate and restrict the scope of application of law on rape and sexual assault.<sup>441</sup>

With the Act on the improvement of combating trafficking in persons of 11 October 2016 amending the Penal Code provisions concerning human trafficking, the German legislature mainly implemented Directive 2011/36/EU by amending and clarifying the criminal law on trafficking in persons and by introducing new criminal offences of forced prostitution, forced labour and labour exploitation.<sup>442</sup> Moreover, the legislature introduced a criminal offence of being the 'client' of a victim of human trafficking or forced prostitution,<sup>443</sup> which was not discussed in public, although questions of 'the criminal accountability of clients' were broadly discussed in Germany and other European countries. This was perhaps due to the expectation that the newly introduced criminal offences would not make a significant difference as long as Germany is unwilling to set priorities, offer effective protection for victims irrespective of their nationality and put sufficient resources into combating trafficking, exploitation and commercialised rape.

In December 2016, the Bundestag adopted several amendments to the criminal law on stalking, which entered into force on 10 March 2017.<sup>444</sup> Stalking is no longer subject to private prosecution, but is to be prosecuted by the authorities. The violation of judicial settlements on the matter also constitute a criminal offence. Severe harm to the personal life of the victim is no longer required, but the general qualification to cause these consequences suffices. It is suggested that 12 % of the population in Germany become victims of stalking at least once in their life, and the vast majority (80 %) of these victims are female. The former requirements of the Penal Code punished victims who resisted giving up their jobs or leaving their homes and made it nearly impossible to prosecute even very persistent stalkers. The fact that stalking could only be addressed through private prosecution gave the harmful impression that stalking was a private problem, although gender-based violence, even and especially when committed by (ex)partners, husbands or relatives, is a legal problem that should be solved primarily by the state. Due to this background, the improvement of the protection against stalking was one more step in the implementation of the Istanbul Convention.

In 2019, further implementation of the Istanbul Convention, the problem of digital violence and hate speech and other forms of gender-based violence such as upskirting were discussed but without further legislative activity.<sup>445</sup>

### 10.1.3 National provisions on online violence and online harassment

There are no specific criminal law or other legal provisions regulating (or, rather, abolishing or preventing) online violence and online harassment in Germany. However, there are some general criminal as well as civil law provisions which could be applied effectively.<sup>446</sup> The main problem, therefore, is not the statutory law but the access to justice for victims, the mobilisation of these provisions by civil society and the application of the law by the

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<sup>441</sup> Steinhilper, U. (1998) *Definitions- und Entscheidungsprozesse bei sexuell motivierten Gewaltdelikten. Eine empirische Untersuchung* (Definition and decision-making processes concerning sexually motivated violent crimes. An empirical study), 2nd edition.

<sup>442</sup> Act on the improvement of combating trafficking in persons of 11 October 2016, Official Journal 2016, p. 2226, <http://dipbt.bundestag.de/extrakt/ba/WP18/651/65143.html>.

<sup>443</sup> There are some problems with the term of 'forced prostitution' as under force, there are neither clients nor prostitutes but perpetrators raping women and paying for the possibility to do so. Moreover, the criminal law as it was could deal with matters of commercialised rape if there were any intention to effectively do so.

<sup>444</sup> Act on the improvement of the protection against stalking of 1 March 2017, Official Journal 2017, p. 386, <https://www.bmiv.de/SharedDocs/Gesetzgebungsverfahren/DE/Stalking.html>.

<sup>445</sup> See German Women Lawyers' Association, <https://www.djb.de/st-pm/pm/2019.html>.

<sup>446</sup> For an overview of applicable provisions see Lembke, U. (2017), *Kollektive Rechtsmobilisierung gegen digitale Gewalt* (Collective legal action against digital violence), pp. 6ff; and Lembke, U. (2016), 'Ein antidiskriminierungsrechtlicher Ansatz für Maßnahmen gegen Cyber Harassment' (An anti-discrimination law approach for measures against cyber harassment) *Kritische Justiz*, vol. 49, No. 3, pp. 385 (391ff).

judiciary.<sup>447</sup> However, prosecuting state authorities as well as specialised media law courts usually do not apply the appropriate laws due to a misunderstanding of digital violence as a private matter or to examining freedom of speech in sole favor of the perpetrator and not the victim and, thus, ignoring the victim's fundamental rights. Further, there is a considerable lack of legal knowledge concerning the potentials and advantages of an anti-discrimination law approach,<sup>448</sup> although there is experience of the successful application of, for example, laws against harassment, in other European countries from which Germany could learn.

#### 10.1.4 Political and societal debate

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 action. In 2012, the Federal Government displayed its lack of intention to improve the funding of women's shelters.<sup>449</sup> In 2013, the Government of North Rhine-Westphalia decided against a state law on the funding of women's shelters because of the costs: a state law would lead to the loss of federal subsidies and diminish the municipalities' voluntary tasks and thus their 'freedom of financial decisions'.<sup>450</sup> As long as the protection against (gender-based) violence is considered to be a question of the discretion or even 'freedom' of Governments or authorities,<sup>451</sup> there is a long way to go for Germany to become a democratic society for all its citizens.

The current governing parties announced their intention to improve the funding of shelters and support structures in the coalition agreement, but the funding will be spent on pilot projects and not structural problems and, moreover, the promised money is yet to be seen. The main structural and (purportedly) legal obstacles have not been addressed and there is still no indication that the federal or state Governments or other public bodies will discard the erroneous idea that shelter and support for victims of gender-based violence should be a voluntary and not mandatory state task.

In 2017, 147 women were killed by their intimate (ex)partners and 223 women survived lethal attacks.<sup>452</sup> As the killing of wives and female (ex)partners is still often framed as 'family tragedy' in German media and discourse, some feminist movements have tried to introduce the concepts of femicide into German law and legal discourse.<sup>453</sup> The Government is not keen to implement this concept into debates concerning German law and legal practice although it is engaged in the support of projects and practices to end the killing of women by their (ex)partners under the term of femicide in other countries outside Europe.<sup>454</sup>

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<sup>447</sup> For the question of collective action within the German legal framework, see Lembke, U. (2017), 'Kollektive Rechtsmobilisierung gegen digitale Gewalt' (Collective legal action against digital violence), E-Paper available under <https://www.qwi-boell.de/de/2018/01/09/kollektive-rechtsmobilisierung-gegen-digitale-gewalt>.

