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Country report

Non-discrimination

Germany

2019

including summary

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Country report
Non-discrimination

Transposition and implementation at national level of Council Directives 2000/43 and 2000/78

Germany

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Reporting period 1 January 2018 – 31 December 2018

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List of Abbreviations

ADS	German Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*)
AGG	General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*)
AufenthG	Residence Act (*Aufenthaltsgesetz*)
BAG	Federal Labour Court (*Bundesarbeitsgesricht*)
BAGE	Decisions of the Federal Labour Court (*Entscheidungen des Bundesarbeitsgerichts*)
BBG	Federal Civil Service Act (*Bundesbeamtengesetz*)
BDSG	Federal Data Protection Act (*Bundesdatenschutzgesetz*)
BetrVG	Works Constitution Act (*Betriebsverfassungsgesetz*)
BGB	Civil Code (*Bürgerliches Gesetzbuch*)
BGBl	Federal Law Gazette (*Bundesgesetzblatt*)
BGG	Equal Opportunities for Persons with Disabilities Act (*Behindertengleichstellungsgesetz*)
BPersVG	Federal Personnel Representation Act (*Bundespersonalvertretungsgesetz*)
BTHG	Federal Participation Act (*Bundesteilhabegesetz*)
BVerfG	Federal Constitutional Court (*Bundesverfassungsgericht*)
BVerfGE	Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*)
BVerwG	Federal Administrative Court (*Bundesverwaltungsgericht*)
CJEU	Court of Justice of the European Union
GG	Basic Law (*Grundgesetz*)
KSchG	Protection against Dismissal Act (*Kündigungsschutzgesetz*)
LAG	Higher Labour Court (*Landesarbeitsgericht*)
LG	Regional Court (*Landgericht*)
OVG	Higher Administrative Court (*Oberverwaltungsgericht*)
SGB I	Social Code I (*Sozialgesetzbuch I*)
SGB III	Social Code III (*Sozialgesetzbuch III*)
SGB VI	Social Code VI (*Sozialgesetzbuch VI*)
SGB IX	Social Code IX (*Sozialgesetzbuch IX*)
SGB XII	Social Code XII (*Sozialgesetzbuch XII*)
SoldGG	Equal Treatment of Soldiers Act (*Gesetz über die Gleichbehandlung von Soldatinnen und Soldaten*)
StGB	Penal Code (Strafgesetzbuch)
SVG	Military Pensions Act (*Soldatenversorgungsgesetz*)
VG	Administrative Court (*Verwaltungsgericht*)
VGH	Higher Administrative Court (*Verwaltungsgerichtshof*)
ZPO	Civil Procedure Code (*Zivilprozessordnung*)

EXECUTIVE SUMMARY

1. Introduction

Like many other countries, Germany enjoys a plural society. It has autochthonous minorities, the Danish and the Sorbs, neither of which are very significant in number. The Friesians of German nationality and the Sinti and Roma of German nationality are also officially recognised as minorities. However, the most significant ethnic minority groups are immigrants, including the so-called guest workers (*Gastarbeiter)* and their descendants. Prior to the Nazi period, most immigration was by Polish people. Since 1945, Turks, people from the former Yugoslavia, Italians and Greeks have formed the largest groups of immigrants. In recent decades, specifically because of an increase in asylum seekers and refugees, a heterogeneous ethnic community has formed in Germany. Due to Germany's efforts in the refugee crisis, the number of foreigners in Germany has risen by 1.9 million since 2015; as of 31 December 2017, there were about 10 623 940 foreigners in Germany, out of a total population of around 82 million.[1] In 2017, the number of people who immigrated to Germany exceeded the number of those who emigrated by roughly 416 000 people.[2] There are now about 700 000 people from Syria, 250 000 people from Afghanistan and 235 000 people from Iraq living in Germany.[3] The overall number of refugees in Germany is about 1 700 000.[4] Statistical data show that about 21 % of all German residents today have an immigration background.

The largest religious groups in Germany are the Catholic Church with about 23.5 million members and the Protestant churches with about 22 million members. About 28 % of the population belongs to the Catholic Church and 27 % to the Protestant churches, meaning that about 55 % of the total populations belongs to the two main Christian denominations. In 2015, around 1.7 million German citizens identified as Muslims, which is approximately 2 % of the population. The total number of Muslims (with or without citizenship) is about 4.7 million, which is approximately 5.4 % of the population. Just under 100 000 people or 0.12 % of the population are Jewish.

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

Nevertheless, Germany has to deal with serious issues of discrimination. Racism and xenophobia continue to be manifest in many forms, including violence, which has claimed several dozens of human lives since 1990. The uncovering of a neo-Nazi terrorist cell responsible for at least nine killings with racist motives was a shocking reminder of what racism can lead to. In recent years, right-wing extremists and parties with xenophobic

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1 See the relevant data of the Federal Statistical Office (*Statistisches Bundesamt, Destatis*) at: www.destatis.de/EN/FactsFigures/SocietyState/Population/MigrationIntegration/Tables_ForeignPopulation/Gender.html.

2 See www.destatis.de/EN/PressServices/Press/pr/2018/10/PE18_396_12411.html. The rise of the population of foreigners between 2014 and 2016 was caused mainly by migrants from Syria (519 700), Afghanistan (178 100) and Iraq (138 500).

3 See the relevant data of the Federal Statistical Office (*Statistisches Bundesamt, Destatis*) at: www.destatis.de/EN/FactsFigures/SocietyState/Population/MigrationIntegration/Tables_ForeignPopulation/Gender.html.

4 See www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/MigrationIntegration/Schutzsuchende/Tabellen/ZeitreiheSchutzstatus.html.

agendas have had some political success, albeit often short-lived. The year 2018 – as in previous years - saw local demonstrations with considerable numbers of people mobilised to express what are generally regarded as xenophobic attitudes. A xenophobic party achieved strong election results in 2017 and is now represented in the German Parliament. The refugee crisis has spurred many violent acts, including numerous attacks on shelters for refugees, including arson. The Federal Criminal Police (*Bundeskriminalamt*) counted about 1 000 such attacks on refugee shelters in 2016 and more than 300 in 2017,[5] which is considerably less, but still a significant number. In 2018, by 25 October, there had been 127 such attacks.[6]

Although there are only a few sound empirical studies on the matter, the available data suggest that human characteristics, such as religion and belief, disability, sexual orientation and age, also continue to be areas of on-going discrimination.

2. Main legislation

On 18 August 2006 an anti-discrimination law was enacted: the Act implementing European directives putting into effect the principle of equal treatment.[7] This act encompasses the General Act on Equal Treatment,[8] the Equal Treatment of Soldiers Act[9] and amendments to various legal regulations.

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

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

The Constitution, or Basic Law,[10] is of central importance for understanding the German legal framework on discrimination. Unlike some other constitutions, the German Constitution is directly binding on all public authorities. Fundamental rights are part of this directly applicable constitutional order. They are binding on the legislature, executive and judiciary as directly applicable law. Under the Basic Law, fundamental rights have become

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5 Federal Criminal Police (*Bundeskriminalamt, BKA*) (2017), *Kriminalität im Kontext von Zuwanderung*, Bundeslagebild 2017, Wiesbaden, p. 56, available at: www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2017.html.

6 Federal Criminal Police (*Bundeskriminalamt, BKA*) (2018), *Krinminalität im Kontext von Zuwanderung, Betrachtungszeitraum: 01.01-30.09.2018*, Wiesbaden, p. 6, available at: www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVon ZuwanderungkernaussagenZuKriminalitaetImKontextVonZuwanderungIuIIQuartal2018.html?nn=62336.

7 Germany, Act implementing European directives putting into effect the principle of equal treatment (*Gesetz zur Umsetzung Europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung*), 14 August 2006.

8 Germany, General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz, AGG*), 14 August 2006. From now on AGG.

9 Germany, Equal Treatment of Soldiers Act (*Soldatinnen- und Soldaten- Gleichbehandlungsgesetz, SoldGG*), 14 August 2006.

10 Germany, Basic Law (*Grundgesetz für die Bundesrepublik Deutschland, GG*), 23 May 1949.

the material core of the legal order in general. They are therefore not only relevant in public law, but permeate other legal spheres as well, such as criminal and private law.

There are several constitutional provisions that protect human equality. Most important is the guarantee of human dignity. The core of this guarantee is respect for any human being as a person, simply by virtue of his or her humanity, irrespective of other characteristics. Case law of the German Federal Constitutional Court consistently states that each individual should be treated not only as an object of state action, but as an end in itself. Furthermore, individuals are protected against degrading or humiliating treatment. The guarantee of human dignity is the central value of German law and its most important and supreme norm. In consequence, it is an important reference point for anti-discrimination law in Germany, especially as it guides interpretation of the constitutional guarantee of equality and provides normative yardsticks for other areas of law. It is important to note that, through the guarantee of human dignity, German law authoritatively states that no distinctions are to be made as to the worth of a human being, irrespective of any characteristic. The only question that arises is therefore how and by what concrete technical means, the overarching value of human dignity can be adequately protected through legal channels in various spheres of life.

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

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

Germany has specific anti-discrimination legislation. There are various legal provisions that reiterate the fundamental guarantee of equality for areas of public law, including the law pertaining to the civil service and other public employees. In labour law, there is a general anti-discrimination clause in the Works Constitution Act[11] and the fundamental principle of the equal treatment of employees has been consistently established by case law.

In addition, various legal instruments have been passed aiming to provide protection against discrimination and increase the social inclusion of disabled people. In respect of sexual orientation, some legal regulations have been created which either directly aim to establish protection against discrimination or do so indirectly by providing options which were not previously open to people of certain sexual orientations, for example, by introducing a legally regulated form of partnership, opening marriage to same-sex couples[12] and the possibility of adoption.

Special legal regulations and case law, in addition to the non-discrimination clauses in public law and labour law, deal with the reasonable accommodation of various religious beliefs, including exceptions from general laws. There is a widely held opinion in legal doctrine (which has resulted in some case law) that the general clauses of civil law provide remedies in private contract law and tort law against discrimination on any ground that infringes basic personality rights. These general clauses must be interpreted in the light of the constitutional order (especially in the light of fundamental rights and, most importantly, of human dignity), which prohibits discrimination.

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[11] Germany, Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), 15 January 1972.

[12] The legislation amended paragraph 1 of Section 1353 German Civil Code: 'A marriage is entered into by two people of a different or the same sex for life.' Germany, Civil Code (*Bürgerliches Gesetzbuch, BGB*), 2 January 2002.

3. Main principles and definitions

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

a) Labour law

Justification of unequal treatment is possible if the treatment forms a genuine and determining occupational requirement. There are further grounds of justification because of the ethos and duty of loyalty as defined by a religious or philosophical belief. Traditionally, the case law has underlined the wide discretion that religious communities enjoy as to the duties of loyalty that can justify unequal treatment.[13] This case law concerns a highly contested area with significant social impact given the importance of the Christian churches and their organisations as employers. The recent case law of the Court of Justice of the European Union (CJEU)[14] has led to significant changes in this area, curtailing the ability of religious organisations to justify unequal treatment on the ground of religion.[15] In addition, further justifications of unequal treatment exist for the ground of age, if there are objective reasons and the unequal treatment is appropriate and necessary. Examples are given for this in the law, following the rules in Directive 2000/78/EC.

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

b) Civil law

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

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

Unequal treatment is justified for religion, disability, age, sexual identity or sex if there is an objective reason for the treatment. As examples of such objective reasons, the AGG

[13] Federal Labour Court (*Bundesarbeitsgericht, BAG*), 5 AZR 611/12, 24 September 2014 and related Federal Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*), 2 BvR 661/12, 20 October 2014.

[14] To avoid confusion, this report refers also to the European Court of Justice (ECJ) as the 'Court of Justice of the European Union (CJEU)' for decisions made prior to 1 December 2009.

[15] Court of Justice of the European Union (CJEU), judgment of 17 April 2018, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung,* C-414/16, EU:C:2018:257 http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0414&lang1=en&type=TXT&ancre=. The case concerns an employer (the defendant) who is affiliated with the Protestant Church in Germany and bound by the internal regulations of the Protestant Church in Germany on employment. The defendant had specified a Protestant confession as a hiring criterion for a job vacancy for a limited-term contract. An applicant without religious affiliation, who had not been invited for a job interview regarding the advertised vacancy, consequently claimed financial compensation based on a violation of the principle of non-discrimination. The principles of this decision where confirmed by Court of Justice of the European Union (CJEU), judgment of 11 September 2018, *IR v. JQ*, C-68/17, EU:C:2018:696 http://curia.europa.eu/juris/celex.jsf?celex=62017CJ0068&lang1=en&type=TXT&ancre=. The courts have started to implement this case law of the CJEU, see: Federal Labour Court (*Bundesarbeitsgericht*), 25 October 2018, 8 AZR 501/14. (For details, see section 4.2 and section 12.2 on case law below.)

lists the prevention of danger and damage, the protection of privacy and of personal security, the provision of special advantages when there is no specific interest in enforcing equal treatment, and the ethos of a religion. In the context of insurance, difference in treatment – with the exception of sex – is only permissible if it is based on objective, actuarial calculations.

c) Public law

The provisions of the anti-discrimination law are applicable to civil servants, judges and conscientious objectors, giving due consideration to the special legal status of these persons. The Equal Treatment of Soldiers Act contains regulations similar to those described above in conjunction with further legal provisions in public law in relation to discrimination.

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

The jurisprudence of the courts has confirmed some important interpretations of legal provisions relevant for discrimination in 2018. Various decisions on wearing a headscarf because of the Muslim faith indicate that this issue continues to occupy the courts in various areas of life, including judiciary functions and employment (see section 12.2 below on case law).

4. Material scope

a) General

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

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

The scope of application of the anti-discrimination law encompasses labour law, social security, social benefits, education and general civil law, including insurance contracts, closely following (in part verbatim) the provisions of the directives in this respect. For unfair dismissal, the regulations of the laws against unfair dismissal (especially the Protection Against Dismissal Act)[16] are supposed to take precedence over the anti-discrimination law. However, case law has interpreted the relevant provision in a way that the prohibition of discrimination applies fully to dismissal.

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

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

The prohibition of discrimination does not apply to legal relations of a personal nature or if there is a special relationship of trust between the parties concerned or their relatives. In the case of housing this is supposed to be the case if the parties or their relatives live at the same premises. The prohibition of discrimination is not supposed to apply in principle

[16] Germany, Protection against Dismissal Act (*Kündigungsschutzgesetz, KSchG*), 25 August 1969.

(although exceptions are deemed possible) if the landlord does not let out more than 50 dwellings.

5. Enforcing the law

The means of enforcement of the anti-discrimination law are the same as for other areas of law, apart from certain special mechanisms, that is, through the courts. There is a growing body of case law on various aspects of discrimination. Some aspects have not been settled and some of the case law is contradictory. Over the years, however, a body of discrimination law has been developed that is in line with the directives and the case law of the CJEU.

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

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

In civil law, in the event of a violation of the prohibition of discrimination, the victim has a claim of forbearance and removal of the disadvantage and can sue for an injunction. The discriminator is liable to pay damages for material loss caused by wilful or negligent wrongdoing. There is a strict liability for damages for non-material loss, the compensation for which must be appropriate. There is a time limit of two months for making any such claims, as in labour law. The burden of proof is shifted for both labour law and general civil law.

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

According to anti-discrimination law, a victim of discrimination is entitled to be supported in legal proceedings by associations dealing with matters of discrimination. They must have at least 75 members or be an association of at least seven other associations concerned with anti-discrimination. The main examples of positive actions stem from disability law. There are various forms of cooperation, partly institutionalised, between governmental agencies and civil society. An *actio popularis* exists only in certain fields of anti-discrimination law, in particular in disability law.[17] A new form of limited class action has been introduced for consumer protection.[18] It is an open question whether it will have any significance for matters of discrimination.

[17] Germany, Equal Opportunities for Persons with Disabilities Act (*Behindertengleichstellungsgesetz, BGG*), 27 April 2002.

[18] Germany, Act to introduce civil model declaratory proceedings (*Gesetz zur Einführung einer Musterfeststellungsklage*), 12 July 2018, with effect from 1 November 2018.

6. Equality bodies

The anti-discrimination law established the Federal Anti-discrimination Agency (*Antidiskriminierungsstelle des Bundes*) from the moment it entered into force in August 2006, although the body only started to operate in 2007. Its mandate covers all the grounds listed in the law, notwithstanding the powers of specialised governmental agencies dealing with related subject matters. The body is organisationally associated with the Ministry of Family Affairs, Senior Citizens, Women and Youth. The head of the agency is appointed by the Minister of Family Affairs, Senior Citizens, Women and Youth, following a proposal by the Government; this first took place in spring 2007. In 2009, a new head was appointed and confirmed in 2014. Following the retirement of the former head in 2018, the agency is now being lead by a temporary head. The head of the agency is independent and subject only to the law. The tenure of the head of the agency is the same as the legislative period of the Bundestag.

The role of the agency is to support people to protect their rights against discrimination, and in particular to inform them about legal recourse against discrimination, to arrange legal advice by other agencies, to mediate between the parties, to provide information to the public in general, to take action for the prevention of discrimination, to produce scientific studies and, together with the commissioners dealing with related matters, to issue a report on the issue of discrimination every four years. These agencies can give recommendations and can jointly commission scientific studies. The agency can demand a position statement from an alleged discriminator, if the alleged victim of discrimination agrees.

Other public agencies are obliged to support the agency in its work. The agency must cooperate with NGOs and other associations. An advisory body has been created and the agency has a budget of around EUR 4.4 million. The agency has a public presence, through conferences, publications and commissioned surveys and studies on particular issues, such as empirical findings on discrimination, discrimination on religious grounds, multiple discrimination and positive action or the situation of Sinti and Roma in Germany.

In addition, other bodies in Germany deal with issues of discrimination, most importantly the Federal Government Commissioners for Migration, Refugees and Integration, for Matters Related to Ethnic German Resettlers (*Aussiedler*) and National Minorities and for Matters relating to Persons with Disabilities.

7. Key issues

Germany has established in principle a comprehensive legal framework to combat acts of discrimination, which is constantly evolving.[19] In the view of the author of this report, there are some shortcomings:

a) the exception of dismissal from the application of the prohibition of discrimination, Section 2(4) AGG, though mitigated by case law;
b) the possible non-application of the AGG to occupational pension schemes, Section 2(2), (second sentence) AGG, depending, however, on the judicial interpretation of the respective norm;
c) the exception from the material scope of the provision of goods and services of all transactions concerning a special relationship of trust and proximity between the parties or their family, including the letting of flats on the premises of the landlord for all grounds including race and ethnic origin, Section 19(5) AGG, which raises problems under the Racial Equality Directive, albeit depending on its contentious interpretation in this respect;
d) the exception in relation to housing, including unequal treatment on the ground of

[19] See Germany, Federal Participation Act (*Bundesteilhabegesetz, BTHG*), 23 December 2016.

race and ethnic origin, to provide for socially and culturally balanced settlements, Section 19(3) AGG, depending on judicial interpretation;

e) the formulation of the justification of unequal treatment for religion and belief, depending on judicial interpretation, Section 9(1) AGG which has not been abrogated despite CJEU jurisprudence in this respect;

f) there is no special prohibition of victimisation in civil law, as set out in Article 9 of the Racial Equality Directive (2000/43/EC);

g) the dependence of compensation for material damage on fault (wilful or negligent wrongdoing) or gross negligence respectively, Sections 15(1), 15(3) and 21(2) AGG, is contrary to CJEU jurisprudence in this respect;

h) in public law, there is no comprehensive implementation regarding race and ethnic origin in the areas of social protection and social advantages, education and the provision of goods and services as there is no special regulation with regard to harassment and the instruction to discriminate in these areas, though protection can be provided by judicial interpretation;

i) there is no general regulation of reasonable accommodation for disability.

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

The case law is still limited, both in absolute terms and compared to other areas of the law. There are indicators that this is due to informal barriers to access to justice and problems of proof. Another issue of concern is the prevalence of attitudes that give rise to discrimination. Recent events, including xenophobic demonstrations of a significant scale, and the considerable success of a xenophobic party since 2017 in various elections despite the strong reaction of civil society, Federal Government and political groups, give reason to believe that persistent efforts to prevent such attitudes forming may be of great importance, not the least in the context of the refugee crisis and the xenophobic reactions that it sometimes provokes. In addition, one should be mindful of the threat of religiously motivated terror, such as the attack that tragically struck Germany in 2016, which may augment these problems.

INTRODUCTION

The national legal system

The constitution of Germany, the Basic Law (*Grundgesetz*, *GG*),[20] is, unlike some other constitutions, directly binding on all public authorities. Legislation is passed subject to the constitutional order, and the executive and the judiciary are bound by law and justice.[21] Fundamental rights are part of this directly effective constitutional order. They are binding on the legislature, executive, and judiciary as directly valid law.[22] The individual in Germany has comparatively wide access to judicial review on the ground of violations of his or her fundamental rights, especially through the constitutional complaint mechanism (*Verfassungsbeschwerde*).[23] Under the Basic Law, fundamental rights have become the material core of the legal order in general. They are therefore not only relevant in public law,[24] but permeate other legal spheres as well, such as criminal and private law.

There are several constitutional provisions that protect human equality. Most important is the guarantee of human dignity.[25] The core of this guarantee is the respect for any human being as an individual, simply by virtue of his or her humanity, irrespective of other characteristics. In accordance with this view, case law of the German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) consistently states that each individual should be treated not only as an object of state action, but be respected as a subject and thus as an end in itself.[26] He or she is, in addition, protected against degrading or humiliating treatment.[27] In consequence, it is an important reference point for anti-discrimination law in Germany, especially as it guides interpretation of the constitutional guarantee of equality and provides normative yardsticks for other areas of law. The only question that arises therefore, is by which concrete legal means the overarching value of human dignity can be adequately protected in various spheres of life.[28] Other important constitutional guarantees are the guarantee of equality[29] and special constitutional equality rights concerning children born outside of marriage,[30] equality of status and office[31] and equality of electoral rights.[32]

Germany is a democratic and social federal state under the rule of law.[33] Given that it is a constitutional principle that Germany is a social state, Germany is obliged to promote the welfare of its citizens. In the field of anti-discrimination, the principle of the social state is relevant, too. It is the constitutional legal source justifying a set of programmes for the

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20 Germany, Basic Law (*Grundgesetz, GG*), 23 April 1949.

21 Article 20(3) GG. Justice (*Recht*) refers according to a prevailing interpretation of general principles of legitimate law.

22 Article 1(3) GG.

23 Article 93(1)(4a) GG.

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

25 Article 1(1) GG: 'Human dignity is inviolable. To respect and protect it is the duty of all state authority.'

26 Settled case law, see e.g. BVerfG, 1BvR 357/05, 15 February 2006.

27 BVerfG, 1BvR 357/05, 15 February 2006.

28 For background see Mahlmann, M., (2008), *Elemente einer ethischen Grundrechtstheorie*, Baden-Baden, Nomos Verlag, p. 97ff, p. 412ff. On the relationship between equality and dignity, see Mahlmann, M. (2012), 'Human dignity and autonomy in modern constitutional orders', in: Rosenfeld, M. and Sajó, A. (eds.), *The Oxford handbook of comparative constitutional law*, Oxford, Oxford University Press, pp. 370-396.

29 Article 3 GG.

30 Article 6(5) GG: 'Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.'

31 Article 33(1) GG: 'Every German shall have in every State (*Land*) the same political rights and duties.'
Article 33(2) GG: 'Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.'
Article 33(3) GG: 'Neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired in the public service shall be independent on religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.'
Article 140 GG in conjunction with Articles 136(1) and 136(2) of the Weimar Constitution, reiterates the equality of status and office independent of religious denomination.

32 Article 38(1) (first sentence), and Article 38(2) GG.

33 Articles 20(1), 20(3) and 28(1) GG.

purpose of promoting the inclusion of groups that face discrimination.[34]

Germany is a federal state in which the *Länder* have substantial powers. Consequently, there are different regulations in different *Länder* in areas where they have legislative powers, such as education, cultural matters or certain aspects of the law regulating civil servants employed by the *Länder* and not the Federation.

The most important matters in public law (with the exceptions mentioned above) and private law are, however, still within the legislative power of the German Federation, either as exclusive legislative power, or concurrent legislative power.[35]

List of main legislation transposing and implementing the directives

The directives were transposed on 18 August 2006, by the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz AGG*) of 14 August 2006 (BGBl. I, 1897) which was last amended on 3 April 2013 (BGBl. I, 610).[36] This act covers labour law, general contract law and public law.

The AGG is part of a legal package that amended other existing legal regulations and also contains a law against discrimination in the army, the Equal Treatment of Soldiers Act (*Gesetz über die Gleichbehandlung von Soldatinnen und Soldaten*, *SoldGG*).[37]

In addition, there are various legal provisions that partly reiterate the fundamental guarantee of equality for areas of public law, including the law on the civil service and other public employees.[38]

In addition, there are other legal regulations relevant for anti-discrimination law. In labour law, there is a general anti-discrimination clause in the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*)[39] and the fundamental principle of equal treatment of employees has been consistently established by case law.[40] In addition, as regards discrimination on the ground of sex (which is not covered by this report) and of disability, various legal instruments have been passed aiming to protect women and disabled people against discrimination and increase their social inclusion.[41]

In the area of sexual orientation, some legal regulations have been created which either directly aim to establish protection against discrimination or do so indirectly by providing options which were not previously open to people of certain sexual orientations, for example, by introducing a legally regulated form of same-sex partnership. With regard to religion, special legal regulations and case law, in addition to the non-discrimination clauses

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34 See below for examples.

35 Articles 70-74 GG.

36 The German Federal Anti-Discrimination Agency *(Antiskriminierungsstelle des Bundes, ADS)* provides an English translation of the AGG on its website: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/agg_in_englischer_Sprache.html.

37 Act implementing European directives putting into effect the principle of equal treatment (*Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlinien*), 14 August 2006. The AGG and the SoldGG have been amended (2 December 2006). A second amendment was made to the AGG on 12 December 2007 and to the SoldGG on 31 July 2008. A third (though only technical) amendment to the AGG was made on 5 February 2009. The most recent amendment to the AGG is of 3 April 2013.

38 See Section 9 Federal Civil Service Act (*Bundesbeamtengesetz, BBG*), 5 February 2009.

39 Section 75(1) Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), 25 September 2001.

40 Settled case law, see Germany, BAG, 10 AZR 640/04, 12 October 2005.

41 Most importantly, the AGG covers disability for all employment relations and other areas beyond the scope of Directive 2000/78/EC. Section 164(2) of the Social Code IX (*Sozialgesetzbuch IX, SGB IX*), 23 December 2016, refers to the regulation of the AGG. The SGB IX of 19 June 2001 was last amended and thoroughly reformed on 17 July 2017. The changes restructuring the SGB IX entered into force on 1 January 2018. The German Equal Opportunities for Persons with Disabilities Act, 27 April 2002, creates special duties for public authorities and some for private parties. The codification was last amended on 10 July 2018. See below for more and for details on disability.

in public law and labour law, deal with the reasonable accommodation of various religious beliefs derived from the fundamental freedom of religion and conscience, including exceptions from general laws.[42]

There is a widely held opinion in legal doctrine (which has resulted in some case law) that the general clauses of civil law provide remedies in private contract law and tort law against discrimination on any ground that infringes basic personality rights. These general clauses must be interpreted in the light of the constitutional order (especially in the light of fundamental rights and, most importantly, of human dignity), which prohibits discrimination.[43] With the enactment of the AGG, in practice those general clauses play an even more limited role in this respect.

[42] See section 2.6 below.

[43] In particular, in relation to race and ethnic origin, see Bezzenberger, T. (1996), 'Ethnische Diskriminierung, Gleichheit und Sittenordnung im bürgerlichen Recht', in *Archiv für die civilistische Praxis* 196, p. 395ff.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The constitution of Germany, the Basic Law (GG), includes the following articles dealing with non-discrimination:

Article 3 GG, guarantee of equality; Article 33(3) GG, equal access to office, being the most important in practice.[44]

The guarantee of equality[45] provides, first, for equality before the law,[46] which has been interpreted by the German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) as going beyond the equal application of law and as giving the right to the creation of law that respects the principle of equality in treating essentially equal things equally and essentially unequal things unequally.[47] This open-ended equality guarantee may cover other grounds as well. The Federal Constitutional Court regards sexual orientation and identity as part of the human personality as protected by the guarantee of human dignity and the general right to personality.[48] The guarantee of equality contains, secondly, special protection against discrimination on the grounds of sex,[49] parentage, race, language, homeland and origin, faith, or religious or political opinions.[50] There is a prohibition against disadvantaging somebody because of their disability, which implies the admissibility of positive action.[51] The same applies to sex. It is explicitly stated that the state should support the effective realisation of the principle of equality for women and men and work towards abolishing current inequalities.[52] Article 33(3) GG guarantees equal access to office irrespective of religion or belief.

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

The provisions are directly applicable.

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

However, fundamental rights have an indirect horizontal effect (*mittelbare Drittwirkung*) through the interpretation of open-textured provisions in private law, most importantly the general provisions on bona fide and equity.[53] In addition, the doctrine of positive duties can give rise to the obligation of state authorities to protect against discrimination.

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[44] There are other provisions relevant for non-discrimination, e.g. Article 6(5) GG (children born out of marriage) or Article 38 GG (voting rights) that are not discussed here.

[45] Article 3 GG.

[46] Article 3(1) GG: 'All humans are equal before the law.'

[47] Settled case law, Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts, BVerfGE*) 49, 148 (165); 98, 365 (385).

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

[49] Article 3(3) and Article 3(2) GG: men and women are equal.

[50] Article 3(3) (first sentence) GG. The prohibition of discrimination on the ground of parentage prohibits any discrimination based on characteristics of the parents. Whether this includes for instance the sexual orientation of parents has not been clarified by case law.

[51] Article 3(3) (second sentence) GG.

[52] Article 3(2) (second sentence) GG.

[53] Germany, BVerfG, 1 BvR 400/51, 15 January 1958: BVerfGE 7, 198, settled case law. A possible exception to this rule is Article 1 GG.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing the two EU anti-discrimination directives that are the object of this report: sex, parentage, race, language, homeland and origin, faith, religion, political opinion and disability. They are explicitly covered by the constitutional guarantee of equality as formulated in Article 3(1) GG, which is a major element of the transposition of the directives. As the guarantee includes, as just mentioned, an open-textured general principle, other grounds are potentially included as well. The Federal Constitutional Court regards sexual orientation and identity (including gender aspects) as part of the human personality as protected by the guarantee of human dignity and the general right to personality.[54] The guarantees in the *Länder* constitutions differ in their details from this list[55] although this is of no great significance in practice.[56]

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

The Equal Treatment of Soldiers Act (*Gesetz über die Gleichbehandlung der Soldatinnen und Soldaten, SoldGG*)[57] covers all grounds with the exception of age and disability in Article 1, taking advantage of the exception for military service in Article 3(4) Directive

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

[55] State/Provision/Ground/Content concerning differences from the federal guarantee of equality: Bavaria: Constitution of the Free State of Bavaria (*Verfassung des Freistaates Bayern, BayVerf*), 15 December 1998, Article 118a; Disability; promotion of equalisation; Berlin: Constitution of Berlin (*Verfassung von Berlin, VvB*), 23 November 1995, Article 10 Section 2; Sexual identity; prohibition of discrimination; Ibid., Article 11; Disability; promotion of equality; Brandenburg: Constitution of the Land of Brandenburg (*Verfassung des Landes Brandenburg, BbgVerf*), 20 August 1992, Article 12 Section 2; Sexual identity, nationality, social background; prohibition of discrimination; Ibid., Article 12 Section 4; Disability; promotion of equality; Ibid., Article 25; Ethnic minority of the Sorbs; Right to own national identity, language, culture, schools, participation in legislation regarding Sorbian affairs; Bremen: Constitution of the Free Hanseatic City of Bremen (*Landesverfassung der Freien Hansestadt Bremen, BremVerf*), 21 October 1947, Article 2 Section 2; Social background; prohibition of discrimination; Ibid., Article 2 Section 3; Disability; promotion of equality; Mecklenburg-West Pomerania: Constitution of the Land of Mecklenburg - West Pomerania (*Verfassung des Landes Mecklenburg-Vorpommern, VerfMV*), 23 May 1993, Article 17a, Article 18; Old age, disability, ethnic and national minorities and groups; special protection when minority or group consists of German citizens; North Rhine-Westphalia: Constitution for the Land of North Rhine-Westphalia (*Verfassung für das Land Nordrhein-Westfalen, VerfNRW*), 28 June 1950, Article 13; Religion; prohibition on denying schooling for religious reasons in state schools in absence of confessional schools; Rhineland-Palatinate: Constitution for Rhineland-Palatinate (*Verfassung für Rheinland-Pfalz, VerfRP*), 18 May 1947, Article 17 Section 2; Diverse grounds (groups of persons (*Personengruppen*)); Prohibition of discrimination; Ibid., Article 17 Section 4; Ethnic and linguistic minorities; Respect (*Achtung)*; Ibid., Article 64; Disability; protection, promotion of equality and integration; Saxony: Constitution of the Free State of Saxony (*Verfassung des Freistaates Sachsen, SächsVerf*), 27 May 1992, Article 6; Ethnic minority of the Sorbs; Right to own national identity, language, culture, tradition, schools; Saxony-Anhalt: Constitution of the Land of Saxony-Anhalt (*Verfassung des Landes Sachsen-Anhalt, VerfST*), 16 July 1992, Article 37; Ethnic minorities; Protection of cultural independence and political participation; Ibid., Article 38; Old age, disability; protection of disabled and elderly people, promotion of equality; Schleswig-Holstein: Constitution of the Land of Schleswig-Holstein (*Verfassung des Landes Schleswig-Holstein, VerfSH*), 13 May 2008, Article 5 Section 1, 2; Ethnic minorities, especially Danes and Frisians and Sinti and Roma; Protection of cultural independence and political participation, protection of Danes and Frisians and promotion of their affairs; Ibid., Article 5a; protection of rights and interests of people in need of care; promotion of accommodation; Thuringia: Constitution of the Free State of Thuringia (*Verfassung des Freistaats Thüringen, ThürVerf*), 25 October 1993, Article 2 Section 3; Ethnicity, social background, sexual orientation; Prohibition of discrimination; Ibid., Article 2 Section 4; special protection of people with disabilities, promotion of equal participation in social life.

[56] See Article 31 GG: 'Federal law shall take precedence over Land law.' However, Article 142 GG states that, notwithstanding the provision of Article 31, provisions of *Land* constitutions guaranteeing basic rights in conformity with Articles 1 to 18 of the Federal Constitution remain in force. This provision gives *Länder* some space for independent guarantees of fundamental rights.

[57] Germany, SoldGG, 14 August 2006.

2000/78. However, there are regulations on severely disabled soldiers[58] based on the provisions of the Sections 1(2) and 18 SoldGG.

Other specialised legislation contains slightly modified lists. The main examples are as follows.

Section 9 of the Federal Civil Service Act (*Bundesbeamtengesetz, BBG*)[59] repeats the principle of access to the civil service according to aptitude, qualifications and professional achievements and prohibits discrimination in access to the civil service on the grounds of sex, parentage, race or ethnic origin, disability, religion and belief, political opinions, background, relationships or sexual identity.[60] Age (*Alter*) is not explicitly included, although it is implicitly covered by other legislation, such as Section 24 AGG.

Section 67 of the Federal Personnel Representation Act (*Bundespersonalvertretungsgesetz, BPersVG*)[61] obliges employers and employees in the public sector to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitude, sex or sexual identity.

At *Land* level, the legal regulations for civil servants and other public employees were amended because of a change in the legal regulation of civil servants.[62]

According to Section 75(1) of the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*),[63] employers and work councils are under an obligation to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitudes, sex or sexual identity. Section 27(1) of the Executive Committees Act (*Sprecherausschussgesetz, SprAuG*)[64] contains an equivalent provision for executives.

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

The general principle of equal treatment of employees protects employees generally against unequal treatment without objective reason. It is generally held that discrimination on the ground of characteristics listed in Section 67(1) BetrVG or Section 75(1) BetrVG lacks objective reason and can be regarded as unlawful arbitrary treatment. The AGG confirms this view.

Legislation regulating public and private employment includes several measures at federal and *Land* level prohibiting discrimination on the ground of disability.[65] There is some *Land*

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[58] See the decision by the Federal Administrative Court *(Bundesverwaltungsgericht, BVerwG)*, 1 WB 8/08, 11 March 2008, which clarifies that there is no analogous application of the AGG in these cases.

[59] Germany, Federal Civil Service Act (*Bundesbeamtengesetz, BBG)*, 5 February 2009.

[60] Section 9 of the Federal Civil Service Act reads as follows: *'Geschlecht, Abstammung, Rasse oder ethnische Herkunft, Behinderung, Religion oder Weltanschauung, politische Anschauungen, Herkunft, Beziehungen oder sexuelle Identität.'*

[61] Germany, Federal Personnel Representation Act, 15 March 1974.

[62] See Annex 1 of this report.

[63] Germany, Works Constitution Act, 25 September 2001.

[64] Germany, Executive Committees Act, 20 December 1988.

[65] Cf. Section 164(2) SGB IX referring to the AGG. The prohibition of discrimination on the basis of disability binds the partners to a collective wage agreement (unions and management), Decisions of the Federal Labour Court (Entscheidungen des Bundesarbeitsgerichts, BAGE) 108, 333. *Land* anti-discrimination laws exist in all German *Länder*: Baden-Württemberg: Act on Equal Opportunities for Persons with Disabilities (*Landes-Behindertengleichstellungsgesetz, L-BGG*), 17 December 2014; Bavaria: Bavaria Act on Equal Opportunities, Integration and Participation for Persons with Disabilities (*Bayerisches Behindertengleichstellungsgesetz - BayBGG*), 9 July 2003; Berlin: Berlin Act on Equal Opportunities for Persons with Disabilities (*Berlin Landesgleichberechtigungsgesetz - LGBG*), 28 September 2006;

law on the prohibition of discrimination on the grounds of sexual orientation[66] and other *Land* laws against discrimination.[67]

2.1.1 Definition of the grounds of unlawful discrimination within the directives

The AGG contains no legal definitions of the protected characteristics. However, the explanatory report to the AGG provides some, albeit non-binding, indications, referred to in the relevant section below.[68]

a) Racial or ethnic origin

- Race

The guarantee of equality in the Basic Law lists 'race' (*Rasse*) among the characteristics on the ground of which discrimination is prohibited. It is commonly held that this term does not refer to any real difference between human beings as, from an anthropological point of view, different human races do not exist. The persistent use of 'race' in English terminology and its counterpart in the Basic Law leads therefore to discussion and criticism,[69] which has an impact on the legal terminology used in (draft) legislation dealing with the matter.[70] In the explanatory report to the AGG it is explained that the term 'race' does not imply the acceptance of racist theories.