<sup>448</sup> See Lembke, U. (2016), 'Ein antidiskriminierungsrechtlicher Ansatz für Maßnahmen gegen Cyber Harassment' (An anti-discrimination law approach for measures against cyber harassment) *Kritische Justiz*, vol. 49, No. 3, pp. 385-406.

<sup>449</sup> See Federal Government (2012) *Report on the situation of women's shelters, specialised counselling, and other support measures for women victims of violence and their children*, 16 August 2012, <http://www.bmfsfj.de/BMFSFJ/Service/publikationen,did=190482.html>.

<sup>450</sup> Statement of the Government of North Rhine-Westphalia, p. 5-6, [http://www.autonome-frauenhaeuser-zif.de/sites/default/files/report\\_attachment/NRW.Rechtsgutachten.Frauenhilfeeinrichtungen.pdf](http://www.autonome-frauenhaeuser-zif.de/sites/default/files/report_attachment/NRW.Rechtsgutachten.Frauenhilfeeinrichtungen.pdf).

<sup>451</sup> There is no 'freedom' of the state, the Government or the authorities. They have powers and obligations, especially the obligation to protect their citizens against (gender-based) violence because the freedom from violence is the basis of the enjoyment of all other rights and of the participation in democratic societies.

<sup>452</sup> Federal Criminal Police Office (2018), *Partnership violence. Survey on the reporting year 2017*, [https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Partnerschaftsgewalt/Partnerschaftsgewalt\\_2017.pdf](https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Partnerschaftsgewalt/Partnerschaftsgewalt_2017.pdf).

<sup>453</sup> See <https://taz.de/Frauenmorde-in-Deutschland/15529757/>.

<sup>454</sup> See <http://dipbt.bundestag.de/doc/btd/19/040/1904059.pdf>.

## 10.2 Ratification of the Istanbul Convention

Germany ratified the Istanbul Convention (IC) on 12 October 2017 and the Convention entered into force as German law on the federal level on 1 February 2018.<sup>455</sup>

Under Article 78 of the Istanbul Convention, the German Government declared reservations concerning Articles 59(2) and 59(3) of the Istanbul Convention on residence status, residence permit and the suspension of expulsion procedures for foreign victims of gender-based violence, thus diminishing the protection for female refugees and migrants who are victims of domestic violence. The statute on the ratification incorporates these reservations and thus, weakens the protection for one of the most vulnerable groups. Reservations to Article 59(2) and (3) are permitted under the Convention.

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 was 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 Penal Code. Article 36 of the IC states that engaging in non-consensual acts of a sexual nature with a person constitutes sexual violence and a criminal offence without further requirements, while the German Penal Code required not only lack of consent but, moreover, coercion by violence or severe threat or the deliberate exploitation of an especially vulnerable situation. The Federal Ministry of Justice denied the necessity to amend the Penal Code to reach conformity with the IC, federal judges campaigned against amendments and politicians from all parties expressed worries about Germans' sex life. It was not until 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. Although such amendments were overdue, the arguments were very often framed with racist tendencies (see Section 3.1.2 above). In July 2016, amendments to the Penal Code to implement Article 36 of the Istanbul Convention were passed by the Bundestag with an overwhelming majority, but the governing parties quite randomly connected these amendments with amendments to the asylum law on deportations and expulsions, obtaining a narrow majority for the latter. This was just one example of the exhibition of right-wing populist politics in the heart of the German Parliament.

The draft for the ratification statute to implement the Istanbul Convention was accompanied by a ministerial memorandum claiming that no further legislative amendments were necessary to reach the full conformity of German law with the Istanbul Convention. The German Women Lawyers' Association, among others, did not share this view and published a longer statement on the effective implementation of the IC in Germany, highlighting 14 examples of fields of action in which comprehensive measures are still needed to begin an implementation process.<sup>456</sup> The first state (and parallel) reporting procedure for Germany before the IC treaty body GREVIO is due in 2020.

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<sup>455</sup> Parliamentary information on the ratification and (unequivocal) adoption by parliament is available at: <https://www.bundestag.de/dokumente/textarchiv/2017/kw22-de-hauesliche-gewalt-507528>, and the draft of the Act on the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (as adopted by Parliament and including the ministerial memorandum): <http://dip21.bundestag.de/dip21/btd/18/120/1812037.pdf>.

<sup>456</sup> German Women Lawyers Association (2018), 'Statement on the effective implementation of the Council of Europe Convention on the Prevention and Suppression of Violence against Women and Domestic Violence (Istanbul Convention) in Germany', 29 January 2018, <https://www.djb.de/verein/Kom-u-AS/K6/st18-02/>.

## **11 Compliance and enforcement aspects (horizontal provisions of all directives)**

### **11.1 General (legal) context**

#### **11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress**

The authors of a comprehensive evaluation of the General Equal Treatment Act<sup>457</sup> point out that the provisions on enforcement of anti-discrimination show several weaknesses, such as barriers in the access to justice, a too-short time limit of two months for anti-discrimination claims, inconsistencies concerning the shift of the burden of proof, the requirement of fault that is incompatible with European law, restrictions to the amount of compensation for non-pecuniary harm, compensation levels lacking dissuasiveness, the burdens for individual claimants and the lack of any possibility of class action or collective action and effective support by anti-discrimination bodies and organisations.

#### **11.1.2 Other issues related to the pursuit of a discrimination claim**

On the one hand, anti-discrimination law was implemented to fail in the eyes of a major part of German legal discourse in 2006 and the devaluation of anti-discrimination law as 'identity politics' play an important role in current political discourse, while on the other hand, more legal and political actors are engaging in questions of anti-discrimination law, some of them by introducing strategic litigation, which will become more and more important over the coming years despite being hampered by the lack of collective or class action.

#### **11.1.3 Political and societal debate and pending legislative proposals**

There is always some political or societal debate about the obstacles to successful enforcement of anti-discrimination law. However, following the adoption of the Pay Transparency Act, the Government and legislature show no eagerness to start further and effective improvements.

### **11.2 Victimisation**

The provisions on victimisation are implemented in German legislation. Section 16 of the General Equal Treatment Act prohibits victimisation in labour relationships and gives the victim of discrimination or any person who supported them a right of action against the employer. This rule also applies to discrimination against civil servants.<sup>458</sup>

There is nearly no case law on the prohibition of victimisation. In 2017, the Federal Labour Court decided that the entitlement to compensation when discriminated against in working life under Section 15(2) of the General Equal Treatment Act did not cover compensation for victimisation.<sup>459</sup> A claimant's attempt to understand the obligation to bear costs in civil procedural law when seeking redress for alleged discrimination as a violation of the prohibition of victimisation was rejected by the State Labour Court of Baden-Württemberg in 2015.<sup>460</sup>

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<sup>457</sup> Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG\\_Evaluation.html](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG_Evaluation.html).