Brandenburg: Brandeburg Act on Equal Opportunities for Persons with Disabilities (*Brandenburgisches Behindertengleichstellungsgesetz - BbgBGG*), 11 February 2013; Bremen: Bremen Act on Equal Opportunities (*Bremisches Behindertengleichstellungsgesetz - BremBGG*), 18 December 2018; Hamburg: Hamburg Act on Equal Opportunities for Persons with Disabilities (*Hamburgisches Gesetz zur Gleichstellung behinderter Menschen, HmbGGbM*), 21 March 2005; Hessen: Hessen Act on Equal Opportunities for Persons with Disabilities (*Hessisches Behinderten-Gleichstellungsgesetz - HessBGG*), 20 December 2004; Low Saxony: Low Saxony Act on Equal Opportunities (*Niedersächsisches Behindertengleichstellungsgesetz, NBGG*), 25 November 2007; Mecklenburg-Vorpommern: Mecklenburg-Vorpommern Act on Equal Opportunities, Equal Participation and Integration for Persons with Disabilities (Mecklenburg-Vorpommern *Landesbehindertengleichstellungsgesetz, LBGG M-V)*, 10 July 2006; Hessen: Hessen Act on Equal Opportunities for Persons with Disabilities (*Hessisches Behinderten- Gleichstellungsgesetz - HessBGG*), 20 December 2004; Rhineland-Palatinate: Rhineland Palatinate Act on Equal Opportunities for Persons with Disabilities (*Rheinland-Pfalz Gesetz zur Gleichstellung behinderter Menschen, LGGBehM*), 16 December 2002; Saarland: Saarland Law Nr. 1541 on Equal Opportunities for Persons with Disabilities (*Saarländisches Behindertengleichstellungsgesetz - SBGG*), 26 November 2003; Saxony: Saxony Act on Improving Integration for Persons with Disabiltities (*Sächsisches Integrationsgesetz, SächsIntegrG*), 28 May 2004; Saxony Anhalt: Saxony-Anhalt Act on Equal Opportunities with Persons with Disabilities (*Behindertengleichstellungsgesetz Saxony-Anhalt, BGG LSA*), 16 December 2010; Schleswig-Holstein: Schleswig-Holstein: Schleswig-Holstein Act on Equal Opportunities for Persons with Disabilities (*Schleswig - Holstein Landesbehindertengleichstellugnsgesetz - LBGG)*, 16 December 2002; Thuringia: Thuringia Act on Equal Opportunities and Integration Improvement of Persons with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderungen, ThürGiG*), 16 December 2005.

66 See Berlin: Law on Article 10(2) of the Constitution of Berlin *(Gesetz zu Artikel 10 Abs. 2 der Verfassung von Berlin)*, 24 June 2004; Saxony-Anhalt: Law on Eliminating the Disadvantages faced by Lesbians and Homosexuals *(Gesetz zum Abbau von Benachteiligungen von Lesben und Schwulen)*, 22 December 1997. In other *Land* law the other mentioned prohibitions of discrimination are applicable.

67 Section 15(2) (third sentence) of the Saarland Media Law *(Saarländisches Mediengesetz, SMG)*, 27 February 2002, provides for non-discriminatory radio programmes which enhance (among other things) respect for people's sexual identity; Section 6(3) Law on Public Security and Order of the Saxony-Anhalt *Land (Gesetz über die öffentliche Sicherheit und Ordnung des Landes Sachsen-Anhalt, SOG LSA)*, 20 May 2014, provides that the discretion of the police must be non-discriminatory, listing as grounds sex, parentage, race, disability, sexual identity, language, home and origin, belief, religious or political opinions.

68 See Bundestag, *Bundestagsdrucksache 16/1780, 31*.

69 The German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) has taken a stand against the use of the term 'race' in legal texts. See Cremer, H. (2010), *"...und welcher Rasse gehören Sie an?" Zur Problematik des Begriffs 'Rasse' in der Gesetzgebung*, Policy Paper, Deutsches Institut für Menschenrechte; Cremer, H. (2010) *Ein Grundgesetz ohne 'Rasse' - Vorschlag für eine Änderung von Artikel 3 Grundgesetz*, Policy Paper No. 16, Berlin, Deutsches Institut für Menschenrechte, available at: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Policy_Paper/policy_paper_16_ein_grundgesetz_ohne_rasse.pdf.

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

Race is defined in legal doctrine as actual or alleged characteristics that are biologically inherited.[71] It is noteworthy that antisemitism is regarded as discrimination on the ground of race, not of religion, because of the historic background of Nazi ideology.[72] Ethnic origin is covered by the term 'race'.

Apart from constitutional law, there are various special laws that refer to race, for example the law on residence,[73] or the law on restitution for victims of persecution during the period of the Nazi Government.[74] In criminal law, there are provisions penalising incitement to racial hatred.[75] In these contexts race is defined along the lines of constitutional law.

- Ethnic origin

It is stated in the explanatory report that 'ethnic origin' is to be understood according to the definitions of the Committee on the Elimination of Racial Discrimination (CERD), including race, colour, parentage, national origin or ethnicity, without clarifying the exact delineation of these terms. The scope of ethnic origin is thus wider than race but overlaps in part.[76]

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

b) Religion and belief

The interpretation of the guarantee of freedom of religion[79] by the Federal Constitutional Court provides the most important basis for understanding the meaning of religion and belief. Under the constitution, the freedom of faith, conscience and of religious and philosophical (*weltanschaulichen*) belief is protected. The terms 'religion' and 'belief' are not defined at constitutional level. However, through the rulings of the Federal Constitutional Court and legal science (*Rechtswissenschaft*, encompassing any scholarly study of the law) these terms have gained a more or less uncontested meaning.

'Faith' in this context is interpreted as a subjective conviction relating to religion or a philosophical belief (*Weltanschauung*) independently of the content of the religion or belief. Religion and belief encompass a wide range of systems of convictions not limited to those that are well-established.[80] Often, religion and belief are taken to be any specific

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71 Nußberger, A. (2018), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (8th ed.), München, Beck Verlag, Art.3, para. 293.

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

73 E.g. Germany, Residence Act (*Aufenthaltsgesetz, AufenthG*), 25 February 2008, Section 60(1): residence rights in the case of persecution on the grounds of race in a person's country of origin.

74 E.g. Germany, Property Law (*Vermögensgesetz, VermG*), 9 February 2005, Section 1(6).

75 Germany, Criminal Code (*Strafgesetzbuch, StGB*), 13 November 1998, Section 130.

76 See Federal Labour Court (Bundesarbeitsgericht), 21.6.2012, 8 AZR 364/11.

77 These groups come under the Council of Europe Framework Convention for the Protection of Minorities: Council of Europe, Framework Convention for the Protection of Minorities, ETS No. 157, 1995, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cdac. See the German Declaration, which states: 'National Minorities in the Federal Republic of Germany are the Danes of German citizenship and the members of the Sorbian people with German citizenship. The Framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma of German citizenship'. Available in English at: www.coe.int/de/web/conventions/full-list/-/conventions/treaty/157/declarations?p_auth=VcH12seG&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=GER&_coeconventions_WAR_coeconventionsportlet_codeNature=10.

78 See section 3.2.8 below and references.

79 Article 4(1) GG.

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

views in relation to the world as a whole and the origin and purpose of humankind, which give sense to human life and the world.[81] To distinguish between religion and philosophical belief, reference is made to the concepts of transcendence and immanence. Religion transcends the world whereas philosophical belief is not a metaphysical, but an immanent system of convictions.[82] This distinction is contested in detail in legal science, but these questions have little practical relevance.

For example, the Federal Constitutional Court accepted as self-evident that Bahá'í is a religion.[83] It relied in this context on current trends in society, cultural tradition and the understanding of religion in general and in religious studies.[84] Beyond that, a teleological interpretation of the fundamental freedom of religion is regarded as being decisive.[85] Freedom of religion encompasses both the freedom of belief (forum internum) and its exercise (forum externum).

c) Disability

Section 2, Social Code IX *(Sozialgesetzbuch IX, SGB IX)*[86] and Section 3 of the Equal Opportunities for Persons with Disabilities Act (*Behindertengleichstellungsgesetz, BGG)*[87] provide the most important legal definition of disability. The Act on strengthening the participation and self-determination of persons with disabilities, referred to as the Federal Participation Act (*Bundesteilhabegesetz, BTHG*),[88] entered into force on 1 January 2018 and amended Social Code IX. According to the new version of Section 2(1) SGB IX, persons with disabilities are people who have physical, mental or sensory impairments which, in interaction with various barriers, whether attitudinal or environmental, may hinder their equal participation in society with a high probability for more than six months. An impairment presupposes that the physical state and health differs from the state typical of the relevant age.[89] According to the explanatory report to the AGG, disability is to be understood as in Section 2 SGB IX[90] and Section 3 BGG.[91] This reference was upheld by the Federal Labour Court (BAG).[92]

The wording of the new definition[93] is modelled on the (non-exhaustive, guidance providing) definition of persons with disability in Article 1 of the UN Convention on the Rights of Persons with Disabilities,[94] incorporated into EU law by the CJEU. The reference

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81 BVerfGE 90, 112 (115).
82 BVerfGE 90, 112 (115).
83 BVerfGE 83, 341 (353).
84 BVerfGE 83, 341 (353).
85 BVerfGE 83, 341 (353).
86 Germany, Social Code IX (*Sozialgesetzbuch IX, SGB IX*), 23 December 2016.
87 Germany, Equal Opportunities for Persons with Disabilities Act (*Behindertengleichstellungsgesetz, BGG)*, 27 April 2002, last amended on 10 July 2018.
88 Germany, Federal Participation Act (*Bundesteilhabegesetz, BTHG*), 23 December 2016, with effect from 1 January 2018.
89 Before the amendment of the relevant provisions, persons with disabilities were defined as such if their physical functions, intellectual abilities or mental health had a high probability of differing from the state typical for their age for longer than six months and if, in consequence, their participation in society was impaired. This definition was close to the findings of the Court of Justice of the European Union (CJEU) in C-13/05 (*Navas*) and the jurisprudence further developed in C-335/11 and C-337/11 (*Ring and Skouboe Werge*). See Court of Justice of the European Union (CJEU), C-335/11 and C-337/11, *Ring v. Dansk almennyttigt Boligselskab and Werge v. Dansk Arbejdsgiverforening*, 11 April 2013, EU:C:2013:222 para. 41, http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0335&lang1=en&type=TXT&ancre=. Court of Justice of the European Union (CJEU), C-13/05 *Navas v. Eurest Colectividades SA*, 11 July 2006, EU:C:2006:456 http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0013&lang1=en&type=TXT&ancre=.
90 Germany, Social Code IX (*Sozialgesetzbuch IX, SGB IX*), 23 December 2016 and Germany, Federal Participation Act, 23 December 2016.
91 Germany, Equal Opportunities for Persons with Disabilities Act, 27 April 2002.
92 Germany, BAG, 8 AZR 642/08, 22 October 2009.
93 The old version of Section 2(1) SGB IX referred to an actual impairment of participation in society rather than a potential one.
94 United Nations (UN), Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006, www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html.

to six months may be less strict than the phrase 'long-term', used by the UN Convention and the CJEU.[95]

The Federal Labour Court has considered some issues deriving from the earlier definition of disability in the old version of Section 29(1) SGB IX that may be relevant for the interpretation of the current definition. It decided that, for the interpretation of disability in the light of EU anti-discrimination law, a wide concept of disability must be adopted which combines the elements in EU anti-discrimination law and national law that are advantageous for a person with disabilities. Disability in the sense of anti-discrimination law exists thus not only in cases that fall under the definition of Section 2 Social Code IX (*SGB IX*). In addition, states typical at a particular age are not excluded from the outset as a possible disability factor. The Federal Labour Court explicitly states – in the context of HIV infection without symptoms – that a disability can be created by social reactions to a long-term illness, thereby impairing a person's participation in society.[96] This interpretation of the concept of disability fully incorporated the jurisprudence of the CJEU. It goes beyond this jurisprudence, at least through the reference to inclusion in society (not only working life) and the (arguably) more lenient criteria of a six-month period of differing physical functions in comparison to the (as yet unspecified) 'long-term' criterion of the CJEU.[97] How this interpretation will be adapted to the new definition is an open question only future case law will clarify. Of particular interest in this context is the role that states that typical at a particular age, which are included in the new definition, will play in the future interpretation of Section 2(1) SGB IX.

People are 'severely disabled' (*schwerbehindert*) if their disability reduces their ability to participate in working life by at least 50 %, Section 2(2) SGB IX. Severe disability is the precondition of the application of special disability legislation.

People with a degree of disability of less than 50 % but more than 30 % are treated as severely disabled if they cannot find or maintain employment due to their disability.[98] The degree of disability is established by the relevant administrative authorities,[99] applying standards defined by experts and the authorities, the details of which are contentious. A minimum impairment of 20 % is necessary for a formal declaration of the degree of disability in this procedure by the authorities.[100] If the above-mentioned threshold of a 30 % reduction in the ability to participate in working life is not reached, the individual cannot under any circumstances be classed as severely disabled.

Some *Land* disability laws already follow the new definition of disability contained in Section 2 SGB IX.[101]

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95 Court of Justice of the European Union, C-335/11 and C-337/11, *Ring v. Dansk almennyttigt Boligselskab and Werge v. Dansk Arbejdsgiverforening*, 11 April 2013, EU:C:2013:222, para. 41, http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0335&lang1=en&type=TXT&ancre=. In CJEU, C-13/05 (Navas) an illness lasting eight months was not regarded as sufficient: Court of Justice of the European Union (CJEU), C-13/05 *Navas v. Eurest Colectividades SA*, 11 July 2006, EU:C:2006:456, http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0013&lang1=en&type=TXT&ancre=.

96 Germany, BAG, 6 AZR 190/12, 19 December 2013, para. 43ff.

97 The Court of Justice of the European Union (CJEU) dealt with the meaning of 'long-term' but did not specify any absolute time period that may be regarded as 'long-term', taking therefore a rather circumstantial approach: Court of Justice of the European Union (CJEU), C-395/15, *Daouidi v. Bootes Plus SL, Fondo de Garantia Salaríal, Ministerio Fiscal*, *1* December 2016, EU:C:2016:917 http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0395&lang1=en&type=TXT&ancre=.

98 Section 2(3) SGB IX.

99 Section 69(1) SGB IX.

100 Section 69(1) (sixth sentence) SGB IX. This has consequences for some benefits related to disability, e.g. in tax law: Section 33b Income Tax Law (*Einkommenssteuergesetz, EStG*), 8 October 2009.

101 For reference to attitudinal and environmental barriers, see Section 2 Saxony-Anhalt Act on Equal Opportunities for Persons with Disabilities (*Behindertengleichstellungsgesetz Saxony-Anhalt, BGG LSA*), 16 December 2010; Section 4 Bremen Act on Equal Opportunities (*Bremisches Behinderten-gleichstellungsgesetz - BremBGG*), 18 December 2018; Section 3.1 Brandeburg Act on Equal Opportunities for Persons with Disabilties (*Brandenburgisches Behindertengleichstellungsgesetz - BbgBGG*), 11 February 2013; Section 3.1 Baden-Württemberg Act on Equal Opportunities for Persons with Disabilities (*Landes-*

d) Age

Age is generally understood as biological age.[102]

e) Sexual orientation

Like the AGG, other laws refer to sexual identity (*sexuelle Identität*) rather than sexual orientation.[103] According to the explanatory report, sexual identity includes homosexual, bisexual, transsexual and intersexual people. In legal commentary, transsexuality is regarded as a matter of gender, not sexual identity.[104] The Federal Constitutional Court refers to both as (distinct) aspects of the individual's autonomous personality.[105] This encompasses homosexuality and transsexuality, without excluding any other imaginable orientation or identity.[106]

2.1.2 Multiple discrimination

In Germany, multiple discrimination is prohibited in the law.

Section 4 AGG provides that any unequal treatment on the basis of multiple prohibited grounds must be justified for each of these grounds. It has not been clarified how the norm applies to cases of intersectionality. Section 27(5) AGG states that, in cases of multiple discrimination, the Federal Anti-Discrimination Agency (*Antidiskriminierungs-stelle des Bundes, ADS*) and the competent agents of the Federal Government and the German Bundestag are obliged to cooperate. The rules in place (within their general limits) would allow such cases to be dealt with.

Behindertengleichstellungsgesetz, L-BGG), 17 December 2014; Section 3.1 Brandeburg Act on Equal Opportunities for Persons with Disabilties (*Brandenburgisches Behindertengleichstellungsgesetz - BbgBGG*), 11 February 2013. The former definition of the old version of 2.1 SGB IX is still to be found in: Section 2 Bavaria Act on Equal Opportunities, Integration and Participation for Persons with Disabilities (*Bayerisches Behindertengleichstellungsgesetz - BayBGG*), 9 July 2003; Section 4 Berlin Act on Equal Opportunities for Persons with Disabilities (*Berlin Landesgleichberechtigungsgesetz - LGBG*), 28 September 2006; Section 3 Hamburg Act on Equal Opportunities for Persons with Disabilities (*Hamburgisches Gesetz zur Gleichstellung behinderter Menschen, HmbGGbM*), 21 March 2005; Section 2 Hessen Act on Equal Opportunities for Persons with Disabilities (*Hessisches Behinderten-Gleichstellungsgesetz - HessBGG*), 20 December 2004; Section 2.2 Low Saxony Act on Equal Opportunities (*Niedersächsisches Behindertengleichstellungsgesetz, NBGG*), 25 November 2007; Section 3 Mecklenburg-Vorpommern Act on Equal Opportunities, Equal Participation and Intergration for Persons with Disabilities (*Mecklenburg-Vorpommern Landesbehindertengleichstellungsgesetz, LBGG M-V*), 10 July 2006; Section 2. 1 Rhineland-Palatinate Act on Equal Opportunities for Persons with Disabilities (*Rheinland-Pfalz Gesetz zur Gleichstellung behinderter Menschen, LGGBehM*), 16 December 2002; Section 3.1 Saarland Act Nr. 1541 on Equal Opportunities for Persons with Disabilities (*Saarländisches Behindertengleichstellungsgesetz - SBGG*), 26 November 2003; Section 2 Sachsen Act on Improving Integration for Persons with Disabiltities (*Sächsisches Integrationsgesetz-SächsIntegrG*), 28 May 2004; Section 2.1 Schleswig-Holstein Act on Equal Opportunities for Persons with Disabilities (*Schleswig - Holstein Landesbehindertengleichstellugnsgesetz - LBGG*), 16 December 2002; Section 3 Thüringen Act on Equal Opportunities and Integration Improvement of Persons with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderungen, ThürGiG*), 16 December 2005.

[102] Hamm Higher Regional Court (*Oberlandesgericht, OLG*), Hamm/20 U 102/10, 12 January 2011, I-20. There are no minimum or maximum age limits set in law for the application of the prohibition of age discrimination.

[103] See Article 10(2) Constitution of Berlin (*Verfassung von Berlin, VerfBE*), 23 November 1995.

[104] See Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch,* Baden-Baden, Nomos Verlag, § 3 para. 63 with further references to corresponding jurisprudence from the Court of Justice of the European Union (CJEU).

[105] See Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), 1 BvL 3/03, 6 December 2005, para. 48; BVerfG, 1 BvR 2019/16, 8 November 2017, para 38ff (geschlechtliche Identität). '*Geschlechtlich'* refers as '*sexuelle Identität'* both to aspects of sex and gender.

[106] Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), 1 BvL 3/03, 6 December 2005, para. 48 ff. On transsexuals, see footnote 54.

In Germany, multiple discrimination[107] is recognised. Although a number of cases have concerned several grounds,[108] the courts usually do not categorise (in legal terms) these as cases of 'multiple discrimination' but instead focus on one ground. Thus, there is no recent case law clarifying the legal concept. In addition, there is as yet no case law on amounts of damages in cases of multiple discrimination.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Germany, discrimination based on a perception or assumption of a person's characteristics, is prohibited in national law. This is explicitly regulated only in the field of employment.

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

b) Discrimination by association

In Germany, discrimination based on association with persons with particular characteristics is not prohibited in national law.

The regulations of the AGG are interpreted in legal doctrine as potentially covering such cases, although there is no reported case law in this respect.[109]

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

a) Prohibition and definition of direct discrimination

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[107] Two expert reports, commissioned by the Federal Anti-Discrimination Agency, were published in early 2011. They concern the conceptual framing and legal handling of 'multidimensional discrimination', as well as an empirical study on this phenomenon. Due to the method applied by the latter (a focus on qualitative analysis), a generalisation of the results would appear to be difficult. However, it was found that a very high percentage of the individuals selected by the researchers due to their experience of social injustice based on one ground also suffered from a similar experience on another ground (181 out of 290). This was particularly true of the ground of sex (as the second ground), cf.: Baer, S. (2001), *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse*, Antidiskriminierungsstelle des Bundes, www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Mehrdimensionale_Diskriminierung_jur_Analyse.html as well as Dern, S., Inowlocki, L. and Oberlies, D. (2011), *Mehrdimensionale Diskriminierung – Eine empirische Untersuchung anhand von autobiographisch-narrativen Interviews*, Antidiskriminierungsstelle des Bundes, www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Mehrdimensionale_Diskriminierung_empirische_untersuchung.html?nn=4192910. An online survey also produced the result that in most cases reported by victims, discrimination was experienced as 'multidimensional' rather than 'one-dimensional', cf. above, Rottleuthner, H. and Mahlmann, M. (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Baden - Baden, Nomos Verlag.