<sup>458</sup> Administrative Court of Gießen, judgment of 26 May 2011, 5 K 401/11.GI, while pointing out that the option to take legal action under civil service law takes precedence.

<sup>459</sup> Federal Labour Court, judgment of 18 May 2017, 8 AZR 74/16.

<sup>460</sup> State Labour Court of Baden-Württemberg, judgment of 19 November 2015, 6 Sa 68/14.

### 11.3 Access to courts

#### 11.3.1 Difficulties and barriers related to access to courts

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.

Court-appointed advocates only appear as public defenders in criminal proceedings or as a very specialised assistant in certain family law proceedings; their significance for sex discrimination cases is supposed to be low. Anti-discrimination interest organisations do not have standing in court, including the Federal Anti-Discrimination Agency. 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 lifts the burden on 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 councils<sup>461</sup> can take action against the employer in the event of a serious breach of their duties concerning non-discrimination. In practice, they have not yet done so. 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 anti-discrimination law, a simple breach of the employer's duties concerning non-discrimination should suffice.<sup>462</sup> The requirement of a serious breach of duties arises from the legal basis of the Works Constitution Act and is unsuitable for anti-discrimination law.

Moreover, there is nearly no legal basis for strategic litigation measures as the opportunities for representation in court or to simply support and advise victims are severely restricted. There is no *actio popularis* and no class action concerning anti-discrimination cases and no standing in court for anti-discrimination associations. *Amicus curiae* can only be brought to the Federal Constitutional Court and on the court's request. Generally, German courts and judges do not appreciate the legal expertise of third parties, so any legal intervention may diminish the applicant's chances of success instead of supporting them.

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 months; in administrative and social law cases, the period for bringing action is one month. These very short time

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<sup>461</sup> 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 who has been discriminated against.

<sup>462</sup> Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, pp. 142ff.

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 the effective protection against and prevention of discrimination. The Federal Labour Court has repeatedly emphasised that the two-month period in labour law cases would suffice and would not violate the principles of equivalence and effectiveness.<sup>463</sup> In the opinion of the author as well as other legal commentators, the time limit should be six months for all anti-discrimination claims,<sup>464</sup> especially in comparison with time limits for other compensation claims, e.g. infringements of personality rights, which is generally three years.

### 11.3.2 Availability of legal aid

There is no special regulation of legal aid for anti-discrimination cases but the general rules apply.

There is some financial aid for persons with a low income.<sup>465</sup> The Counselling Assistance Act ensures that people with low incomes receive legal advice and legal representation outside court proceedings in return for a small contribution of their own. If the efforts to reach an out-of-court settlement fail and a court has to deal with the matter, legal aid can be claimed. Persons are entitled to legal aid when they meet the requirements under Sections 114 et seq. of the Code of Civil Procedure.

#### Legal advice assistance

Counselling assistance is provided under the Legal Advice Assistance Act<sup>466</sup> to persons who, according to their personal and economic circumstances, are unable to raise the means to exercise rights outside the court proceedings. Furthermore, it must be that no other reasonable possibility of legal advice is available, such as advice from consumer centres, tenants' associations, authorities, debt counselling or legal expenses insurance.

In the states of Bremen and Hamburg, the public legal advice service that was introduced there some time ago prevails. Therefore, persons seeking legal advice cannot consult a lawyer or other adviser of their choice. In Hamburg, the Public Legal Information and Settlement Agencies (*Öffentliche Rechtsauskunft, ÖRA*) provide information and in Bremen it is the Chambers of Employees. In Berlin, persons seeking legal advice can choose between public legal advice and advice under the Counselling Assistance Act.

The use of the legal advice assistance must not be random. A person who applies for legal advice assistance is acting at random if a person seeking legal advice who does not receive this assistance would not use money for legal advice and representation, as this does not appear to be sensible in the given case.

The person seeking legal advice must be in need of financial support. When assessing personal and financial circumstances, the income and expenses of the person concerned are taken into account. The calculation can be very extensive and complicated in individual cases. Not only Germans but also foreigners receive legal advice assistance, even if they

<sup>463</sup> Federal Labour Court, judgment of 18 May 2017, 8 AZR 74/16; judgment of 21 June 2012, 8 AZR 188/11. The court argues that due to the special distribution of the burden of proof in anti-discrimination cases, the claim for compensation because of discrimination could not be compared to other compensation claims. As the regulations on the burden of proof do not work out too well in practice, one obstacle for access to justice is justified by another.

<sup>464</sup> See German Women Lawyers Association (2016), Press Release of 18 August 2016, <https://www.djb.de/verein/Kom-u-AS/K1/pm16-21/>; Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, pp. 145ff.

<sup>465</sup> See Federal Ministry for Justice, [https://www.bmjbv.de/DE/Themen/GerichtsverfahrenUndStreitschlichtung/Prozesskostenhilfe/Prozesskostenhilfe\\_node.html](https://www.bmjbv.de/DE/Themen/GerichtsverfahrenUndStreitschlichtung/Prozesskostenhilfe/Prozesskostenhilfe_node.html).

<sup>466</sup> See <https://www.gesetze-im-internet.de/berathig/BJNR006890980.html>.



do not have a residence in Germany. Therefore it is a very helpful instrument also for refugees.

Legal advice assistance must be requested from the local court at the domicile of the person seeking legal advice. This must be done in person and include a description of the disputed facts as well as a statement of the person's personal and financial circumstances, plus copies of the required documents. The local court can refer the claimant to a consultation opportunity or issue a certificate of entitlement if the requirements are met. This certificate of entitlement can be used to visit an adviser (lawyer, tax consultant, auditor, pension consultant). EUR 15 must then be paid to this person. The adviser can waive this payment if the person seeking legal advice cannot afford it.

### Legal aid

Legal aid is granted to persons who, according to their personal and economic circumstances, are unable to meet the costs of the proceedings, only partially or only in instalments (Sections 114 et seq. of the Code of Civil Procedure).<sup>467</sup> The intended law enforcement or legal defence must offer sufficient prospects of success and must not appear wilful. In other words, the aid is granted if, by superficial examination by the court, the applicant's case has a good chance of success.

The application for legal aid must be filed with the court in which the proceedings are pending or are to be instituted. The request must be made in writing, on record at the court registry or orally at the hearing. It must contain a description of the facts at issue as well as the evidence, and a statement of the personal and economic circumstances, plus copies of the required documents.

The economic and personal circumstances are assessed according to the principles of granting legal aid as well as those of legal advice assistance (see above). Legal aid is also granted to foreigners, even if they are not resident in Germany, and is therefore a very helpful instrument for refugees. There may be a complete exemption from court costs and the costs of one's own lawyer or an obligation to pay in instalments. However, the party conducting the proceedings must use its assets to the extent that this is reasonable. In particular, assets also include a claim to an advance on legal costs (e.g. against the spouse under maintenance law) or a claim to insurance cover with regard to legal costs (e.g. against legal expenses insurance).

Depending on the income to be used, legal aid will cover in full or in part the applicant's own contribution to the court costs and costs of her or his own lawyer. However, legal aid has no influence on the costs that may have to be reimbursed to the opposing party, in particular the costs of the opposing lawyer. Whoever loses the case must therefore, as a rule, pay the costs of the opposing party, even if legal aid has been granted to him or her. An exception applies in labour court proceedings, where the party who loses the case in the first instance does not have to reimburse the costs of the opposing lawyer.

If the applicant is able to pay the costs in instalments, the duration of the instalment payment is a maximum of 48 months. If the costs of legal proceedings have not been paid by then, they will be remitted to the applicant.

Constitutional complaint proceedings are free of charge. Financial aid for lawyer's fees is only possible if a complainant cannot adequately assert his or her rights on his or her own, if he or she will be unable to meet the cost of the proceedings if a lawyer is hired, and if the constitutional complaint has prospects of success.

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<sup>467</sup> See [https://www.gesetze-im-internet.de/englisch\\_zpo/index.html](https://www.gesetze-im-internet.de/englisch_zpo/index.html).



## 11.4 Horizontal effect of the applicable law

### 11.4.1 Horizontal effect of relevant gender equality law

The horizontal effect of gender equality and anti-discrimination law has always been a central issue of dispute in German legal discourse. For a long time, a possible horizontal effect of the constitutional prohibition of sex discrimination and the principle of gender equality was strongly contested and the state equality laws only applied to the civil service and the state as employer. The very reason why the implementation of the European anti-discrimination directives was fiercely rejected by judges, lawyers, law professors and politicians was the fact that the new anti-discrimination legislation would address private employers, insurance, contractors and suppliers of goods. German civil law literature and practice was especially averse to the idea of binding non-discrimination rules applying to private employment relationships and the provision of goods and services by private contractors. Most of them try to ignore possible horizontal effects of European anti-discrimination and fundamental rights law.

### 11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

In Germany, the CJEU decision in *Bauer* was not highlighted as an issue in legal debate, at least not with regard to horizontal direct effects of the charter.<sup>468</sup> One reason for this might be that the *Bauer* decision was preceded by the CJEU ruling in *Egenberger*,<sup>469</sup> which caused some uproar and that the side remarks in the latter ruling concerning the possible direct horizontal effects of the charter were certainly noticed.

As the case of *Egenberger* is now pending before the Federal Constitutional Court, its attention to horizontal effects has been raised in relation to another FCC decision. In 2018, the Federal Constitutional Court decided on the possible horizontal effect of the constitutional provision of equality before the law under Article 3(1) of the German Constitution in the case of *Stadionverbot*.<sup>470</sup> The court maintained the general rule of only indirect horizontal effects and pointed out that such effects would not mean that legal relations between private individuals must be designed by them in strict compliance with equality. However, constitutional requirements of equal treatment may apply in specific circumstances, namely in the event that one private party has a powerful monopoly in offering a generally accessible and socially relevant good or service and excludes another private individual from this offer without objective reasons. In Germany, the CJEU ruling in *Egenberger* and the FCC ruling in *Stadionverbot* are at the centre of legal debate, which is maybe not as inspired by European legal thought as one might wish.

However, the labour courts directly apply Article 157 TFEU in pay discrimination cases.<sup>471</sup>

## 11.5 Burden of proof

German legislation provides for a shift of the burden of proof in sex discrimination cases. 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

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<sup>468</sup> E.g. see Fuhlrott, M. (2018), 'Anmerkung' (Remark), in *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 24, pp. 1054-1055.

<sup>469</sup> Judgment of the Court (Grand Chamber) of 17 April 2018, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, Case C-414/16, ECLI:EU:C:2018:257.

<sup>470</sup> Federal Constitutional Court, judgment of 11 April 2018, 1 BvR 3080/09 (*Stadionverbot*).

<sup>471</sup> Established case law, e.g. Federal Labour Court, judgment of 26 September 2017, 3 AZR 733/15; State Labour Court of Berlin and Brandenburg, judgment of 5 February 2019, 16 Sa 983/18.

and the courts' reluctance to allow or even practice the use of statistical data as prima facie evidence.<sup>472</sup>

The idea of the 2017 Pay Transparency Act was to diminish problems of proof in pay discrimination cases and thus further gender equality in working life. Under Sections 10-16 of the Act, employees 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. Unfortunately, the information obtained does not suffice to shift the burden of proof.<sup>473</sup>

In 2016, a female freelancer working in the position of a senior editor on a full-time basis with defined duties for a public service broadcaster (ZDF) and receiving a fixed monthly remuneration, discovered that her male colleagues doing the same or equivalent work were being paid significantly more than herself. She took legal action and filed a complaint against pay discrimination with the support of the Society for Civil Rights presenting hundreds of pages enumerating evidence and testimony. The case was lost in the first instance with some amazing reasoning about the nature of women<sup>474</sup> and in the second instance because the State Labour Court of Berlin and Brandenburg stated that the claimant could not prove that the lower remuneration (in comparison to 12 male colleagues) was based upon sex discrimination and no other reasons.<sup>475</sup> In the applicant's view, she had reached the burden of proof in demonstrating and proving that her employer pays her a lower salary than a male colleague while she performs the same work or work of equivalent value to that of the male colleague used for the comparison. However, although the court assumed that the claimant performed work of equivalent value and that she was paid less than 12 of her male colleagues, it still asked for further evidence that the lower remuneration for the equivalent work was based upon sex/gender discrimination in order to agree to a shift of the burden of proof. Further, the court rejected the claimant's right to information under Section 10 of the Pay Transparency Act, with the argument that the claimant as a freelancer and, thus, quasi-subordinate worker, was not covered by the personal scope of application of the Act.