[108] For example, Cologne Labour Court (*Arbeitsgericht Köln, AG Köln*), Köln/19 Ca 7222/07, 6 March 2008; Düsseldorf Administrative Court (*Verwaltungsgericht Düsseldorf, VG Düsseldorf*), Düsseldorf/2 K 26225/06, 5 June 2007; Frankfurt Administrative Court (*Verwaltungsgericht Frankfurt, VG Frankfurt*), Frankfurt/9 L 3454/09, 9 December 2009; Hamm Higher Labour Court (*Landesarbeitsgericht Hamm, LAG Hamm*), Hamm/7 Sa 1026/13, 4 February 2014. For an overview Baer, S. (2001), *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse*, Antidiskriminierungsstelle des Bundes, p. 53 ff.

[109] Däubler, W. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 1 para. 109; on the background in European law, Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 3 para 83, 104.

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

The AGG contains the following definition of direct discrimination, following the German version of the directives: 'Direct discrimination shall be taken to occur where a person is treated less favourably than another is, has been or would be treated in a comparable situation on the basis of any of the [prohibited grounds]'.[110] Hidden direct discrimination is taken to occur if unequal treatment is based on apparently objective criteria, which are, however, necessarily linked to a forbidden ground of discrimination.[111]

The guarantee of equality establishes the principle of equal treatment as a fundamental right at the constitutional level.[112] However, this provision contains no explicit legal definition of direct discrimination. The definitions in use have been developed by the Federal Constitutional Court.

At the constitutional level, most doctrinal developments have been initiated by cases involving discrimination on the ground of sex.[113] This case law forms the blueprint for the concept of discrimination as used in other areas of the law as well.

According to settled case law, unequal treatment presupposes the unequal treatment of essentially equal matters. For something to be considered to be direct discrimination (although this term is not necessarily used), the unequal treatment must be based on a particular characteristic.

In some early decisions, the German Federal Constitutional Court emphasised the need for intent on the part of the discriminator.[114] This precondition has been weakened in a more recent decision. Discrimination is held to have taken place even if the act concerned was not deliberately discriminatory but had other aims or if discrimination is only one factor in a 'bundle of motives' (*Motivbündel*).[115] Consequently, no decisive causal link between the characteristic and the discrimination is needed. It suffices that the characteristic is part of the (negative) criteria that lead to the discriminatory behaviour.[116]

The Federal Labour Court regarded the objective qualification of a job candidate as a condition for possible discrimination,[117] but has abandoned this jurisprudence: currently, any applicant, irrespective of objective suitability, can be the victim of discrimination, according to this interpretation of the prohibition of discrimination.[118] The Federal Labour Court underlined that filing suit for discrimination may form abuse of rights, ruling out a violation of the prohibition of discrimination.[119]

Section 164(2) SGB IX prohibits discrimination on the ground of disability in work relations for severely disabled people and people of equivalent status,[120] referring to the AGG,

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[110] Section 3(1) (first sentence) AGG. Within the meaning of the provision a 'person' is a natural person.

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

[112] Article 3 GG.

[113] Article 3(2) and 3(3) GG.

[114] BVerfGE 75, 40 (70).

[115] BVerfGE 89, 276 (289).

[116] BAG, 8 AZR 470/14, 19 May 2016, para 53.

[117] BAG, 8 AZR 370/09, 19 August 2010.

[118] BAG, 8 AZR 470/14, 19 May 2016, para. 24ff.

[119] BAG, 8 AZR 470/14, 19 May 2016. This is in line with Court of Justice of the European Union (CJEU), C-423/15, *Kratzer* v. *R+V Allgemeine Versicherung AG*, 28. July 2016, EU:C:2016:604 http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0423&lang1=en&type=TXT&ancre=.

[120] The Federal Labour Court ruled that prior to the AGG and the amendment of Section 81(2) SGB IX (now Section 164(2) SGB IX) coming into force, the personal scope of the non-discrimination rule in the old version of Section 81(2) Social Code IX was already to be interpreted as covering all types of disability as understood in EU Law (direct/indirect discrimination), cf. BAG, 9 AZR 823/06, 4 April 2007.

including its regime of justifications.[121]

Section 7(2) (second sentence) of the BGG defines discrimination as follows: 'Discrimination shall be deemed to occur if disabled and able-bodied persons are treated differently without a compulsory reason and the equal participation of people with disabilities in society is in consequence directly or indirectly impaired'.[122]

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

Section 11 AGG states that discriminatory job vacancy announcements are prohibited. Such an advertisement, e.g. expressing a preference for applicants of a certain age,[123] may constitute direct discrimination.[124] With regard to other discriminatory statements, there is no explicit regulation beyond the norms of harassment. The prohibition of discrimination in the AGG is, however, open to interpretation in relation to such cases.

b) Justification for direct discrimination

There are justifications for discrimination in general civil law. According to Section 20(1) AGG, differences in treatment on the grounds of religion, disability, age, sexual identity or sex (the latter is not covered in this report) are not prohibited if there is an objective reason for the treatment. The following are listed as examples:

- the avoidance of dangers, the prevention of damage or other comparable aims (Section 20(1)(1));
- the protection of privacy or personal security (Section 20(1)(2));
- the granting of special advantages when there is no specific interest in enforcing equal treatment (Section 20(1)(3));[125]
- in case of differences in treatment on the ground of religion, if the treatment is justified in the light of freedom of religion or the right to self-determination of religious communities or their institutions, irrespective of their legal form, or of organisations, the aim of which is to practise a religion together, in accordance with their respective ethos (Section 20(1)(4)).

Section 20(2) (second sentence) of the AGG provides that a difference in treatment on the grounds of religion, disability, age or sexual identity is only admissible for private insurance if it is based on acknowledged principles of calculations adequate to the risks, especially on actuarial evaluations based on statistical data.

Section 19(3) AGG contains a special justification for unequal treatment in the case of housing. Differences in treatment in the context of letting housing are permissible for the purpose of creating and maintaining socially stable structures of residents, balanced settlement structures and balanced economic, social and cultural relations. Given that

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

[122] This definition therefore only covers discrimination against people with disabilities. The provision applies in specific areas, in particular barrier-free access facilities provided by public authorities. It has therefore a different material scope than Article 3 AGG. There is no definition of what constitutes compulsory reasons in the law. It is argued that such reasons may include the case that a person with disabilities lacks the mental or physical abilities to act in certain ways, cf. Dau, in: Dau/Düwell/Joussen (eds.) SGB IX, § 7 BGG para 4. Considerations of reasonable accommodation would need to be taken into account, however.

[123] See for example: Schleswig/Holstein Higher Labour Court (*Landesarbeitsgericht, LAG*), Schleswig/Holstein/5 Sa 286/08, 9 December 2008.

[124] See Däubler, W. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 3 para. 20.

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

there is no explicit exception or possibility of justification of such unequal treatment under the Racial Equality Directive (2000/43/EC), the reconcilability of the clause with the European law depends on the question whether the interpretation of the clause is limited to very specific cases, e.g. of preventing ghettoization.[126]

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

Other areas of the law contain no explicit provision for justifications.

With regard to the constitutional guarantee and the justification of unequal treatment, the Federal Constitutional Court holds that any unequal treatment on the ground of sex (which, as mentioned above, is the standard-setting characteristic in the framework of Article 3 GG) is unconstitutional unless it is a necessary consequence of attempts to resolve problems which by their very nature affect men or women only.[127] Whether any direct discrimination on the grounds listed in Article 3(3) GG can be justified or not is the subject of debate. Some argue for this interpretation, while others regard Article 3(3) GG as a strict prohibition of any discrimination.[128]

The general doctrine of justification of unequal treatment is of relevance in this context as well, given the open-textured nature of Article 3 GG, which extends its scope of application to such characteristics as age or sexual identity. Article 3(1) GG has been interpreted in the older case law of the Federal Constitutional Court as the prohibition of arbitrary treatment within the limits of material justice.[129] More recent decisions have increased the demands for unequal treatment to be justified beyond this position. The Federal Constitutional Court has ruled that, as the principle of equality before the law is intended to prevent unjustified unequal treatment, the legislature is usually subject to strict constraints in cases of unequal treatment. These legal constraints become stricter, depending on the extent to which the personal characteristics that constitute the ground for unequal treatment resemble the characteristics listed in Article 3(3) GG and there is therefore a greater likelihood that unequal treatment based on them will lead to discrimination against a minority. The strict constraint is, however, not limited to discrimination against individuals. It also exists where unequal treatment of subject matters of the law leads to the unequal treatment of groups of people.

The strictness of the constraint depends on the degree to which the people affected are able to change through their behaviour the characteristics that are the grounds for unequal treatment. In addition, the limits on the legislature are more narrowly circumscribed, depending on the extent to which the unequal treatment of people or subject matters can disadvantageously affect the enjoyment of basic liberties.[130] As a result, direct discrimination under the guarantee of equality is possible, but only within the limit of differentiated standards of justification. These standards range from a test of arbitrariness to strict scrutiny of proportionality.

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[126] Arguing for permissibility on the ground of a teleological reduction of the regulation of the Racial Equality Directive (2000/43/EC) as the prevention of ghettoisation is not against the telos of the directive, Armbrüster in B. Rudolph, M. Mahlmann (2007), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 7 para. 109 et seq.; for the impermissibility of exclusive quotas but the permissibility of supporting quotas implying maximum representation of certain minorities, Klose, A. and Braunroth, A. (2018), in: Däubler, W. and Bertzbach, M. (4th ed.), *Allgemeines Gleichbehandlungsrecht: Handkommentar*, Baden-Baden, Nomos Verlag, § 19 para. 54ff.

[127] BVerfGE 57, 335 (342); 85, 191 (207).

[128] See Nußberger, A. (2018), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (8th ed.), München, Beck Verlag, Art. 3 para 239ff, 254 (justification possible).

[129] BVerfGE 1, 14 (52); 25, 101 (105).

[130] BVerfGE 88, 87 (96).

2.2.1 Situation testing

a) Legal framework

In Germany, the law is silent on situation testing.

There is no explicit regulation of situation testing in German law. Its use depends therefore on the law of evidence in the relevant field.[131]

Under Section 22 AGG, regulating the shift of the burden of proof, situational testing could be used as evidence that makes the assumption of discrimination plausible.[132]

b) Practice

In Germany, situation testing is used in practice.[133] The practice is, however, limited. For example, in 2017, the Local Court Hamburg-Barmbek,[134] acknowledged that evidence of discrimination can also be obtained through fictitious applications using a 'testing procedure', in this case regarding applications for a flat where fictitious German and foreign-sounding names were used.

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

a) Prohibition and definition of indirect discrimination

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

Section 3(2) AGG provides that indirect discrimination will be taken to occur where an apparently neutral provision, criterion or practice would put people with one of the characteristics within the scope of the AGG at a particular disadvantage compared with other people unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[135] The criterion must affect a group of people protected by the AGG significantly more than others.[136] This can be determined by statistical comparison,[137] although recourse to statistics is not mandatory.[138] Instead it is sufficient if the criterion is typically likely to have such consequences.[139]

The case law on predecessors of this norm gives some further indications of its possible

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[131] E.g. in civil proceedings an expert opinion (Germany, Civil Procedure Code (*Zivilprozessordnung, ZPO*), 5 December 2005: Section 404), could refer to the results of situation testing. There is, however, no reported case law on the matter. According to Section 284, sentence 2 ZPO, evidence beyond the legally prescribed type and form can be used if the parties agree. For a rare case on the matter cf. Oldenburg Local Court (*Amtsgericht, AG*), Oldenburg/E2 C 2126/07, 23 July 2008.

[132] See the explanatory report, Bundestag, *Bundestagsdrucksache* 16/1780 p. 47.

[133] This is true both for NGOs and individuals. For a rare example, see Kiel Higher Labour Court (*Landesarbeitsgericht*, *LAG*), Kiel/3 Sa 401/13, 9 April 2014; For an expert study involving situation testing in the housing sector cf.: Müller, A. (2015) *Expertise 'Diskriminierung auf dem Wohnungsmarkt'. Strategien zum Nachweis rassistischer Benachteiligungen*: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Wohnungsmarkt_20150615.html.

[134] Amtsgericht Hamburg-Barmbek/811bC 273/15, 3 February 2017.

[135] Section 3(2) AGG: 'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on any of the grounds referred to under Section 1, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

[136] BAG, 1 ABR 47/08, 18 August 2009; Saarland Higher Labour Court (*Landesarbeitsgericht, LAG*), Saarland/1 TaBV 73/08, 11 February 2009.

[137] BAG, 10 AZR 639/07, 24 September 2008.

[138] BAG, 1 ABR 47/08, 18 August 2009.

[139] BAG, 1 ABR 47/08, 18 August 2009. Thus, a job announcement limiting the list of applicants to those 'in their first year in post' constitutes an indirect discrimination on the ground of age.

interpretation.[140] Courts have ruled that discrimination on the ground of sex is not only assumed to have taken place if one sex is always disadvantaged with respect to working conditions but also if there are significant differences (*wesentliche Unterschiede*) between the number of men and women among privileged and disadvantaged employees.[141] According to this ruling, discrimination may be based on a regulation, a contract or the actual behaviour of the employer. The latter clarifies that indirect discrimination can result from factors other than just regulations, as now explicitly stated in Section 3(2) AGG.

The question of what difference in number establishes a 'significant difference' (potentially relevant for the interpretation of 'particular disadvantage') has not been clarified by the courts and is the subject of debate. A ratio of 1 woman to 10 men enjoying better working conditions has been regarded as a significant difference.[142] In another decision, a ratio of about 80 % women to 20 % men was deemed sufficient to establish a significant difference.[143]

Indirect discrimination does not presuppose the intention to discriminate. It is regarded as sufficient to establish a significantly greater (*wesentlich stärker*) negative impact of the regulation, contract or actual behaviour of the employer on one sex.[144] This case law is based on CJEU case law.[145]

The former prohibition of discrimination based on disability, Section 81(2) Social Code IX (*SGB IX*), which in its current form refers to the AGG, has previously been interpreted by the Federal Labour Court in this manner, explicitly referring to Article 2(2)(b) of Directive 2000/78/EC.[146] There are no indications that this case law has become irrelevant.

Other federal courts also apply this interpretation of indirect discrimination along the lines of CJEU case law and the directives, although important details, such as references to hypothetical comparators, are not explicitly mentioned.[147]

Section 7(2) (second sentence) of the Equal Opportunities for Persons with Disabilities Act defines discrimination as follows: discrimination will be deemed to occur if disabled and able-bodied people are treated differently without a compulsory reason and the equal participation of disabled people in society is in consequence directly or indirectly impaired.[148]

The meaning of an indirect impairment is not further specified. Most *Land* disability laws

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[140] Below the constitutional level, the concept of indirect discrimination has been elaborated in particular by the labour courts and legal science in the context of the application of sex discrimination legislation, cf. former Sections 611a and 612(3) BGB, repealed by the Law transposing European anti-discrimination directives. This formed the basis for solving problems connected with discrimination in other areas, e.g. on the grounds of disability. Although indirect discrimination was not defined in Section 611a BGB on sex discrimination, it has been assumed that it was nevertheless covered by this regulation as only this interpretation brings it in line with Directive 76/207/EC, where this concept was explicitly stated in Article 2(1). As is shown in other examples from the case law referred to in the text, indirect discrimination is not a new concept in German law.

[141] See BAG, *Neue Juristische Wochenschrift 1992*, 1125; BAG, *Neue Juristische Wochenschrift 1993*, 3091, 3093.

[142] BAG, *Neue Juristische Wochenschrift 1993*, 3091, 3094.

[143] BAG, *Neue Juristische Wochenschrift 1992*, 1125, 1126f.

[144] BAG, *Neue Juristische Wochenschrift 1993*, 3091, 3094.

[145] Court of Justice of the European Union (CJEU), C-170/84, *Bilka - Kaufhaus GmbH v. Weber von Hartz*, 13 May 1986, EU:C:1986:204, http://curia.europa.eu/juris/celex.jsf?celex=61984CJ0170&lang1=en&type=TXT&ancre=.

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

[147] BVerwG, 2 C 21/04, 23 June 2005.

[148] As already mentioned, there is no definition of what constitutes compulsory reasons in the law. It is argued that such reasons may include the case that a person with disabilities lacks the mental or physical abilities to act in certain ways, cf. Dau, in: Dau/Düwell/Joussen (eds.) SGB IX, § 7 BGG para 4.

follow this definition closely.[149]

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

In the same decision, the Federal Constitutional Court explicitly recognised neutral provisions with discriminatory effects as being indirectly discriminatory. According to this ruling, confirmed by later decisions, indirect discrimination is established if neutrally formulated regulations apply disproportionately to women (or men) and if this is caused by natural or social reasons.[150] The Court referred in this context to the respective case law of the CJEU. Again, although this ruling directly referred to discrimination based on sex, it applies equally to other grounds. This case law has been upheld in more recent decisions.[151]

b) Justification test for indirect discrimination

In legal science it is widely held that CJEU case law forms a suitable model to answer the question of justification for indirect discrimination in constitutional law.[152]

This position has been adopted by the Federal Constitutional Court. It ruled that indirect discrimination is justified if objective reasons of considerable importance can be given for the indirect discrimination.[153]

In 2004, the Court stated that the strict test of proportionality developed for cases of direct

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[149] See Germany, Baden-Württemberg Law on the Equality of the Disabled (*Landes-Behindertengleichstellungsgesetz Baden-Württemberg, BGG Baden-Württemberg*), 17 December 2014: Section 3.3; Germany, Bavarian Law on the Equal Opportunities for Disabled People (*Bayerisches Behindertengleichstellungsgesetz, BayBGG*), 9 July 2003: Art. 5; Germany, Brandenburg Law on the Equal Opportunities for Disabled People (*Brandenburgisches Behindertengleichstellungsgesetz, Bbg BGG*), 11 February 2013: Section 3.2; Germany, Bremen Law on the Equal Opportunities for Disabled People (*Bremisches Behindertengleichstellungsgesetz, BremBGG*), 18 December 2013: Section 3; Germany, Hamburg Law on the Equal Opportunities for Disabled People (*Hamburgisches Gesetz zur Gleichstellung behinderter Menschen, HmbGGbM*), 21 March 2005: Section 6.2; Germany, Hesse Law on the Equal Opportunities for Disabled People (*Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen, HessBGG*), 20 December 2004: Section 4; Germany, Mecklenburg - West Pomerania Law on the Equal Opportunities for Disabled People (*Landesbehindertengleichstellungsgesetz Mecklenburg Vorpommern, LBGG M-V*), 10 July 2006: Section 5; Germany, Lower Saxony Law on the Equal Opportunities for Disabled People (*Niedersächsisches Behindertengleichstellungsgesetz, NBGG*), 25 November 2007: Section 4.2; Germany, North Rhine-Westphalia Law on the Equal Opportunities for the Disabled People (*Behindertengleichstellungsgesetz Nordrhein-Westfalen, BGG NRW*), 16 December 2003, Section 3.2; Germany, Rheinland-Palatinate Law on the Equal Opportunities for Disabled People (*Landesgesetz zur Gleichstellung behinderter Menschen Rheinland-Pfalz, BehGleichG RP*), 16 December 2002: Section 2.2; Germany, Saarland Law on the Equal Opportunities for Disabled People (*Saarländisches Behindertengleichstellungsgesetz, SBGG*), 26 November 2003: Section 3.2; Germany, Saxony Integration Law (*Sächsisches Integrationsgesetz, SächsIntegrG*), 28 May 2004: Section 4.3; Germany, Schleswig-Holstein Law on the Equal Opportunities for Disabled People (*Landesbehindertengleichstellungsgesetz Schleswig-Holstein, LBGG S-H*), 16 December 2002: Section 2.2; Germany, Thuringian Law on the Promotion of Equality and Integration of People with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderungen, ThürGIG*), 16 December 2005: Section 4. Section 3 of the Berlin Law on the Equal Opportunities for Disabled People (*Berliner Behindertengleichstellungsgesetz, LGBG Berlin*), 17 May 1999, states that any unjustified case of unequal treatment is considered to be discrimination. Unequal treatment is not justified if it is based solely or decisively on circumstances that are in indirect or direct connection with the disability. Unequal treatment shall not be deemed to occur if the consideration of disability is necessary or serves the interest of the disabled person. The similar Section 4 of the Saxony-Anhalt Law on Promoting the Equality of Disabled People (B*ehindertengleichstellungsgesetz Sachsen-Anhalt, BGG LSA*), 16 December 2010, includes cases where the development of people with disabilities is limited due to a lack of positive accommodation of their needs.