Under these circumstances, the intended shift of the burden of proof cannot contribute to successful legal action against (pay) discrimination. The authors of a comprehensive evaluation of the General Equal Treatment Act<sup>476</sup> suggested amending the Act to clarify that the shift of the burden of proof not only applies to the causality between discrimination and harm but to the indices presented as evidence for discrimination as well and to give examples of legitimate evidence, such as gender-segregated statistics and testing procedures. In light of the requirements for successfully presenting circumstantial evidence to achieve a shift of the burden of proof, amendments to the Act and corrections of case law are indeed necessary. Otherwise, only direct, explicit and outspoken discrimination can be proved and brought to court while harmful indirect, structural and intersectional discrimination remains beyond sanctions.

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<sup>472</sup> 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.

<sup>473</sup> Franzen, M. (2017), 'Anwendungsfragen des Auskunftsanspruchs nach dem Entgelttransparenzgesetz' (Questions of application of the right to information under the Pay Transparency Act), in *Neue Zeitschrift für Arbeitsrecht*, Vol. 13, pp. 814-819.

<sup>474</sup> Labour Court of Berlin, judgment of 1 February 2017, 56 Ca 5356/15.

<sup>475</sup> State Labour Court of Berlin and Brandenburg, judgment of 5 February 2019, 16 Sa 983/18.

<sup>476</sup> Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG\\_Evaluation.html](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG_Evaluation.html).

## 11.6 Remedies and sanctions

### 11.6.1 Types of remedies and sanctions

The remedies and sanctions under Sections 15 and 21 of the General Equal Treatment Act differ according to the field of law. In labour and civil cases, the victim has a right to injunction or removal as well as damages and compensation.

In working life, the employer is obliged to take all necessary measures to end the discrimination perpetrated by other employees and third parties, such as customers, under Section 12 of the Act.<sup>477</sup> However, under Section 15(6) of the Act, discrimination by the (prospective) employer does not constitute an entitlement to the conclusion of an individual labour contract. In civil law cases, the victim can bring a claim for the cessation of the discrimination and non-repetition under Section 21(1) of the Act and prevailing legal opinion argues that, contrary to labour law cases, the reinstatement or the fulfilment of the denied contract is covered as well.

Persons discriminated against can claim for damages and compensation under Section 15(2) of the General Equal Treatment Act (working life) or under Section 21(2) of the Act (access to goods and services). Following the Federal Labour Court, the entitlement to compensation when discriminated against in working life does not cover compensation for victimisation.<sup>478</sup> Generally, the amount of compensation is decided on by the court, but there is a restriction in the event of discrimination in recruitment processes under Section 15(2)(2) of the Act. In the event of non-recruitment, the amount of compensation is restricted to a maximum of three months' salary if the applicant would not have been hired in a discrimination-free procedure either.

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 authority responsible.<sup>479</sup> 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 in nurseries, kindergartens or by childminders (known as day-care mothers).<sup>480</sup> The Federal Court of Justice decided that the entitlement to public day care should not only favour the children cared for, but also their parents, especially those wanting to return to work, 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. However, 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 decision<sup>481</sup> and referred to many

<sup>477</sup> There is no case law on the latter.

<sup>478</sup> Federal Labour Court, judgment of 18 May 2017, 8 AZR 74/16.

<sup>479</sup> Federal Court of Justice, judgment of 20 October 2016, III ZR 278/15. The action was brought before the court by three mothers.

<sup>480</sup> 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 Juristinnenbundes* 4/2016, pp.155ff, 161ff, 167ff, 171f.

<sup>481</sup> Federal Labour Court, judgment of 20 November 2014, 2 AZR 755/13.

times since.<sup>482</sup> 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 on sexual harassment at the workplace in general.<sup>483</sup> The court confirmed that sexual harassment does not require sexual intentions and that the intentional touching of primary or secondary sexual organs constitutes 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, which is covered by the Penal Code as amended in 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.<sup>484</sup>

If the offender cannot be identified, victims of gender-based violence can make a claim for compensation against the state under certain conditions under the Victim Compensation Act (*Opferentschädigungsgesetz*).<sup>485</sup> Unfortunately, one of the conditions was that the assault must have been of a physical nature, although the consequences compensated for can include severe psychological harm or suffering. This restriction was incompatible with the requirements of the Istanbul Convention. Furthermore, it meant 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 have received any compensation irrespective of the severity and duration of their suffering.

With the Social Compensation Act of 12 December 2019, the compensation law was fundamentally restructured and, among other things, the concept of the violent act giving rise to a claim was extended to include 'acts of psychological violence'. Unfortunately, the necessary restrictions of the scope of application go far beyond the objective by limiting compensation to harm suffered by 'a serious conduct directed directly against the free will and choice of a person', e.g. human trafficking, forced prostitution, stalking, abduction and extortion. It is hardly imaginable that, with the exception of stalking, one of these offences can be performed without physical violence, and the psychological consequences of physical violence are already covered by the law.<sup>486</sup>

#### 11.6.2 Effectiveness, proportionality and dissuasiveness

The compatibility of several restrictions of remedies and sanctions with the directives and the CJEU case law as well as the Istanbul Convention is doubtful, at the very least.

Under Sections 15(1)(2) and 21(2)(2) of the General Equal Treatment 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 case law of the CJEU.<sup>487</sup> Moreover, in labour law cases,

<sup>482</sup> Schrader, P. & Thoms, T. (2017), 'Sexuelle Belästigung – Denn sie wissen nicht, was sie tun?' *Arbeitsrecht Aktuell*, pp. 31ff, 60ff, referring to relevant court decisions.

<sup>483</sup> 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>.

<sup>484</sup> E.g. Fischer, T. (2016 and 2018) *Strafgesetzbuch. Kommentar* (Commentary on the Penal Code) 64<sup>th</sup> ed. & 65<sup>th</sup> ed. whose commentary is the main source of legal expertise for criminal court judges and state lawyers in Germany.

<sup>485</sup> Victim Compensation Act of 7 January 1985, Official Journal 1985, p. 1, <https://www.gesetze-im-internet.de/oeg/BJNR011810976.html>.

<sup>486</sup> Critique by the German Women Lawyers' Association, <https://www.djb.de/themen/thema/ik/st20-09/>.

<sup>487</sup> 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.

perpetrators of the discrimination not being employers can exonerate themselves by showing that they did not act negligently or intentionally under general rules of German civil law. In the event of discrimination caused by collective agreements, the employer is only responsible if they acted with gross negligence or intentionally under Section 15(3) of the General Equal Treatment Act – the compatibility of which with the directives cannot be confirmed in this regard.<sup>488</sup>

The amounts of compensation granted for personal harm are very modest. In labour law cases, the victim of sex/gender discrimination has a right to compensation the amount of which has to be defined by the competent court. What remains questionable is the restriction of the amount of compensation for discrimination in recruitment procedures: if the applicant would not have been hired in a discrimination-free procedure, the amount of compensation is restricted to a maximum of three months' salary. Although, in light of proportionality, there is not much to argue against the restriction of the amount of compensation in cases where the applicant had no chance of getting the job, the referral to the monthly salary is most irritating. Why should discrimination against applicants for a poorly paid job be less costly than discrimination against applicants for a leading position, especially as it cannot be assumed that the applicant for a poorly paid job suffers less when discriminated against? In other words: why is the amount of compensation for the (immaterial) suffering of discrimination coupled with the (material) salary for a specific position, while the entitlement to compensation is rightly not based on the question whether the victim of discrimination would have got the job? This might set false incentives to avoid discrimination only in cases concerning leading positions and might give the false impression that freedom from discrimination is more valuable for some persons than others.

In civil law cases concerning the access to goods and services, the amount of compensation is not restricted under Section 21(2) of the General Equal Treatment Act. However, the courts are very reluctant to award more than a few hundred euros, which raises the question of dissuasiveness and effectiveness. There is nearly no (published) case law on compensation for sex/gender discrimination in access to goods and services. The few decisions on compensation for young men of an alleged foreign ethnic origin who were denied access to clubs and discotheques, partly granted compensation for the racist discrimination<sup>489</sup> and only partly for intersectional discrimination on the grounds of gender and racial prejudice,<sup>490</sup> but with no further explanation how this might concern the amount of compensation. After the court of first instance had denied any compensation with the argument that the denial of access might happen to everyone, the Higher Regional Court of Stuttgart awarded compensation in the (then spectacular) amount of EUR 900 for intersectional discrimination, pointing out that this amount equalled the amount of revenue for the evening in question.<sup>491</sup> Generally, the courts awarded compensation between EUR 500 and 1 000,<sup>492</sup> but it cannot be clarified whether such compensation awards for racist discrimination are higher than compensation awards for sex/gender discrimination would be.

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<sup>488</sup> 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.

<sup>489</sup> E.g. District Court of Hannover, judgment of 25 November 2015, 549 C 12993/14; District Court of Munich, judgment of 17 December 2014, 171 C 27856/13; District Court of Hannover, judgment of 14 August 2013, 462 C 10744/12; District Court of Leipzig, judgment of 18 May 2012, 118 C 1036/12; District Court of Bremen, judgment of 20 January 2011, 25 C 278/10.

<sup>490</sup> 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.

<sup>491</sup> Higher Regional Court of Stuttgart, judgment of 12 December 2011, 10 U 106/11. The District Court of Hannover, judgment of 25 November 2015, 549 C 12993/14 awarded compensation in the amount of EUR 1 000 pointing out the dissuasive effect.

<sup>492</sup> The Regional Court of Aachen, judgment of 19 May 2017, 2 S 26/17, awarded compensation in the amount of EUR 2 500 for intersectional discrimination on the grounds of gender and racial prejudice because the black male applicant had been denied admission to a gym chain with racist arguments about him being a danger for female members several times.

There is only one published case dealing with compensation for sex/gender discrimination in the access to goods and services: the Higher Regional Court of Hamm awarded compensation to the amount of EUR 2 000 for non-pecuniary harm after a private health insurance provider terminated the membership of the pregnant applicant.<sup>493</sup> However, it is doubtful that this case sets an example for compensation for discrimination on the grounds of sex/gender as it is evident that maternity protection is an important issue for the courts, while this cannot be said for other forms of sex/gender discrimination.

Another main problem is that remedies and sanctions are often not enforceable due to the illegitimate restrictions mentioned above.

### 11.7 Equality body

In 2006, the Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes) was established under federal law and with federal funding.<sup>494</sup> On the level of the states (*Länder*), only very few comparable bodies exist.<sup>495</sup> The competencies of FADA extend to all grounds of discrimination contained in the European anti-discrimination directives. Its responsibilities are to inform individuals claiming to have been discriminated against and the general public about the legal means available in the event of discrimination. Further, FADA is required to conduct studies on discrimination and propose measures to prevent discrimination.

Unfortunately, the agency has no power to support individuals in anti-discrimination suits, and cannot impose any fines for discrimination. Thus, its influence on the legal and factual situation regarding anti-discrimination is limited. The authors of a comprehensive evaluation of the General Equal Treatment Act<sup>496</sup> strongly suggest that the agency should be given the powers to offer support in specific legal actions by means of advice and *amicus curiae* briefs, by effective rights to information, complaint and participation, and by the authority to take legal action independent of another claimant in fundamental cases.

### 11.8 Social partners

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 legislature 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. Nevertheless, 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.

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.

<sup>493</sup> Higher Regional Court of Hamm, judgment of 12 January 2011, 20 U 102/10, I-20 U 102/10. The District Court of Hannover, judgment of 26 August 2008, 534 C 5012/08, rejected a pregnant applicant's claim for compensation when her private health insurance excluded benefits for pregnancy and childbirth from the beginning.

<sup>494</sup> See [http://www.antidiskriminierungsstelle.de/DE/Home/home\\_node.html](http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html).

<sup>495</sup> For example, the anti-discrimination authorities of Berlin (<http://www.berlin.de/lb/ads/>) and Schleswig-Holstein (<http://www.antidiskriminierungsstelle-sh.de/>), and the anti-discrimination office for Saxony (<http://www.adb-sachsen.de/>).

<sup>496</sup> Berghahn, S., Klapp, M. & Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes* (Evaluation of the General Equal Treatment Act), ADS: Berlin, [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG\\_Evaluation.html](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG_Evaluation.html).