[150] Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts, BVerfGE*) 97, 35 (43).

[151] BVerfGE 121, 241 (254ff).

[152] Nußberger, A. (2018), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (8th ed.), München, Beck Verlag, Article 3 para. 255f.

[153] BVerfG, 2 BvR 1476/01, 19 November 2003.

discrimination also applies to cases where the unequal treatment of facts indirectly leads to disadvantage for certain people. The Federal Constitutional Court determines in each case whether there are reasons of sufficient weight to justify the unequal treatment.[154]

In its case law, the Federal Labour Court, affirmed that indirect discrimination by a 'neutral criterion' may be justified by any legitimate aim as long as the principle of proportionality is not violated.[155] The objective reason for the discrimination must be weighed against the consequences of the unequal treatment to establish whether or not the unequal treatment is justified. Any rule established by the employer must be suitable for its purpose and necessary to achieve it. The reason must not be disproportionate as to the principle of equal treatment, for example non-discriminatory requirements set out in employment policies.[156]

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

The AGG definition is compatible with the directives. In addition, the concept of indirect discrimination has in most cases been defined in line with the definition and interpretations of the relevant European law and the case law of the CJEU in particular. The definition in Section 3(2) AGG continues to inform the understanding of indirect discrimination for all courts.

As far as objective reasons and justifications excluding indirect and direct discrimination are concerned, there is a great deal of variety in the case law (see section 12.2 below and previous country reports for the European network of legal experts in the non-discrimination field). Detailed argument would be needed for the various spheres concerned that are regulated by the law, in order to assess convincingly whether or not they are in conformity with European standards.[157]

2.3.1 Statistical evidence

a) Legal framework

In Germany, there is legislation regulating the collection of personal data.

Germany has a differentiated set of statutory regulations on data protection. A great deal of case law exists on these matters. The regulations have their constitutional basis in the interpretation of the fundamental right to the protection of the personality, Article 2(1) in conjunction with Article 1 GG. The Federal Constitutional Court ruled that everybody enjoys

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[154] BVerfG, 1 BvR 1748/99, 20 April 2004.

[155] BAG, 1 ABR 47/08, 18 August 2009, referring to Court of Justice of the European Union (CJEU), C-388/07, *Age Concern England v. Secretary of State for Business, Enterpreise and Regularory Reform*, 5 March 2009, EU:C:2009:128, http://curia.europa.eu/juris/celex.jsf?celex=62007CJ0388&lang1=en&type=TXT&ancre=.

[156] Schlachter, M. (2019), in: Müller-Glöge, R., Preis, U. and Schmidt, I. (eds.), *Erfurter Kommentar zum Arbeitsrecht (*19th ed.), München, Beck Verlag, § 3 AGG, para. 9ff for an overview, para. 13 for the balance of interests reasoning.

[157] To take one example, where case law from the CJEU exists: one Chamber of the Federal German Constitutional Court, BVerfG, 6. May 2008, 2 BvR 1830/06, held that the unequal treatment of same-sex couples in relation to certain (social) benefits is justified despite CJEU, C-267/06 (*Tadao Maruko*), 1 April 2008, because in heterosexual couples one partner is assumed to be in a greater need of financial support due to the requirements of child rearing than the partner in a same-sex partnership, where these requirements and the assumed positive effects of such unequal treatment on the rate of procreation of a society typically do not exist. See Court of Justice of the European Union (CJEU), C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, EU:C:2008:179 http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0267&lang1=en&type=TXT&ancre=. For critical comments on the German case law, see Mahlmann, M. *EuZW* 2008, 218f. A (senate) decision by the Federal Constitutional Court did not follow this line of argument but affirmed the right of same-sex couples living in registered partnerships to the same benefits as married spouses, Germany, BVerfG, 1 BvR 1164/07, 7 July 2009. For the important matter of the justification of unequal treatment on the ground of religion or belief, see section 4.2 below.

the right to informational self-determination (*informationelle Selbstbestimmung*).[158] This right is not restricted to sensitive data. Everyone has the right to determine generally which data can be used and which cannot. The limits of this right are fundamentally those of the principle of proportionality. If the person concerned consents to the use of data, their use is, of course according to this jurisprudence, permissible. Given the doctrine of the requirement for a specific statutory regulation (*Gesetzesvorbehalt*) for matters that touch upon fundamental rights, detailed legal regulations on data protection have been established in many areas of life.

These laws encompass the relations between the state and citizens and private relations. In 2017, Germany passed the new Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*)[159] which implemented both the GDPR (Regulation (EU) 2016/679)[160] and Directive (EU) 2016/680.[161] For public bodies[162] the Federal Data Protection Act stipulates as a general principle that a public authority is allowed to process personal data if it is necessary for performing its tasks and exercising its official authority.[163] Section 22 BDSG sets out further restrictive conditions as a precondition for the processing of special categories of personal data. The law groups cases according to a strict test of proportionality for data collection that serves the public good, in order to protect the fundamental right to informational self-determination. These general rules are specified in legislation dealing with certain areas of public law.

The Federal Data Protection Act provides further that the processing of personal data by public bodies for a purpose other than the one for which the data were collected is permissible if: a) it is obviously in the interest of the data subject and there is no reason to assume refusal of consent; b) it is necessary to check the information provided by the data subject on the assumption that this might not be correct; c) the processing is necessary to prevent substantial harm to the common good or a threat to public security, defence or national security and to safeguard substantial concerns of the common good or to ensure tax and customs revenues; d) the processing is necessary for the prosecution of criminal and administrative offences and the enforcement of punishment, measures and fines provided by the Criminal Code and the Juvenile Court Act; e) the processing is necessary for the prevention of serious harm to the rights of another person; and f) the processing is necessary for exercising powers of supervision and monitoring.[164]

In addition, according to the Federal Data Protection Act, the processing of personal data by private bodies for a purpose other than the one for which the data were collected is permissible first, if it is necessary for the prevention of threats to state or public security or the prosecution of criminal offences and secondly, if it necessary for the establishment,

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158 BVerfGE 65, 1 (154ff).

159 Germany, Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*), 30 June 2017, with effect from 25 May 2018, which abrogated the old BDSG.

160 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, pp. 1-88, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679.

161 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977JHA, OJ L 119, pp. 89-131, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.119.01.0089.01.ENG.

162 The Federal Data Protection Act applies to public bodies of the Federation (*Bund*) and of the states (*Länder*) where data protection is not governed by state (*Land)* law. Section 1(1) Nrs. 1 and 2 BDSG. For the public bodies of the *Länder* see the relevant *Land* law implementing the Regulation (EU) 2016/679: e.g. Hessian Data Protection and Freedom of Information Act (*Hessisches Datenschutz - und Informationsfreiheitgesetz*, *HDSiG*), 3 May 2018, with effect from 25 May 2018.

163 Section 3 BDSG.

164 Section 23 BDSG.

exercise or defence of legal claims.[165] In the case of an overriding interest of the data subject for not having the data processed, the processing becomes impermissible.[166]

As defined in the Federal Data Protection Act, data on racial and ethnic origin, political opinion, religious or philosophical beliefs, membership of unions, health, sexual life and sexual orientation form 'special categories of personal data'.[167] The processing of such special categories of personal data is only permissible when it is strictly necessary for the performance of the controller's tasks.[168] The act sets appropriate safeguards for the legally protected interests of the data subject when processing these special categories of personal data.[169]

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

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

Section 214 Social Code IX (SGB IX) stipulates the collection of federal statistics on severely disabled persons, including number, personal characteristics such as age, sex, nationality and place of residence, and type, cause and grade of disability.

The Commissioner for Migration, Refugees and Integration, the Commissioner for Matters Related to Ethnic German Resettlers and National Minorities and the Land Commissioners for Foreigners publish periodical reports on the situation of foreigners in Germany, including statistical data.

It should be noted that, given historic experience, German authorities are explicitly reluctant to gather data for any purpose on certain characteristics that formed the basis of discrimination in the Nazi period.

In Germany, statistical evidence is permitted by national law in order to establish indirect discrimination.

In the AGG, the admissibility of statistical evidence is not explicitly regulated but is presupposed for indirect discrimination.[170] For example, Article 286 of the Civil Procedure Code[171] provides for such a possibility.

The statistical data collected on the basis of Section 214 Social Code IX (*SGB IX*) about severely disabled people provides background information on the situation of this group of persons and the law, including for the purposes of positive action. In other areas, there is no relevant use of such data for positive action.

b) Practice

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

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[165] Section 24 BDSG.
[166] Section 24.1 BDSG.
[167] Section 46(14) BDSG. There is no difference in meaning of sexual orientation in this context and sexual identity in the AGG.
[168] Section 48(1) BDSG.
[169] See Section 48(2) BDSG.
[170] Cf. the explanatory report, Bundestag, *Bundestagsdrucksache* 16/1780, p. 47.
[171] Germany, Civil Procedure Code (*Zivilprozessordnung, ZPO*), 5 December 2005.

Courts routinely use statistical evidence to establish indirect discrimination. The Federal Constitutional Court has used statistical evidence to establish whether or not indirect discrimination exists.[172] The data in the specific case (concerning sex) were derived from statistics provided by the defendant, the City of Hamburg.

The groups compared are formed according to the general doctrine of equality law on a case-by-case basis. It has been consistently held in case law that essentially equal groups must be treated equally. The criteria that are used to establish whether groups are essentially equal depend on the specific context. There is no settled case law on a specific quantitative measure for establishing the disproportionate application of a regulation to one group in comparison to another group.

As the examples discussed above indicate,[173] statistical evidence establishes a prima facie case of indirect discrimination. The statistics used are social statistics, if available. In other cases, the ratio is determined for the individual case.

In legal science there are voices that regard any difference that persists for a period of time as sufficient to establish indirect discrimination. If the ratio is small, the justification of this discrimination becomes easier for the employers. Others propose a threshold of about 75 %.[174]

The groups to be compared are determined by the personal scope of the regulation challenged. For example, for a collective agreement, all people bound by the agreement form the relevant group. The group of applicants is relevant for a guideline on the selection of applicants for employment, although it is disputed whether all applicants should be considered or only sufficiently qualified applicants. The case law of the Federal Constitutional Court supports the former interpretation, as it ruled that Section 611a of the Civil Code (*Bürgerliches Gesetzbuch, BGB*)[175] (repealed by the AGG) not only forbids a refusal to employ someone on the ground of a particular characteristic (in this case sex), but that it suffices if the characteristic is one of a 'bundle of motives' for not choosing this applicant.[176] It is not far-fetched to assume that these other considerations include the applicant's other qualifications, which precludes the possibility that only qualified applicants are considered. The Federal Labour Court regarded the objective qualification of a job candidate as a condition for possible discrimination,[177] but has abandoned this jurisprudence – according to this interpretation of the prohibition of discrimination, any applicant, irrespective of objective suitability can be the victim of discrimination.[178]

Section 154(1) Social Code IX (*SGB IX*) establishes the duty of any employer employing more than 20 employees to employ at least 5 % severely disabled persons. This rule is interpreted as not directly prejudicial for individual claims, as it establishes only a general duty for the employer. If the employer does not fulfil this duty, it does not mean that discrimination has occurred in an individual case.

However, there are voices in the literature that argue that where the employer does not employ 50 % of the quota prescribed by law (2.5 %) this should lead to a presumption of discrimination, which can shift the burden of proof.[179] There is not yet any settled case law

[172] See BVerfGE 97, 35 (44).
[173] See section 2.3 a of this report.
[174] On the debate, see Schlachter, M. (2019), in: Müller-Glöge, R., Preis, U. and Schmidt, I. (eds.), *Erfurter Kommentar zum Arbeitsrecht (*19th ed.), München, Beck Verlag, § 3 AGG, para. 9, on the discussion about the significance and relevance of quotas see para. 10.
[175] Germany, Civil Code, 2 January 2002.
[176] BVerfGE 89, 276 (189), see above.
[177] BAG, 8 AZR 370/09, 19 August 2010.
[178] BAG, 8 AZR 470/14, 19 May 2016, para 24ff.
[179] See Neumann, D. (2018), in: Neumann, D., Pahlen, R., Winkler, J. and Jabben, J. (eds.), *Sozialgesetzbuch IX: Kommentar* (13th ed.), München, Beck Verlag, § 154, para. 1ff.

on these matters.

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

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

Section 3(3) AGG defines harassment as discrimination when unwanted conduct related to any of the grounds covered by the AGG intend or cause the dignity of a person to be violated and an intimidating, hostile, degrading, humiliating or offensive environment to be created.[180] According to German jurisprudence on Section 3(3) AGG, such an 'environment' is generally not created by one-off incidents but only by continuous behaviour,[181] of certain severity, beyond mere onerousness.[182] The personal and material scope of the prohibition of harassment is no different to other forms of discrimination under the AGG (explained below in section 3).

General legal provisions can cover cases of harassment as well. For example, in private law a case of harassment on the basis of ethnic origin can be regarded as a violation of the right to personality, which is protected by tort law.[183] Such an action can give rise to compensation for material and non-material damage. In criminal law the provisions against criminal insult and defamation can also cover cases of harassment, with the relevant sanctions.[184]

In Germany, harassment does explicitly constitute a form of discrimination (Article 3(3) AGG).

b) Scope of liability for harassment

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

The violation of the prohibition of discrimination of employees by employers or other employees is a violation of contractual duty (Section 7(3) AGG) giving rise to contractual liability.

The AGG establishes organisational duties for the employer. According to Section 12(1) AGG, the employer is under a duty to provide for appropriate measures of protection against and prevention of discrimination. Section 12(2) AGG provides that the employer must educate employees on the principles of non-discrimination. Section 12(3) AGG establishes the duty of the employer to act against discrimination by his or her employees through appropriate measures, including dismissal. Section 12(4) AGG provides that employers have a duty to take appropriate measures to protect employees against

[180] BAG, 8 AZR 74/18: conduct and environment cumulative conditions.

[181] BAG, 8 AZR 347/07, 24 April 2008: unjustified dismissal as such not creating a hostile environment; Germany, Higher Labour Court (*Landesarbeitsgericht, LAG*), Düsseldorf/7 Sa 383/08, 18 June 2008: graffiti in restroom not enough by itself to create a hostile environment. Germany, Higher Labour Court (*Landesarbeitsgericht, LAG*), Berlin-Brandenburg/6 Sa 271/10, 18 June 2010: no harassment if considerable time period and no inherent connection between different incidents.

[182] Schleswig-Holstein Higher Labour Court (*Landesarbeitsgericht, LAG*), Schleswig-Holstein/6 Sa 158/09, 23 December 2009: no ethnically discriminating harassment by an employer's repeated demands to take a German language course.

[183] Section 823(1) BGB. In legal doctrine, it has been argued that protection against harassment through tort law is much wider than protection would be through a specific prohibition.

[184] Sections 185, 186 and 187 StGB.

discrimination by third parties. A wider liability of employers – although discussed – does not form part of the AGG. The employer is under a duty to make the AGG known in the organisation (Section 12(5) AGG).

According to Section 15(1) AGG, employers are liable for material damages caused by violations of the prohibition of discrimination in case of fault. For non-material damages there is strict liability.[185] If the discrimination occurs while applying collective agreements, intent or gross negligence is necessary (Section 15(3) AGG). Equivalent claims in the case of provision of services covered by the AGG can be based on Section 21(2) AGG (see section 6.5 below).

The general rules of responsibility of agents acting on behalf of others apply to the extension of liability.[186] There are no special rules for discrimination.[187] For example, a service provider can be liable for the action of their representative. Beyond the listed specific duties, there is no general responsibility for discrimination by third parties.[188]

An individual harasser or discriminator is liable if there is contractual or tortious liability, as outlined. The rules for responsibility for agents apply to unions and professional associations as well.

The AGG does not contain any particular provision regarding the liability of legal persons. Instead, the general rule of Section 31 Civil Code *(Bürgerliches Gesetzbuch, BGB)* is applicable, according to which legal persons are liable for damage caused by executive employees.[189]

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Germany, instructions to discriminate are prohibited in national law. Instructions are defined: 'An instruction to discriminate against people on any of the grounds covered by the AGG shall be deemed to be discrimination' (Section 3(5) AGG). This is especially the case if someone instigates someone else to engage in a behaviour that disadvantages an employee due to one of the covered grounds (Section 3(5) (second sentence) AGG). According to prevalent opinion, an instruction presupposes the competence of the instructor to direct the action of the person instructed.[190] Courts have had no occasion yet to clarify the matter.

In addition, such cases may be covered by general legal provisions.[191] Responsibility for

[185] BAG, 8 AzR 906/07, 22 January 2009.
[186] Most importantly, Sections 31, 278 and 831 BGB, see section 2.5 of this report.
[187] In cases of sex discrimination, employers have been held liable for the actions of others, e.g. an employer for a discriminatory job advertisement by an employment agency, see BAG, Az. 8 AZR 112/03, 5 February 2004.
[188] BAG, Az. 8 AZR 118/13, 23 January 2014. In terms of the relationship to candidates, the court ruled that third parties subcontracted by the potential employer to recruit employees, cannot be held liable given that the AGG only provides for compensation obligations on the part of the potential employer. As it was not necessary to rule on this issue in the present case, the court left open the question of whether a third party's duty of compensation may arise from any other legal source.
[189] Leuschner, A. (2018), in: Säcker, F. J., Rixecker, R., Oetker, H. and Limpeg, B. (eds.), *Münchner Kommentar zum Bürgerlichen Gesetzbuch* (7th ed.) (2018), München, Beck Verlag, § 31, para. 20.
[190] Deinert, O. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden - Baden, Nomos Verlag, AGG, § 3 Rn 106.
[191] Prior to the enactment of the AGG, a first instance labour court regarded a dismissal as justified by an employee's behaviour in the following case. The employee in charge of recruitment was instructed by the employer not to hire more 'Turks'. The employee did not accept this order, arguing that everybody irrespective of origin should have the same chance. The court argued that the employer's right to give instructions covered this order, which did not violate any equality provision of German law (Article 3, principle of equal treatment of employees, European law including Directive 2000/43), and that the employee consequently had to follow these instructions. The parties settled at the next instance, see

agents in contractual relations and in tort law is relevant in this respect.[192] Another example from criminal law is incitement to discrimination that amounts to a criminal offence, e.g. criminal insult.[193]

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

b) Scope of liability for instructions to discriminate

In Germany, the instructor and the discriminator are liable. This is the case when there is no justification of the discrimination.

The general rules on responsibility of agents apply to the extension of liability.[194] There are no special rules or case law for discrimination.[195]

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

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

In Germany, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law and is defined. There is no general definition, although it is defined in particular provisions, which are referred to below.

The AGG contains no additional regulation on reasonable accommodation of a general scope, as prescribed in Article 5 Directive 2000/78/EC for employment. It is argued by courts, including the Federal Labour Court, that a duty of reasonable accommodation is to be understood as a contractual duty stemming from Section 241(2) BGB.[196] From this point of view, it is a contractual duty of the employer to take proper care of the legitimate needs of their employees. For people with disabilities, this means that the duty exists to reasonably accommodate their needs.