However, the ministry explicitly rejects the publication of any agreements. Most collective agreements do not present themselves as a particularly effective means of implementing EU gender equality law. Critics argue that one important reason for this is that most social partners are male-dominated organisations.<sup>497</sup> A 2018 analysis of the remuneration system of the states' civil service<sup>498</sup> stated that there was broad leeway for adverse impacts on female-dominated working activities and, thus, for indirect pay discrimination based on sex/gender. Further, the authors of the study deemed it nearly impossible to seek effective legal redress.

### 11.9 Other relevant bodies

Equality bodies, specialised public agencies, NGOs and unions as well as law clinics can – and do – offer support by providing legal advice and political support and raising awareness and campaigning etc. Referrals to law firms may constitute a problem due to non-interference in the free competition of legal advisors and lawyers. But of course, some organisations work together with lawyers to bring anti-discrimination cases before the courts and they refer to these lawyers.

Some of the unions engage in tackling sex discrimination by public awareness raising, political influence, commissioning studies and legal expertise on sex discrimination, offering education and training courses for their members etc. However, to the author's knowledge, they do not represent victims of discrimination based on sex at court.

Some NGOs – the European Centre for Constitutional and Human Rights (ECCHR),<sup>499</sup> Büro zur Umsetzung von Gleichbehandlung (BUG, Office for the Implementation of Equal Treatment),<sup>500</sup> Gesellschaft für Freiheitsrechte (GFF, Society for Civil Rights),<sup>501</sup> Juristische Menschenrechtsarbeit Deutschland (JUMEN, Legal Human Rights Advocacy in Germany),<sup>502</sup> and the Centre for Intersectional Justice<sup>503</sup> – were recently founded to implement, use and/or support strategic litigation in anti-discrimination and human rights cases. Until now, German courts have not always acted professionally when confronted with the phenomenon of strategic litigation.

There are many law clinics supporting refugees and some acting in the field of customer protection law. There is also the Humboldt Law Clinic for Basic and Human Rights (HLCMR),<sup>504</sup> which deals with questions of discrimination including sex/gender discrimination. The HLCMR is training law and gender students in anti-discrimination law and policies, human rights and law enforcement, especially strategic litigation. The clinic works in close cooperation with equality bodies, unions, lawyers, NGOs and anti-discrimination advice organisations to further basic, human rights and anti-discrimination law and practice in Germany. The students complete internships with these cooperation partners and after this, write legal expertise to be used by the partners in their work and/or to be published to be accessed by the public. Sometimes, the law clinic supports strategic litigation when performed by the partners and sometimes the clinic is involved in reporting procedures before international human rights treaty bodies.

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<sup>497</sup> 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.archiv.soziologie.phil.uni-erlangen.de/system/files/3akt\\_2809\\_programm\\_tagung\\_geschlechterperspektiven\\_auf\\_gewerkschaften.pdf](http://www.archiv.soziologie.phil.uni-erlangen.de/system/files/3akt_2809_programm_tagung_geschlechterperspektiven_auf_gewerkschaften.pdf)

<sup>498</sup> Jochmann-Döll, A. & Tondorf, K. (2018), *Gleiches Entgelt für gleichwertige Arbeit? Die Entgeltordnung des Tarifvertrags der Länder (TV-L) auf dem Prüfstand* (Equal pay for equivalent work?), ADS: Berlin, [https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Entgelt\\_UN\\_Gleichheit/TV\\_L.html?nn=7742234](https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Entgelt_UN_Gleichheit/TV_L.html?nn=7742234).

<sup>499</sup> See <https://www.ecchr.eu/>.

<sup>500</sup> See <https://www.bug-ev.org/>.

<sup>501</sup> See <https://freiheitsrechte.org/>.

<sup>502</sup> See <https://jumen.org/>.

<sup>503</sup> See <https://www.intersectionaljustice.org/>.

<sup>504</sup> See <http://hlcmr.de/engl/>.



### **11.10 Evaluation of implementation**

Impediments to the access to justice for victims of discrimination are the legal costs, the very short periods in which to decide upon legal action and find a lawyer, the lack of information, the adverse stance of main parts of legal discourse and some broader parts of media discourse towards anti-discrimination claims, especially concerning sex discrimination, and the general reluctance to bring discrimination cases before a court instead of settling them otherwise (which often fails and only leads to the situation that the time limit for bringing legal action is missed in the end).

Unfortunately, statutory law and case law contribute to these obstacles. The problems are as well known as the solutions. The time limit of two months for anti-discrimination claims must be extended to six months. Amendments to the General Equal Treatment Act and corrections of case law should clarify and extend the shift of the burden of proof, in compliance with the requirements of European law. The requirement of fault must be removed as it is incompatible with European law and hampers access to justice. Restrictions to the amount of compensation for non-pecuniary harm should be regulated with plausible reason and the courts should improve the dissuasiveness of compensation awards. To remove the burdens for individual claimants and truly strengthen the enforcement of anti-discrimination law, the potential for class action or collective action and effective support by anti-discrimination bodies and organisations have to be introduced.

### **11.11 Remaining issues**

There are no remaining issues to report.

## 12 Overall assessment

The following specific transposition problems were mentioned in this report:

1. Lack of implementation of important CJEU rulings such as *Coleman* and *Feryn*.
2. The gender pay gap remains at 21 % in Germany.
  - 2.1. There is no entitlement to equal pay for equal work but only a prohibition of pay discrimination.
  - 2.2. Despite the importance of gender-discriminatory job classifications, employers bound by collective agreements are privileged under the Pay Transparency Act, because collective agreements are exempted from judicial review.
  - 2.3. The Pay Transparency Act is insufficient: reporting duties are restricted to companies with more than 500 employees and there are no effective sanctions in the case of non-compliance, pay audits are not mandatory, the right to information is restricted to companies with more than 200 employees, although the majority of women work in smaller enterprises.
  - 2.4. Statutory justifications of indirect pay discrimination on the grounds of sex are incompatible with CJEU rulings (especially *Barber*).
  - 2.5. Despite the shift of the burden of proof, courts state that unequal pay for the same or equivalent work for men and women could not in itself indicate discrimination.
3. 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.
4. Statutory requirement of fault in labour law cases, incompatible with European law and hampering access to justice.
5. Repeated occurrence of strong gender bias in justifications (e.g. minimum height requirements in police service and 'boys' choir sound'),
6. Lack of positive action measures.
  - 6.1. The equal qualification requirement produces counter-effects as gender-biased assessment procedures and persistent gender stereotypes lead to the devaluation of female qualifications.
  - 6.2. Nearly no progress in female leadership within the civil service and, due to the lack of sanctions, zero target quotas for women in leading management positions and on executive boards of private companies.
7. The male breadwinner model is still widespread.
8. Lack of a statutory right to return after parental leave.
9. Lack of explicit prohibition of sex/gender discrimination in (partly tax-funded) occupational social security schemes.
10. Lack of explicit implementation of Directive 79/7.
11. No explicit implementation of Directive 2010/41/EU and, thus, no effective protection of self-employed women against discrimination on the grounds of sex/gender, sexual harassment, maternity discrimination, lower income, lesser social security coverage, and poverty in old age.
12. Lack of adequate and comprehensive legal protection of students against sexual harassment in education.
13. Lack of adequate implementation of Directive 2004/113/EC.
  - 13.1. The prohibition of discrimination in access to goods and services does not cover provisions by public authorities and applies only to so-called 'mass contracts'.
  - 13.2. The prohibition of pregnancy and maternity discrimination is restricted to the field of employment.
  - 13.3. The protection against sexual harassment is restricted to the field of employment.
  - 13.4. The prohibition of victimisation is restricted to the field of employment.
  - 13.5. The requirement of proportionality is missing in statutory law covering possible justification of differential treatment based on sex in the provision of goods and services.