Nevertheless, the legislation on disability, constitutionally buttressed by the disability clause of the Basic Law[197] and the obligations created by the Convention on the Rights of Persons with Disabilities, signed and ratified by Germany (see annex II of this report) and *Land* constitutions, provides for reasonable accommodation in various contexts, including those set out below.

The social security system has the general aim of integrating disabled people into society through individual assistance and accommodation of their needs[198] and establishes claims to material means of integration.[199] The German welfare agencies provide support for participation in working life.[200] This encompasses the support of people with disabilities for obtaining employment, including vocational training, special medical and psychological support for participation in working life, housing near the place of work, transport or the

Wuppertal Local Court (*Arbeitsgericht, AG*) Wuppertal/3 Ca 4927/03, 10 December 2003.

192 Sections 31, 278, 831 BGB.

193 Sections 26, 185 StGB.

194 Most importantly, Sections 31, 278 and 831 BGB, see section 2.5 of this report.

195 In cases of sex discrimination, employers have been held liable for the actions of others, e.g. an employer for a discriminatory job advertisement by an employment agency, see BAG, Az 8 AZR 112/03, 5 February 2004.

196 BAG, 6 AZR 190/12, 19 December 2013, para. 53.

197 Article 3.3 (second sentence) GG.

198 Germany, Social Code I (*Sozialgesetzbuch I, SGB I*), 11 December 1975, Section 10

199 Germany, Social Code IX (*Sozialgesetzbuch IX, SGB IX*), 23 December 2016, Section 4ff; Social Code XII (*Sozialgesetzbuch XII, SGB XII*), 27 December 2003, Section 53ff. Special regulations for blind people: SGB XII, Section 72.

200 Germany Social Code III (*Sozialgesetzbuch III, SGB III*), 24 March 1997, Section 112ff; SGB IX, Section 187.

creation of housing adequate for the disabled people, to name some examples.[201]

Section 164(4) Social Code IX (*SGB IX*) imposes various duties on public and private employers in providing reasonable accommodation for severely disabled people.[202]

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

Due consideration is to be paid to the disability and its effects on employment. The Federal Labour Agency and the integration agencies support the employer in introducing accommodation measures. The severely disabled person has no claim if these measures would be unreasonable (*unzumutbar*) for the employer or cause a disproportionate burden or are contrary to other legal regulations.[203] The employers are under a duty to promote part-time work.[204] Under certain circumstances, the severely disabled person can have a claim to part-time work.[205] They also have a claim to additional paid holidays.[206]

According to Section 106 (third sentence) of the Industrial Code (*Gewerbeordnung, GewO*),[207] an employer must pay due regard to disability in their directives guiding the enterprise.

Public and private employers should conclude integration agreements with the representatives of disabled employees for enterprises and authorities with regard to working conditions and other issues of integration of severely disabled people.[208] There are special regulations in pension law, including a lower minimum age for severely disabled people to collect a state pension.[209]

Given that there is no general regulation of reasonable accommodation that covers all areas within the material scope of the Employment Equality Directive, including, among others, job applicants, the law as it stands does not seem to conform to EU law.

b) Practice and case law

A measure of accommodation is regarded as unreasonable for the employer in disability legislation if the financial burden is disproportionate, despite support from the Federal Labour Agency and the integration agencies, using funds from the equalisation levy.[210] There is only limited case law clarifying precise standards.[211]

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[201] See e.g. Section 49 SGB IX.
[202] On the definition of this, see section 2.1.1 above.
[203] Section 164.4 SGB IX.
[204] Section 164.5 SGB IX.
[205] Section 164.5 sentence 3 SGB IX.
[206] Section 208 SGB IX.
[207] Germany, Industrial Code (*Gewerbeordnung*, GewO), 22 February 1999.
[208] Section 166 SGB IX.
[209] Section 37 SGB VI.
[210] Sections 160.5, 185.3.2 SGB IX.
[211] Baden-Württemberg Higher Labour Court (*Landesarbeitsgericht, LAG*), Baden-Württemberg/Az: 2 Sa 11/05, 22 June 2005, with further references. The duty of accommodation in the workplace includes organisational matters such as a new distribution of work if the disabled person cannot work as much as before. It has been held that an accommodation is not reasonable if it poses a disproportionate burden on the employer despite state financial help. The burden is deemed to be disproportionate if the measure demands significant financial investment even though the work relationship will end soon because of a fixed-term

c) Definition of disability and non-discrimination protection

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

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

In Germany, failure to meet the duty of reasonable accommodation in employment for people with disabilities does count as direct discrimination.

The Federal Constitutional Court found that disabled people are not only discriminated against if there is unequal treatment, but also when a disadvantage results from the lack of appropriate measures to accommodate the needs of the disabled person.[212] This principle was developed in the context of integrated schooling but also applies as a constitutional principle to other spheres of life. The Federal Labour Court has clarified that a justification of direct discrimination on the ground of disability (Section 8 AGG, concerning genuine occupational requirements) is only possible if an employer meets their duty of reasonable accommodation derived from Section 241(2) BGB.[213] Meeting the duties to reasonable accommodation is a precondition for the possibility of the justification of discrimination. A failure to make reasonable accommodation for the needs of human beings with disabilities can thus lead to discrimination. The failure to meet the duty of reasonable accommodation duties could give rise to a right to compensation, e.g. under Section 15 AGG.

There is no special provision for the shift of the burden of proof in reasonable accommodation cases, apart from the general regulations providing for the shift of the burden of proof and case law on the matter.[214]

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

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

There are various areas where such rules exist. There are several dimensions to the question of integrated education. The general aim is not to separate disabled children from their social background and to educate them with children without disabilities through integrated schooling.[215]

In the leading case concerning integrated schooling, the German Federal Constitutional Court held that the decision to place a child in a special school for people with disabilities against the will of the parents constituted a breach of Article 3(3)(2) GG, if it was possible

contract or age limits. If the measure jeopardises employment or places an undue burden on other employees, the same holds true. It has been regarded as unreasonable to demand that an employer introduce a measure directed purely at the rehabilitation of an employee without a real possibility that this measure will lead in the foreseeable future to the reintegration of the person concerned, see Rhineland-Palatinate Higher Labour Court (*Landesarbeitsgericht, LAG)*, Rhineland-Palatinate/Az: 12 Sa 566/04. On the duty to create a procedural precondition for measures of accommodation in dealing with the works council, see BAG, Az: 9 AZR 481/01, 3 December 2002.

[212] BVerfGE 96, 288. This judgment is not limited to severely disabled people.

[213] BAG, 6 AZR 190/12, 19 December 2013, para. 50ff.

[214] There is specific case law easing the burden to provide evidence for a possible breach of the duty to provide reasonable accommodation of a disabled person, see Hessen Higher Labour Court (*Landesarbeitsgericht, AG*), Hessen/Az. 5 Sa 842/11, 21 March 2013, para 49; BAG, 9 AZR 230/04, 10 May 2005, para 42.

[215] Section 4.3 SGB IX. The school laws of the *Länder* contain detailed regulations on the matter.

for the child to attend an ordinary school without special pedagogical help, if his or her special needs could be fulfilled using existing means and other interests worthy of protection, especially of third parties, did not weigh against integrated schooling. A general ban on integrated schooling was regarded to be unconstitutional.[216] Higher education in universities should take account of the needs of people with disabilities.[217]

There are various provisions stipulating that reasonable accommodation should be made to allow disabled people to communicate with public authorities and in court. Severely disabled people experiencing a severe lack of mobility or orientation are granted free local and regional transport, including free transport for an escort on long-distance journeys (train),[218] and other aspects of mobility, to name just a few examples.[219]

There are particular regulations for disabled people in civil law relating to their special needs.[220]

A special regulation of general contract law allows for valid contracts with people with intellectual disabilities.[221]

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

According to the Equal Opportunities for Persons with Disabilities Act, organisations and social partners should conclude agreements (*Zielvereinbarungen*) that specify what kind of measures for reasonable accommodation are to be provided in certain areas of life, e.g. for accessibility to financial institutions. These agreements determine the relevant measures in general terms. This regulation is not limited to severely disabled people.[222]

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

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

The duty to provide reasonable accommodation in respect of other grounds covers the grounds of religion and age.

Specifically, public authorities are under a duty to take the special needs of religious communities and the individuals who form these communities into account because of the fundamental right to freedom of religion. If, for instance, a butcher who is a practicing Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to provide his customers, in accordance with their religious belief, the opportunity to consume the meat of animals that have been ritually slaughtered, the constitutionality of this activity

[216] See BVerfGE 96, 288.

[217] Germany, Framework Act for Higher Education, 19 January 1999: Section 2(4) (second sentence). The act is expected to be abrogated in the near future as are the corresponding regulations at the *Land* level (subject to reform).

[218] Sections 228-230 SGB IX.

[219] See Sections 7-11 BGG and the corresponding regulations in *Land* laws on disability, on a special regulation on mobility, e.g. Section 9 of the [Berlin] Law on the Promotion of Equality of People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung, LGBG Berlin*); on communication with public authorities and in court see also e.g. Section 17(2) SGB I; Section 165 SGB IX; Section 19(1) (second sentence) SGB X; Sections 186, 191a Courts Constitution Act (*Gerichtsverfassungsgesetz, GVG)*, 9 May 1975; Civil Procedure Code (*Zivilprozessordnung, ZPO*), 5 December 2005: Section 483; Section 66, 259(2) Code of Criminal Procedure (*Strafprozessordnung, StPO*), 7 April 1987; Section 22ff Law on Authorisation (*Beurkundungsgesetz, BeurkG*), 18 August 1969, on notarial instruments; Section 2233(2) BGB.

[220] Section 305(2)(2) BGB establishes, for example, the duty to pay due regard to the needs of disabled people when general terms and conditions are included in a contract; on other matters see Section 138(6) SGB IX.

[221] See Section 105a BGB, applying automatically to all persons having such disabilities.

[222] Section 5 BGG. This may concern a variety of accessibility issues – from buses to buildings.

must be examined in accordance with Article 2(1) in conjunction with Articles 4(1) and 4(2) GG, providing for freedom of religion, including its exercise. Section 4a(1) in conjunction with Section 4a(2) of the Animal Protection Act (*Tierschutzgesetz, TierSchG)* provides for the possibility that an exceptional permission for ritual slaughter may be granted.[223]

Employers must pay due consideration to the fundamental right to freedom of religion.[224] In previous case law, internationally much discussed, it has been held constitutional to prohibit a teacher in a state school from wearing a headscarf.[225] The German Federal Constitutional Court has abandoned this jurisprudence and has held that a general ban on headscarves for teachers at state schools is not compatible with the Constitution.[226] The same principle holds for belief.

Under German law on social security, there are stipulations providing for special means to accommodate the needs of older people. These include help in the household, adaptation of housing to the needs of older people, and support for inclusion in social and cultural life, etc.[227]

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[223] Germany, Animal Protection Act (*Tierschutzgesetz, TierSchG)* of 18 May 2006 (BGBl. I, 1206, 1313), last amended on 29 March 2017 (BGBl. I, 626). See e.g. BVerfG 1 BvR 1783/99, 15.1.2002. See also BAG, 2 AZR 636/09, 24 February 2011, where the court ruled that, even in cases of dismissals due to breach of the legitimate loyalty expectations of a church institution (employer), the continuity of employment could in individual cases be proved reasonable and therefore the dismissals would be ineffective, after balancing the competing interests of the self-perception of the Church on one hand and the employee's right to respect for their private and family life on the other. Section 241(2) BGB can play a role in this respect, without there being any clear patterns of application of this norm. A complaint by a schoolgirl requested dispensation from swimming lessons in a public school because of prohibitions stemming from her Muslim faith against showing her body's form to men. Although the school allows for the use of so-called burkinis, this option was not regarded as sufficient by the complainant. The complaint was struck down by the Federal German Constitutional Court. The Court argued that the complainant did not substantiate the claim that the use of the burkini was not sufficient to abide by religious rules in this respect.

[224] Cases include religious dress codes, e.g. Mala (Düsseldorf Higher Labour Court (*Landesarbeitsgericht, LAG*), 22.03.1984, Düsseldorf/14 Sa 1905/83, 22 March 1984), Sikh turban (Hamburg Labour Court (*Arbeitsgericht, AG*), 3 January 1996, Hamburg/19 Ca 141/95) or the head-scarf (BAG, 2 AZR 472/01, 10 October 2002; Dortmund Labour Court (*Arbeitsgericht, AG*), Dortmund/6 Ca 5736/02, 16 October 2003). The Berlin-Brandenburg Higher Labour Court regarded a rejection of an application in connection with the Muslim headscarf as discrimination, (Berlin-Brandenburg/Az.: 14 Sa 1038/16, 09.02.2017); also see: Osnabrück Administrative Court (*Verwaltungsgericht, VG*), Osnabrück/Az.: 3 A 24/16, 18 January 2017, on the withdrawal of a recruitment offer. The Federal Constitutional Court decided on a case where a trainee lawyer wanted to wear a headscarf during her training, BVerfG, 2 BvR 1333/17, 27 June 2017, and did not grant a temporary injunction on her behalf (for details see case law section below). On the legitimate ban of a headscarf for a nurse working in a hospital run by the Protestant Church, see: BAG, Az.: 5 AZR 611/12, 24 September 2014 and the reconsideration of the Hamm LAG, Az.: Sa 1724/14, 8 May 2015 (see for further examples the case law section 12.2 below). Other cases concern breaks for prayers (Hamm Higher Labour Court (*Landesarbeitsgericht, LAG*), Hamm/5 Sa 1782/01, 18 January 2002: balancing of interests in the case of break for prayers, no obligation if disruption of process of production. The impact of Court of Justice of the European Union (CJEU), C-157/15, *Achbita and Centrum voor ge*lijkheid van Kansen en voor racismebestrijding v. G4S Securesolutions NV, 14 March 2017, EU:C:2017:203 http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0157&lang1=en&type=TXT&ancre=, and Court of Justice of the European Union (CJEU), C-188/15, *Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA,* 14 March 2017, EU:C:2017:204 http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0188&lang1=en&type=TXT&ancre= is not entirely clear and the courts are seeking further guidance by the CJEU, cf. for example the preliminary reference of Hamburg Labour Court (*Arbeitsgericht, AG)*, Hamburg/8 Ca 123/18, 21 November 2018 (for details see case law section 12.2 below). For an example of a reference to this recent case law of the CJEU see Nürnberg Higher Labour Court (*Landesarbeitsgericht Nürnberg*), 27 March 2018 (for details see case law section 12.2 below).

[225] BVerfG, 2 BvR 1436/02, 24 September 2003; BVerwG, 2 C 45/03, 24 June 2004.

[226] BVerfG, 1 BvR 471/10 and 1 BvR 1181/10, 27 January 2015.

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

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

The AGG is not restricted to German nationals or residents. It applies to everyone within the German jurisdiction, including undocumented migrants.

The personal scope of the constitutional guarantee of equality is not limited to German citizens as it is a human right with universal application. Any person who is the target or is otherwise affected by an action of a public authority that is contrary to the guarantee of equality is protected. The main legal pillars of anti-discrimination law thus are applicable to migrants and refugees as well.

The regulations on the special protection of severely disabled people apply to people who are legally resident or employed in Germany.[228] Other special legislation only applies to German citizens and those of other qualified countries, especially EU countries.[229]

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

a) Protection against discrimination

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

In terms of protection, Section 7, in conjunction with Sections 3 and 6(1) AGG, protect employees, thus natural persons. The prohibition of discrimination against disabled people in employment applies only to natural persons.[230] In other areas of the law, depending on the circumstances, natural and legal persons can be protected: for example, Section 19(1) AGG applies to natural persons in contract law and Article 3 GG to legal persons, such as a religious community.

The constitutional guarantee of equality protects natural persons. Legal persons are within the scope of the norm to the extent allowed by the nature of that right, which is relevant for religious organisations.[231] It prohibits discrimination against legal persons on the ground of the ethnicity of their members, too. It is directly applicable to actions by public authorities and indirectly to actions by private actors through the interpretation of private law. Other prohibitions in public law apply to natural persons only, due to the nature of the matter concerned.[232]

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[228] Section 2(2) (second sentence) SGB IX.

[229] For example, under the terms of Section 7 Federal Civil Service Act, German nationality (or citizenship of another EU-member or EEA-contracting state or a state with which Germany or the EU has concluded an agreement on the recognition of respective professional qualifications) is a prerequisite for employment as a civil servant.

[230] For example, Section 164(2) SGB IX, referring to the AGG.

[231] Article 3 in conjunction with Article 19(3) GG. It is a matter of case-by-case scrutiny which kinds of legal persons are protected. See, for example, BVerfGE 111, 366 (372). Political parties are included, but not all associations pursuing the rights of their members.

[232] For example, the anti-discrimination clauses in the laws on the civil service or the Federal Personnel Representation Act, 15 March 1974.

b) Liability for discrimination

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

Under the AGG, both natural and legal persons can be held liable for violations of the prohibition of discrimination, Articles 7 and 19 AGG, pursuant to Articles 3, 6(2) and 19(1) AGG. Natural and legal persons may be liable under the prohibition of discrimination against disabled persons in employment (with reference to the AGG).[233] If law other than the AGG applies, for example contract or tort law, natural and legal persons can be liable depending on the circumstances. In public law, legal persons are also liable, for example, under Section 24 AGG.[234]

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

a) Protection against discrimination

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

The differentiated system of rules of non-discrimination applies to both the private and the public sector, albeit depending on the particular kind of rules. For example, the equality guarantee in the constitution applies directly to actions of public bodies (e.g. any legislative or administrative act from the provision of social services to police action, the public education system etc.), protecting thus individuals in a legal relation governed by public law and through indirect horizontal effect to private parties.[235] The AGG applies to private parties, Sections 2, 3, 6(1), 7(1), 19(1) AGG (including employment and general contract law on the provision of goods and services, including private education or housing) and, by extension, Section 24 AGG applies to public employment, including the judiciary and conscientious objectors.[236]

b) Liability for discrimination

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

As for protection against discrimination, there is a differentiated set of rules for the liability in both the private and public sectors. For example, the equality guarantee in the constitution applies directly to actions of public bodies (e.g. any legislative or administrative act from the provision of social services to police action, the public education system etc.) and through indirect horizontal effect to private parties which can thus both be held liable under this provision.[237] The AGG applies to private parties, Sections 2, 3, 6(2), 7(1), 19(1) (including employment and general contract law on the provision of goods and services, including private education or housing) and, by extension, Section 24 AGG applies to public employment, including the judiciary and conscientious objectors, making public employers liable for breaches of the prohibition of discrimination.[238]

[233] See Section 164(2) SGB IX.
[234] See Mahlmann, M. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz* (4th ed.), Baden-Baden, Nomos Verlag, § 24 para. 64ff; Federal Administrative Court (*Bundesverwaltungsgericht, BVerwG),* 30.10.2014, 2 C 3/13 - 2 C 11/13 et al.
[235] Consistent case law since BVerfG 7, 198.
[236] See Mahlmann, M. (2018), in: Däubler, W. and Bertzbach, M.(eds.), *Allgemeines Gleichbehandlungsgesetz* (4th ed), Baden-Baden, Nomos Verlag, § 24 para 21f.
[237] Consistent case law since BVerfG 7, 198.
[238] See Mahlmann, M. (2018), in: Däubler, W. and Bertzbach, M.(eds.), *Allgemeines Gleichbehandlungsgesetz* (4th ed), Baden-Baden, Nomos Verlag, § 24 para 64ff.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

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

In addition, public employment (civil service and other employees) is covered by the guarantee of equality,[239] the guarantee of equal access,[240] civil service laws (which exclusively concern civil servants),[241] prohibitions of discrimination in the law on the representation of public employees[242] and – with regard to disability – a special regulation prohibiting discrimination that applies to private employers, too.[243] Equal access to any kind of (self-)employment is guaranteed by freedom of profession, Article 12 GG.[244] For the public sector, there are additional duties, such as the early registration of vacancies to facilitate the employment of disabled people.[245] The prohibition of discrimination in the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) applies only to certain enterprises, in particular excluding under certain conditions enterprises based on a particular religious, philosophical or political ethos (*Tendenzbetriebe*).[246] The general principle of equal treatment of employees demanding equal treatment of employees in equal circumstances (developed in the case law before and independently of the AGG) applies in all matters of labour law, including collective agreements, although contentiously not to recruitment.[247]

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

In Germany, national legislation prohibits discrimination in the following areas: conditions for access to employment, self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds, in both private and public sectors, as described in the directives.

Section 2(1)(1) AGG closely follows the regulation of the directives in this respect, covering all these areas. Section 11 AGG contains a prohibition of discriminatory job advertisements.[248] Section 24 AGG provides for an application of the regulations of the

[239] Article 3 GG.
[240] Article 33(2) and 33(3) GG.
[241] On additional sexual orientation law on the *Land* level, see e.g. Article 1: Law on Article 10(2) of the Constitution of Berlin (*Gesetz zu Artikel 10 Absatz 2 der Verfassung von Berlin*). For the changing legal basis in this area see Annex 1 of this report.
[242] See Section 67(1) Federal Personnel Representation Act and the respective *Land*-level regulations.
[243] Section 164(2) SGB IX, now referring to the AGG.
[244] BVerfGE 7, 377: no differentiation between employed and self-employed.
[245] Section 165 SGB IX.
[246] Works councils are formed in all enterprises with more than five employees, excluding enterprises based on an ethos, see Section 118 BetrVG.
[247] See also the interpretation in Maschmann, F. (2018), in: Richardi, R. (ed.), *Betriebsverfassungsgesetz: Kommentar* (16th ed.), München, Beck Verlag, § 75 para. 8, arguing for the application of the principle to recruitment.
[248] See for an example Hessen Higher Labour Court (*Landesarbeitsgericht, LAG*), Hessen/7 Sa 851/7, 18 June 2018.

AGG that takes account of the specificities of the civil service. In addition, Section 9 of the Federal Civil Service Act (*Bundesbeamtengesetz, BBG*) repeats the prohibition of discrimination in access to the civil service. This prohibition is relevant for other areas of civil service law as well (Section 22(1) (first sentence) BBG). This prohibition of discrimination does not cover discrimination on the ground of age. This ground, however, is covered for civil service law by Section 24 AGG.

As indicated above, controversially, the general principle of equal treatment of employees in equal circumstances does not apply to recruitment.

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

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

The AGG covers employment and working conditions, including pay and dismissals, in Section 2(1)(2). The AGG contains a special regulation in Section 2(4), which provides that, for dismissals, only the existing general and particular regulations for dismissal are to be applied, most importantly the Protection against Dismissal Act.[249] As there are no prohibitions of discrimination in these norms, it seems unlikely to be possible to interpret these norms, due to their wording, in conformity with the directives. Therefore, this exception is not in accordance with European law.[250] However, the Federal Labour Court argued that a discriminatory dismissal may be contrary to social choice (*Sozialwidrigkeit*) and hence lead to the invalidity of the dismissal according to the Protection against Dismissal Act.[251] It held that such an interpretation of German law on protection against dismissal is in conformity with the directives. This line of argument has been confirmed in a decision holding that the AGG applies only to those rules on dismissal that are not covered by Section 2(4) AGG because special rules of dismissal are not applicable, e.g. in a probation period.[252]

Since 1 January 2018, following amendments to Social Code IX, the representatives of disabled persons (*Schwerbehindertenvertretungen*) must be included in the process before the dismissal of a severely disabled person.[253]

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

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

Section 2(1)(3) AGG closely follows the provisions of the directives. There is no explicit reference to vocational training outside employment relationships. Section 19(a) Social Code IV (*SGB IV*)[254] contains a prohibition on all grounds for benefits concerning access to

[249] See footnote 16.

[250] Accordingly, this regulation, which was created at the very end of the legislative process as part of political bargaining, has been widely criticised in jurisprudence, cf. Düwell, *jurisPR-ArbR* 28/2006 para. 7; Thüsing/Bauer/Schunder (Thüsing) NZA 2006, 777; Däubler, W. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allegemeines Gleichbehandlungsrecht: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 2, para. 288ff.

[251] Germany, BAG, 2 AZR 523/07, 6 November 2008; BAG, 2 AZR 676/08, 5 November 2009. On the concept of social choice (*Sozialauswahl*) see Section 1(3) Protection against Dismissal Act, which refers to a selection for dismissal on social grounds, like age, employability etc. to prevent dismissal of the most vulnerable.

[252] BAG, 6 AZR 190/12, 19 December 2013, para. 22.

[253] Section 178(2) (third sentence) SGB IX.

[254] Germany, Social Code IV (*Sozialgesetzbuch IV*, *SGB IV*), 12 November 2009.

all forms and levels of vocational guidance, vocational training, advanced vocational training and vocational retraining including practical work experience. In addition, Section 36(2) Social Code III (*SGB III*)[255] provides that the employment agency (*Agentur für Arbeit*) may only consider limitations imposed by employers for job and training applicants on the grounds of age (among other grounds like health or nationality), if they are indispensable for the kind of work in question. A consideration of race or ethnic origin, religion or belief, disability or sexual identity is possible, according to this norm, if this is permitted on the basis of the AGG. In addition, the constitutional guarantee of equality is applicable in public law and thus extends to social law.

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

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

Section 2(1)(4) AGG follows the provisions of the directives. Section 18 provides for the application of the regulation on labour law in the AGG in this area, including a right to membership of these organisations (Section 18(2) AGG). Section 24 AGG extends the provisions to public employment.

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

It is important to keep in mind for the following that the AGG applies in principle to all grounds. As far as general contract law is concerned, for the topics covered by sections 3.2.6 to 3.2.8 of this report, the AGG is fully applicable for discrimination on the grounds of race and ethnic origin (Section 19(1) and 19(2) AGG). For other grounds, this is only the case for certain qualified contracts (Section 19(1) AGG).

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

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

According to Section 2(1)(5) AGG, the AGG applies – for all grounds covered – in these areas. According to Section 2(2) (first sentence) of the AGG, Section 33c of Social Code I (*SGB I*)[256] and Section 19a of Social Code IV (*SGB IV*) are applicable. Given the scope of the Social Code, this provision is applicable to both social protection and social advantages. Section 33c of Social Code I (*SGB I*) prohibits discrimination on the grounds of race, ethnic origin and disability in relation to claiming social rights.

This provision of Section 33c of Social Code I (*SGB I*) is applicable to the whole Social Code, including social insurance, educational benefits, social compensation, benefits for families, housing allowances, support for children and adolescents, social welfare benefits and or participation by disabled people. The norm intends to implement Directive 2000/43/EC and adds the ground of disability. Section 19a Social Code IV (*SGB IV*) concerns vocational training, including vocational training in the framework of social protection. It covers all grounds of the directives.

[255] Germany, Social Code III (*Sozialgesetzbuch III, SGB III*), 24 March 1997.
[256] Germany, Social Code I (*Sozialgesetzbuch I, SGB I*), 11 December 1975.

a) Article 3(3) exception (Directive 2000/78)

In Germany, national law does not rely on the exception in Article 3(3) of the Employment Equality Directive in relation to religion or belief, age, disability and sexual orientation.

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

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

Section 2(1)(6) AGG covers social advantages.[257]

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

Social advantages are understood in a wide sense. Social welfare benefits (*Sozialhilfe*) are taken to be social advantages as well.[258] According to Section 2(2) (first sentence) of the AGG, Section 33c Social Code I (*SGB I*) and Section 19a Social Code IV (*SGB IV*) are applicable. Given the scope of the Social Code, this regulation is applicable to both social protection and social advantages. Section 33c Social Code I (*SGB I*) prohibits discrimination on the grounds of race, ethnic origin and disability in relation to claiming social rights.

The provision of Section 33c Social Code I (*SGB I*) is applicable to the whole Social Code, including social insurance, educational benefits, social compensation, benefits for families, housing allowances, support for children and adolescents, social welfare benefits and or participation by disabled people. The norm intends to implement Directive 2000/43/EC and adds the ground of disability. Section 19a Social Code IV (*SGB IV*) concerns vocational training and covers all grounds of the directives. The constitutional guarantee of equality is also applicable.

The exception in Article 3(3) Directive 2000/78 does not lead to an absence of any protection against discrimination given that Germany does not rely on it.[259] There are no explicit rules on harassment and instruction to discriminate in public law in this area, as the rules of the AGG are not applicable. However, depending on judicial interpretation, prohibition of harassment and instruction to discriminate may be derived from the existing norms.

As far as social advantages in the public service are concerned, the guarantee of equality with the scope already outlined applies. For example, it has been held,[260] that it is lawful in relation to employment benefits to treat married civil servants better than those living in a *Lebenspartnerschaft* (life partnership, registered partnership for homosexuals and lesbians) because of the special protection for marriage provided by the Basic Law.[261] Such

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[257] Cf. Eichenhofer, E. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz* (4th ed.), Baden-Baden, Nomos Verlag, § 2 para. 66.

[258] Cf. Eichenhofer, E. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz* (4th ed.), Baden-Baden, Nomos Verlag, § 2 para. 83.

[259] However, there is some case law on the question of what is covered by Article 3(3) of Directive 2000/78/EC, arising from the terms used in the English, French and German versions of the directive, especially regarding whether only payments (as in the English version) or other services as well are included. See Federal Social Security Court (*Bundessozialgericht, BSG*), B 4 RA 29/03, 29 January 2004 (left open); for narrow interpretation (only monetary payments) Hesse Regional Social Security Court *(Landessozialgericht, LSG)*, Hesse/L 6/7 KA 58/04 ER, 10 June 2005: continuing position as contractual doctor of public health insurance no benefit (*Leistung*) of social security. Survivors' pensions are exempt from the application of Directive 2000/78 by Article 3(3): Federal Social Security Court (*Bundessozialgericht, BSG*), B 4 RA 29/03 R, 29 January 2004; concurrent Hessen Social Security Court (*Sozialgericht, SG*), Hessen/L 12 RJ 12/04, 29 July 2004, compared to Düsseldorf Social Security Court (*Sozialgericht, SG*), Düsseldorf/S 27 RA 99/02, 23 October 2003; cf. Court of Justice (CJEU), C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen* , 1 April 2008, EU:C:2008:179 http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0267&lang1=en&type=TXT&ancre=.

[260] BVerwG 2 C 43.04, 26 January 2006, NJW 2006, 1828.

[261] Article 6 GG.

jurisdiction is contrary to the provision in the AGG.[262] The CJEU has clarified that it is a violation of the principle of non-discrimination (Articles 1 and 2 of Directive 2000/78/EC), if a surviving life partner, in contrast to a surviving spouse, has no right to receive a survivor's pension, if life partners and spouses are in a comparable position according to national law.[263]

Accordingly, the Federal Constitutional Court has held that both same-sex couples living in a life partnership and married spouses must be treated equally with regard to social benefits, overruling contradicting case law on this matter.[264] The German courts have followed this line of argument, as the decisions of the Federal Constitutional Court are binding.[265] Section 46(4) SGB VI extends the entitlement to state pensions to registered partners.

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

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

Section 2(1)(7) AGG covers education in relation to all grounds. It is clear that this norm applies to any form of education provided on the basis of a private contract (Section 19 AGG). There is no explicit extension by the AGG to education ruled by public law as there is in Section 24 AGG for civil servants. For state education (schools, universities, universities of applied sciences etc.), which forms the majority of education in Germany, the constitutional equality guarantee, which prohibits discrimination by its general equal treatment clause (Article 3(1) GG), and its specific prohibitions of discrimination (Article 3(3) GG), is thus central,[266] the former relevant for age and sexual orientation, the latter for race, ethnic origin, religion, belief and disability.

Education is mostly dealt with by the *Länder*. *Land* school laws on education contain special provisions against discrimination and set out the aims of the educational system with respect to values such as human dignity.[267] Private schools, possibly with a religious or philosophical ethos, have a right to equal treatment as regards state support.[268] There is an explicit prohibition in the Basic Law of discrimination based on income by private schools that function as a substitute for state schools.[269] Beyond this prohibition, the organisation responsible for the school has the right to select pupils freely, e.g. by faith, as long as pupils in the area are able to attend an alternative state school.[270] There are rules on reasonable accommodation for disabled children. All these rules on equal treatment in schools apply irrespective of nationality and thus to non-nationals, including migrants and refugees. Nevertheless, the underrepresentation of migrants in higher schooling and universities persists, which raises questions about the reasons, including possible unequal treatment or language skills.[271] Whether or not such patterns of underrepresentation are

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[262] Mahlmann, M. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz* (4th ed.), Baden-Baden, Nomos Verlag, § 24 para. 50.

[263] Court of Justice of the European Union (CJEU), C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, EU:C:2008:179, http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0267&lang1=en&type=TXT&ancre=.

[264] BVerfG, 1 BvR 1164/07, 7 July 2009.

[265] See, for example, Saxony Higher Administrative Court (*Oberverwaltungsgericht, OVG*), Saxony/2A665/10, 4 March 2011.

[266] Cf. Rudolf, B. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 6 para. 154.

[267] See e.g. Article 7(1) North Rhine-Westphalia Constitution (*Landesverfassung Nordrhein-Westfalen, VerfNW),* 28 June 1950 and Section 1(1) North Rhine-Westphalia School Law (*Schulgesetz Nordrhein-Westfalen, NRW – SchulG*), 15 February 2005: no discrimination on basis of economic status, origin or sex.

[268] BVerfGE 75, 40.

[269] Article 7(4) (third sentence) GG.

[270] Given that education in a private school is provided on the basis of a civil law contract, the possibility of justification of discrimination in the case of selection on the ground of religion is provided by Section 20(1)(4) AGG.

[271] Cf. Bildungsbericht, Bildung und Migration (2016), www.bildungsbericht.de/de/bildungsberichte-seit-

regarded as 'segregation' depends on the understanding of this concept. The definitions of this term vary. Racial segregation is (alongside Apartheid) prohibited in Article 3 CERD. State parties undertake to 'prevent, prohibit and eradicate all practices of this nature.' According to General Recommendation XIX on Article 3 of the Convention, partial segregation is also covered by the term.[272] However, a narrower definition guides ECRI.[273]

Article 1(c) of the Convention against Discrimination in Education 1960,[274] prohibits the establishing or maintaining of separate educational systems or institutions for persons or groups of persons, with the exception of schools established for coeducation, religious or linguistic reasons, and private schools (Article 2).

A legally or institutionally enshrined separation of the educational system according to race or ethnic origin does not exist in Germany. Any system of segregation in this sense establishing separate schools on the ground of race or ethnic origin in education would be prohibited under Article 3 GG as a form of direct or indirect discrimination in conformity with the case law of the ECtHR.[275]

There are special regulations for indigenous minorities in Germany,[276] which provide special protection of cultural identity, including the use of language in schools.

a) Pupils with disabilities

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

This does not mean that there are not particular legal issues to be solved. As already mentioned, with regard to education, there are several dimensions to the question of integrated education for children with disabilities, which varies among the *Länder* because of the federal structure of Germany. The general aim is not to separate disabled children from their social background (e.g. friends and peers) and to educate them with children

2006/bildungsbericht-2016, on the tendency towards segregation because schooling is based on the family's place of residence and the existence of areas with a high concentration of migrants, who sometimes do not have sufficient German language abilities, ibid., p. 185ff. The German Federal Anti-Discrimination Agency uses the term 'segregation' widely in the sense of separation into different social groups, cf. *Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages* (2013), p. 14 et passim. In this sense, it concludes that segregation exists in the educational system. Differing educational opportunities for people from a migrant background are in any case well documented, cf. Klose, A. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 10 for further details. For a differentiated assessment, including of continuing underrepresentation of migrants, among other social groups and the rising number of pupils with migrant background in the Gymnasium as the highest German school form (the number of Gymnasiums with more than 25 % of children with a migrant background has increased in 2018 to 36 %), Bildungsbericht 2018, p. 93, https://www.bildungsbericht.de/de/bildungsberichte-seit-2006/bildungsbericht-2018/bildung-in-deutschland-2018.

[272] General recommendation XIX on Article 3 of the Convention, (HRI/GEN/1/Rev. 9, (Vol. II), 'a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form or discrimination in which racial grounds are mixed with other grounds.'

[273] ECRI General Policy Recommendation No 7, On National Legislation to Combat Racism and Racial Discrimination, 2002/2017, Explanatory Memorandum, 16: 'Segregation is the act by which a (natural or legal) person separates other persons on the basis of one of the enumerated grounds without an objective and reasonable justification, in conformity with the proposed definition of discrimination. As a result, the voluntary act of separating oneself from other persons on the basis of one of the enumerated grounds does not constitute segregation.'

[274] Convention against Discrimination in Education 1960, Paris, 14 December 1960.

[275] See ECrtHR, Application no. 57325/00, 13 November 2007, *D.H. and others* v. *the Czech Republic*, para. 175ff, 198.

[276] See footnote 77 above and footnotes 382, 383 below.

without disabilities through integrated schooling.[277]

In the leading case concerning integrated schooling, the German Federal Constitutional Court held that the decision to place a child in a special school for people with disabilities against the will of the parents constituted a breach of Article 3(3) (second sentence) GG, if it was possible for the child to attend an ordinary school without special pedagogical help, if his or her special needs could be fulfilled using existing means and if other interests worthy of protection, especially of third parties, did not weigh against integrated schooling. A general ban on integrated schooling was regarded as unconstitutional.[278] Higher education in universities should take account of the needs of people with disabilities.[279]

b) Trends and patterns regarding Roma pupils

In Germany, there are no specific patterns existing in education regarding Roma pupils such as segregation.

This assessment depends, however, on the understanding of the term, which varies. Segregation in the sense of (often legally) enshrined patterns of exclusion of certain social groups – in contrast to individual and structural issues of discrimination – is not a feature of the German school system. Given the statements on the issue of segregation by the representatives of the Sinti and Roma community to this rapporteur, this seems to be the standpoint of the Sinti and Roma community as well.[280]

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

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

Section 19 AGG contains a prohibition of discrimination in contract law. The prohibition covers the grounds of race and ethnic origin, sex, religion, disability, age and sexual identity. Belief, although contained in the drafts, was removed from the provision because of last-minute political decisions arguing that the inclusion of belief might broaden the prohibition too much. Thus, in principle, the provision goes beyond what is demanded by Directive 2000/43/EC because it covers more grounds that just race and ethnic origin.

There are no special provisions in German law covering racial or ethnic discrimination in the provision of goods and services by public sector institutions. However, the constitutional

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[277] Section 4(3) SGB IX. The school laws of the *Länder* contain detailed regulations on the matter.
[278] See BVerfGE 96, 288.
[279] Germany, Framework Act of Higher Education, 19 January 1999: Section 2(4) (second sentence).
[280] There are some independent investigations on this matter, reporting that a high percentage of Sinti and Roma children do not attend school and are over-represented in remedial schools, that is schools designed for children with special needs. However, in the absence of reliable statistical data, these reports have to draw on interviews and other less comprehensive data (cf. e.g. ERRC/EUMAP Joint EU Monitoring and Advocacy Program / European Roma Rights Centre (2004) *Shadow Report Provided to the Committee on the Elimination of Discrimination Against Women, Commenting on the fifth periodic report of the Federal Republic of Germany* Submitted under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, Budapest, 09.01.04). There is the widespread perception – again including voices from the German Sinti and Roma community – that these kinds of studies do not convincingly establish any patterns of segregation (in the narrower sense), though discrimination against Sinti and Roma continues to be a problem, given some surveys on the experience of discrimination by Sinti and Roma or structures of prejudice. Strau, S. D. (ed.) (2011) Studie zur aktuellen Bildungssituation deutscher Sinti und Roma: Dokumentation und Forschungsbericht: Federal Anti-Discrimination Agency (2014), *Zwischen Gleichgültigkeit und Ablehnung - Bevölkerungseinstellungen gegenüber Sinti und Roma* (Between indifference and rejection - Population attitudes towards Sinti and Roma, available at: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Bevoelkerungseinstellungen_gegenueber_Sinti_und_Roma_20140829.html;jsessionid=5E9577EF246F7504031322D4400DA9A2.2_cid322?nn=4193516.
There has been very little case law on the matter in recent years (see the previous reports by this rapporteur to the European network of legal experts in the non-discrimination field).