14. The number of anti-discrimination court cases is vanishingly small in Germany.
15. Lack of regulations to put anti-discrimination law into practice and to guarantee its factual effectiveness, several weaknesses of the enforcement provisions.
  - 15.1. Severe restrictions of the possible use of statistical data to prove indirect discrimination.
  - 15.2. The case law on the shift of the burden of proof is not in compliance with the requirements of European law (e.g. courts held that even large differences in remuneration between a female claimant and the median of the male peer group is not an indication of pay discrimination on the grounds of sex).
  - 15.3. There are mostly no effective sanctions for discrimination (e.g. the amount of compensation for non-pecuniary harm is overly restricted).
  - 15.4. There is no right of associations to start legal proceedings in discrimination cases and no possibility of effective support by anti-discrimination bodies and organisations.

Overall, the assessment of Germany's implementation of EU gender equality law does not lead to consistent results. There is a mixed picture emerging in terms of formal legislative implementation, material legislative implementation and effectiveness in practice.

In general, Germany implemented the European anti-discrimination directives solely through the 2006 General Equal Treatment Act, which has not been amended since. Due to the date of the Act's entry into force as well as its scope of application, it cannot implement all relevant provisions and directives. There is obviously no statutory implementation concerning occupational pensions or questions of social security or the protection of self-employed persons against sex/gender discrimination. At the same time, there are several statutory provisions covering questions of abolishing discrimination on the grounds of sex/gender without formally transposing European directives. Some of these provisions, for example those concerning maternity protection or parental leave and allowances, go beyond the requirements of the directives, others just contain prohibitions or incentives in material compliance with European law. The fact that formal legislative implementation is lacking does not necessarily mean that German statutory law would not cover central terms and concepts of European anti-discrimination law.

On the other hand, there are disturbing gaps in the formal legislative implementation that have been only very partially closed by case law, including: 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 implementing Directive 2010/41/EU; the restriction of legal protection to so-called 'mass contracts' regarding the provision of goods and services; and the restriction of the prohibition of sexual harassment to the area of employment. Further, there are detrimental misconceptions in the formal legislative implementation, such as the requirement of fault of the employer or the vast possibilities of justification by collective agreements ignorant of the question whether they contain discriminatory job classification systems or not. There is a reason that European law requires unequivocal transposition of directives, and this transposition is yet to happen in Germany.

Although German 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, the factual situation of gender equality in Germany does not indicate that there has been successful implementation of European anti-discrimination law. The gender pay gap remains at more than 20 % and has not changed since 1995. The (half-hearted) introduction of pay transparency neither works in practice before the courts nor does it address structural reasons for the gender pay gap, including the strongly gender-segregated labour market, the unequal distribution of paid full-time and part-time work as well as of unpaid care work between men and women or the practices of institutionalised devaluation of 'female' work. There are neither political nor legal concepts to effectively implement the prohibition of sex/gender discrimination into social security systems, especially pension schemes. The

enormous gender pension gap is not just a consequence of the gender pay gap, but of additional discrimination and disadvantages in women's working lives. All of these problems multiply for migrant women, female refugees and women with disabilities. Moreover, self-employed workers do not actually enjoy protection against discrimination but suffer severe disadvantages, especially regarding the upbringing of children or other care work, remuneration, social security and pensions. Further, discrimination by gender pricing is widespread in the field of access to goods and services, while protection against sexual harassment or discrimination on the grounds of gender or maternity is lacking.

Germany has to fully implement the European anti-discrimination law in order to ensure that on the basis of a good legal framework gender equality is achieved. Full implementation means formal statutory implementation of the relevant directives and the landmark decisions of the CJEU as well as case law that guarantees the (factual) effectiveness of this anti-discrimination law.

Some German courts are eager to apply anti-discrimination law from the national and European levels, to close implementation gaps and to introduce concepts of anti-discrimination into legal discourse and practice in Germany. The labour courts in particular regularly refer to CJEU rulings, anti-discrimination directives and European primary law, such as Article 157 TFEU. However, other courts do not and, moreover, it has to be noted that the total number of anti-discrimination cases is exceptionally small in Germany. This indicates fundamental problems concerning the access to justice. The full implementation of the European anti-discrimination law includes regulations to put this law into practice and to guarantee its factual effectiveness. The great opposition to the introduction of concepts of anti-discrimination in labour and civil law resulted, among other things, in disadvantageous regulations on the enforcement of anti-discrimination law. There are many aspects of statutory and case law that need amendments in this respect: the far too short, two-month time limit for bringing legal action; the non-functioning distribution of the burden of proof, particularly in the case of indirect discrimination; the overemphasis on the freedom of coalition for the social partners and their collective agreements; the requirement of fault in labour law and civil law cases; the dysfunctional restrictions upon affirmative action; and the question of effective, proportionate and dissuasive sanctions.

Finally, neither statutory law nor case law will suffice without a legal culture of anti-discrimination. There is a considerable lack of legal education, legal literature and (serious) legal discourse on anti-discrimination law. The problems of German courts when dealing with questions of discrimination, especially indirect or intersectional discrimination, are just a symptom of a severe blank in German law and legal practice, which should be filled by legislation, courts, lawyers, legal researchers and those who strive for access to justice collaboratively.

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