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

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

There are laws that either allow public authorities to act against certain forms of discrimination in the private sector or require equal treatment of clients in specific market sectors where specific market conditions apply.

The Passenger Transport Act (*Personenbeförderungsgesetz, PBefG*)[281] requires that a company must be reliable in order to receive a licence and establishes the duty to provide services to anyone who abides by the transport regulations.[282] Telecommunications and postal service regulations require companies with a dominant market position to offer their services to everyone on the same conditions.[283] The Licensing Act (*Gaststättengesetz, GastG*)[284] makes authorisation for the establishment of a restaurant dependent on the provision of rooms that reasonably accommodate the needs of disabled people.[285] The licence itself can be denied in cases of discriminatory behaviour.[286] There is some case law in this area.[287]

In general, private law, a prohibition of discrimination can arise through the interpretation of the general provisions of private law in the light of the guarantee of equality and the guarantee of human dignity. However, despite some literature on the matter, the case law in this respect is limited.[288]

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[281] Germany, Passenger Transport Act (*Personenbeförderungsgesetz, PBefG)*, 8 August 1990.

[282] Germany, Passenger Transport Act, 8 August 1990, Section 22. Disabled people are consequently included.

[283] Section 2 Regulation on the Protection of Telecommunications Customers (*Telekommunikations-Kundenschutzverordnung, TKV*), 11 December 1997; Section 2 Postal Service Regulation *(Postdienstleistungsverordnung, PDLV),* 21 August 2001. Furthermore, Section 1(3)(4) Universal Postal Service Regulation *(Post- Universaldienstleistungsverordnung, PUDLV)*, 15 December 1999, excludes from delivery postal items with racist statements written on their envelopes.

[284] Germany, Eating and Drinking Establishments Act (*Gaststättengesetz, GastG*), 20 November 1998.

[285] Section 4(1)(2a) Eating and Drinking Establishments Act. This provision is applicable in some of the *Länder*, e.g. Nordrhein-Westfalen or Bayern. Others have enacted their own Eating and Drinking Establishments Acts. Bremen's act contains a regulation on barrier free access, Section 3.3 Bremen Eating and Drinking Establishments Act (*Bremisches Gaststättengesetz, BremGastG*), 24 February 2009. Regional building laws contain such norms, too. Some Länder have in addition made denial of access to or discriminatory treatment in restaurants etc. a misdemeanour, cf. Section 12.1 Nr. 15 Bremen Eating and Drinking Establishments Act (*Bremisches Gaststättengesetz, BremGastG*), (ethnic origin, disability, sexual identity, gender identity, religion, belief); similarly, Section 11.1 Nr. 14 Niedersachsen Eating and Drinking Establishments Act (*Niedersächsisches Gaststättengesetz, NGastG*), 10 November 2011 (ethnic origin, religion for 'discotheques').

[286] Cf. Klose, A. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 6 para. 177ff.

[287] Schleswig-Holstein Administrative Court (*Verwaltungsgericht, VG*), 27 September 2000, Schleswig/Holstein/12 B 81/00: no denial of licence for restaurant on basis of political belief (Neo-Nazi) if no crime committed; for further case law, see Klose, A. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 6 para. 177ff.

[288] Examples from case law are rare and not of recent date: The practice by a taxi control centre of offering 'German taxi drivers' was regarded as a violation of the guarantee of equality which was held to apply indirectly to the legal relationship between the taxi driver and the taxi control centre, making joint decision in this respect null and void, see Düsseldorf Higher Regional Court (*Oberlandesgericht, OLG*), Düsseldorf/14 U 238/98, 28 May 1999; Karlsruhe Regional Court (*Landgericht, LG*), Karlsruhe/2 O 243/00, 11 August 2000: Violation of Section 826 BGB through the exclusion of a gay singing club by an association of such clubs; the termination of a contract with the executive because of ethnic origin is an offence against good morals and consequently null and void, Frankfurt Regional Court (*Landgericht, LG*), Frankfurt/13 O 78/00, 7

Insofar as financial services are provided on the basis of private contract, the general rules of the AGG apply. Section 19(1)(2) AGG extends the prohibition of discrimination to private insurance. The grounds covered are race and ethnic origin, sex, religion, disability, age and sexual identity.

Discrimination on the ground of race or ethnic origin cannot be justified. With regard to unequal treatment on the ground of religion, disability, age or sexual orientation, Section 20(2)(2) AGG provides that a difference in treatment on the ground of religion, disability, age or sexual identity is only admissible if it is based on acknowledged principles of calculations adequate to the risks, especially on actuarial evaluations of risks based on statistical surveys.

a) Distinction between goods and services available publicly or privately

In Germany, national law distinguishes between goods and services that are available to the public (e.g. in shops, restaurants, banks) and those that are only available privately (e.g. limited to members of a private association).

The prohibition of discrimination on the ground of race and ethnic origin extends to all legal transactions available to the public (Section 19(2) AGG). The interpretation of the term 'available to the public' is contentious in legal doctrine and not ultimately settled in case law.

The most convincing interpretation, which is in line with EU law on this matter,[289] is one that regards any good or service that is offered (including an *invitatio ad offerendum*) to an unlimited group of people by any means as 'available to the public'.[290]

The prohibition on the other grounds extends to all legal transactions that are typically concluded in a multitude of cases under comparable conditions without regard to the person, bulk business (*Massengeschäfte*), or to legal transactions where the characteristics of the person have only subordinate importance (Section 19(1)(1) AGG).[291] Furthermore, the prohibition of discrimination extends to private insurance (Section 19(1)(2) AGG).

The prohibition of discrimination does not apply to legal relations of a personal nature or if there is a special relationship of trust between the parties concerned or their relatives (Section 19(5) (first sentence) AGG). As recital 4 of Directive 2000/43/EC underlines, and as it follows from European fundamental rights, the protection of the private sphere is a (fundamental and important) aspect of European law. However, as Directive 2000/43/EC contains no explicit exception in this respect (unlike Article 3(1) of Directive 2004/113/EC), it is questionable whether the exception in the AGG is in accordance with the legal regime of EU law pertaining to race and ethnic origin, bearing in mind that any intrusion into the private sphere can be avoided by the party concerned by not making the goods and services in question available to the public, and thus rendering the AGG inapplicable.[292] The regulation of the AGG is thus, in the view of the author of this report, contrary to EU law.

March 2001. Extraordinary termination of contract, Section 626 BGB void if severe disability has not been duly considered, Brandenburg Higher Labour Court (*Landesarbeitsgericht, LAG*), Brandenburg/7 Sa 385/02, 19 February 2003.

289 Cf. Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 3 para. 89.

290 Cf. Armbrüster, C. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 7 para. 75ff; explanatory report, *Bundestagsdrucksache* 16/1780 p. 32.

291 Cf. Federal Court (*Bundesgerichtshof, BGH*), V ZR 115/11, doubting applicability to hotels.

292 For the reconcilability of Sections 19.5.1 and 19.5.2 AGG with Directive 2000/43/EC, cf. e.g. Armbrüster, C. (2007), in Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 7 para. 84ff.

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

In Germany, national legislation prohibits discrimination in the area of housing[293] as formulated in the Racial Equality Directive.

As stated above these rules are applicable to non-nationals, including migrants and refugees.

Although the AGG applies to housing, unequal treatment is nevertheless permissible on all grounds if it serves to create and maintain stable social relations regarding inhabitants, and balanced patterns of settlement and economic, social and cultural relations (Section 19(3) AGG). According to the explanatory report, this clause should not be interpreted as justifying the under-representation of any racial or ethnic minority.[294] This question has practical importance for various groups of residents from migrant backgrounds, given the residential structures in some cities where people from such backgrounds find housing predominantly in some areas, but not others. It is of less relevance for Roma, as comparable housing patterns in their case do not exist. Some measures will be justifiable as positive action insofar as they increase the presence of some minorities. In other cases, possible indirect discrimination on grounds of race and ethnic origin because of the application of certain socio-economic parameters might be justified by the objective reason of creating a socially balanced structure of inhabitants, if these measures are proportionate. Given that there is no explicit exception or possibility of justification of such unequal treatment under Directive 2000/43/EC beyond that, the reconcilability of the clause with European law depends on the question of whether the interpretation of the clause is limited to this framework.[295] A recent decision confirmed the interpretation that the clause permits positive action, intended to balance the social mix but not discrimination on the ground of race or ethnic origin.[296]

As mentioned above, the prohibition of discrimination in contract law does not apply to legal relations of a personal nature or if there is a special relationship of trust between the parties concerned or their relatives (Section 19(5) (first sentence) AGG).

In the case of housing this is supposed to be the case if the parties or their relatives live at the same premises (Section 19(5) (second sentence) AGG). This raises the same issues as discussed under section 3.2.9 of this report, as there is no explicit exception to this extent in the directive. The reconcilability of this clause depends on the interpretation of Directive 2000/43/EC and the legal reach of considerations of privacy (see section 3.2.9 above). There is no case law clarifying these issues.

The principle of non-discrimination is not supposed to apply in principle (although exceptions are supposed to be possible), if a landlord does not let more than 50 dwellings, as in this case a *Massengeschäft* is not assumed to exist (Section 19(5) (third sentence) AGG).

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[293] Cf. background information: Müller, A. (2015), *Expertise "Diskriminierung auf dem Wohnungsmarkt". Strategien zum Nachweis rassistischer Benachteiligungen*, Antidiskiminierungsstelle des Bundes, https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Wohnungsmarkt_20150615.pdf?__blob=publicationFile, on cases of discrimination based on race and ethnic origin in the area of housing and above, footnote 127.

[294] Bundestag, *Bundestagsdrucksache* 16/1780 p. 42.

[295] Arguing for permissibility on the ground of a teleological reduction of the regulation of the Directive 2000/43/EC as the prevention of ghettoization is not against the purpose of the directive, see Armbrüster, C., in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 7 para. 109ff; for the impermissibility of exclusive quotas but the permissibility of supporting quotas implying maximum representation of certain minorities, see Klose, A. and Braunroth, A. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Glechbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 19 para. 54ff.

[296] Hamburg-Barmbek Labour Court (*Amtssgericht,* AG), Hamburg-Barmbek/811b C 273/15, 3 February 2017: The landlord had disregarded applicants with 'foreign sounding' names.

There is a special clause enabling registered partners (*Lebenspartner*) to succeed in rental contracts after their partner's death.[297]

If a public body provides housing, it is bound by the guarantee of equality. Support for people with disabilities is granted for finding, modifying, equipping and preserving housing adequate for their special needs (Section 77(1) (second sentence) Social Code IX (*SGB IX*)).

Further provisions provide for special means to accommodate the needs of older people, including adaptation of housing to their needs (Sections 70 and 71(2)(2) Social Code XII (*SGB XII*)).

a) Trends and patterns regarding housing segregation for Roma

In Germany, there are no patterns of housing segregation and discrimination against the Roma.

Nevertheless, individual discrimination may occur. There is no case law on this matter.

[297] Section 563(1)(2) BGB, mirroring the same right of married couples, Section 563(1) BGB.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

Section 8(1) AGG provides that unequal treatment that is based on a characteristic shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate, and the requirement is proportionate, following closely the wording of the directives.[298]

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

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

General framework

In German law, an elaborate system of justifications exists for religious communities – an area of considerable social, cultural and political importance, as the Christian churches and their dependent organisations are among the biggest employers in Germany.[299] The

[298] The head scarf issue is at its core not conceptualised by the Federal Constitutional Court as a matter relating to unequal treatment of religions, but instead as relating to possible limits on the freedom of religion, see Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), 2 BvR 1436/02, 24 September 2003, para. 32 et passim. Even the yardstick for the guarantee of equality of Article 33(3) GG is the compatibility of a regulation with freedom of religion, BVerfG, 2 BvR 1436/02, 24 September 2003, para. 39. However, the Court emphasises that any prohibition of religious symbols must respect the strictly interpreted equality of religions, BVerfG, 2 BvR 1436/02, 24 September 2003, para. 43, 71. The Federal Administrative Court confirmed this principle of equal treatment in its second headscarf decision, Federal Administrative Court (*Bundesverwaltungsgericht, BVerwG*), 2 C 45/03, 24 June 2004 para. 35. On the general legal framework cf. Kunig, P. and Mager, U. (2006), in: Mahlmann, M. and Rottleuthner, H. (eds.), *Ein neuer Kampf der Religionen?*, Berlin, Duncker & Humblot Verlag, p. 161ff; p. 185ff. The neutrality of the state as a fundamental principle is also reinforced by the Hesse Civil Service Act (*Hessisches Beamtengesetz, HBG*), 27 May 2013, Section 45 (entry into force on 1 March 2014) prohibits the act of wearing symbols that violate the neutrality of the state. (In the earlier version of the Hesse Civil Service Act (11 January 1989), the neutrality of the state was discussed in Section 68.) In this context, the Hesse Land Government prohibited the wearing of the burqa in the public services. The case arose when a public employee announced they would return to work wearing a burqa after a period of leave. The decision was considered unsurprising given the established legal framework in Hesse. There is a broad consensus that the burqa does not constitute suitable dress in the public services, not least because of functional necessities, e.g. in the context of contact with those seeking the public services provided.
The Federal German Constitutional Court ruled that a general ban on such a religious symbol like the headscarf was not reconcilable with the fundamental right to freedom of religion, Article 4, and the equality guarantee of the Basic Law, Article 3. See Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG)*, 1 BvR 471/10, 27 January 2015. Cf. Mahlmann, M. (2015), 'Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Head Scarf Decision', 16 *German Law Journal*, p. 887ff. The Federal German Constitutional Court confirmed this jurisprudence in a decision on the permissibility of wearing an Islamic headscarf by a kindergarten teacher employed by a public authority, cf. Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG)*, 1 BvR 354/11, 18 October 2016. A complaint by a schoolgirl requested dispensation from swimming lessons in a public school because of prescriptions stemming from her Muslim faith against showing her body's form to men. Although the school allows for the use of burkinis, this option was not regarded as sufficient by the complainant. The complaint was struck down by the Federal German Constitutional Court. The Court argued that the complainant did not substantiate the claim that the use of the burkini was not sufficient to abide by religious rules in this respect. A lower court held that the prohibition on wearing a headscarf for a legal trainee in the public justice system is not legal in light of freedom of religion, Augsburg Administrative Court (*Verwaltungsgericht, VG*), Augsburg/Au 2 K 15.457, 30 June 2016. A higher court did not follow this reasoning, see Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof, BayVGH*), 7 September 2018, 3 BV 16.2040 (for details see case law section 12.2 below).

[299] Religious communities are understood as associations of at least two people based on a consensus of faith

question of the conformity of the exception in discrimination law cannot be answered without a view on this legal framework. The legal basis for it is the constitutional provisions on the status of religious communities: the Constitution separates religion and state and establishes the principle of the neutrality of the state. This principle is not explicitly stated but implied by various constitutional provisions on freedom of religion and the legal status of churches. It has been interpreted in an 'open' fashion. This concept of 'open' neutrality was formulated by the Federal Constitutional Court and means that, to a certain degree, religious faiths can play a role in public life, subject to strict equal treatment of all religions. Article 140 GG incorporates several articles of the Weimar Constitution,[300] namely Articles 136, 137, 138, 139 and 141. Articles 136 and 137 are relevant in this respect: Article 136(1) provides a regulation similar to Article 33(3) GG, establishing the same civic duties and rights irrespective of religion and is thus practically superseded by this provision and the equality guarantee.

Article 137 of the Weimar Constitution is of particular importance. Article 137(1) abolished any 'state church'. This entails the separation of the secular and religious spheres and creates a basis for the autonomy of churches and other religious communities.

Article 137(3) of the Weimar Constitution forms the legal basis for this autonomy from the state. A number of landmark decisions by the Federal Constitutional Court have elaborated the nature of this autonomy.[301] The religious community is autonomous in organisation and administration. This is not only limited to the internal organisation of churches but extends to all institutions related to the religious community, regardless of their legal form. The only precondition is a substantial relationship with the religious mission of the religious community. Whether such a relationship exists is not to be determined by state institutions, but most importantly by the courts. It is solely up to the religious community to determine the scope and limit of its religious mission. For example, for Christian churches it is accepted that, due to the principle of charity, all charitable activities (such as running kindergartens, hospitals, etc.) are encompassed by the religious mission of the Christian faith. Acts concerning the internal workings of a church are not acts by public authorities and thus not regulated by public law.

Given this autonomy, provisions of law do not apply to religious communities without qualification. For example, according to the Federal Constitutional Court, the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) is not applicable to hospitals as employers if their operation is part of the religious mission of a religious community.[302] The Works Constitution Act contains a general provision in this respect, which exempts from its scope all organisations that are of a directly or predominantly religious nature, among others.[303] Another provision in the law directly exempts religious communities.[304]

According to Article 140 GG and Article 137(3) of the Weimar Constitution, the autonomy of a religious community is limited by the laws applicable to everyone. This provision has been narrowly interpreted by the Federal Constitutional Court. These laws are understood as laws that have the same meaning for a religious community as for everyone else. For example, given the special mission of churches, labour laws do not have the same meaning

aiming at least partly to manifest this faith.

300 Germany, the Constitution of the German Reich (*Die Verfassung des Deutschen Reichs*), 11 August 1919, usually known as the Weimar Constitution (*Weimarer Verfassung*).

301 BVerfGE 46, 73 (Application of the Works Constitution Act to a Catholic hospital); BVerfGE 57, 220 (Access of unions to religious institutions); 70, 138 (Dismissal on the basis of a breach of the duty of loyalty in religious institutions). Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), 2 BvR 661/12, 20 October 2014 (see section 12.2 on case law below).

302 Federal Labour Court (*Bundesarbeitsgericht, BAG*), 5 AZR 611/12, 24 September 2014. This special legal position is applicable to institutions (like hospitals) that yield financial profits. It is an open question whether the situation would change if the material gains become a central or even preponderant motive of a religious organisation in running such an institution.

303 Section 118(1) Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), 25 September 2001. This provision applies if the character of the organisations justifies the exemption.

304 Section 118(2) Works Constitution Act, 25 September 2001.

for churches as for everyone else. The Federal Constitutional Court argued that these laws cannot therefore limit the autonomy of churches, without paying due regard to their special status when interpreting them.

This special legal position is of considerable practical importance. For example, religious communities are not generally exempted from legislation on protection against dismissal. The Federal Constitutional Court held that churches are free to choose the legal form by which they regulate their affairs.[305] If, however, they exercise their private autonomy, they are in principle regulated by general labour law.[306]

The special position of the church has, however, to be considered in this application. For example, a church can expect employees to respect special duties of loyalty as determined by the church itself. As mentioned above, churches are free to determine the precise content of these duties of loyalty. It is dependent on the internal structure of the church which authority can make this type of decision.

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

However, the Federal Constitutional Court set important limits on this regulatory autonomy of the churches. It does not allow arbitrariness, the violation of bona fide principles and the *ordre public*, including the application of fundamental rights.[307]

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

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

Section 9 AGG contains an exception for religion mirroring this general legal framework. A difference in treatment on the grounds of the religion or belief of the employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations that have undertaken conjointly to practise a religion or belief, will not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, with regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination (Section 9(1) (first alternative) AGG) or by the nature of the particular activity (Section 9(1) (second alternative) AGG). The prohibition of different treatment on the grounds of religion or belief must be without prejudice to the right of the religious community referred to under Section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken conjointly to practise a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation (Section 9(2) AGG).

This general legal regime is, in principle, in accordance with the regime of exceptions in Article 4(2) and (also relevant) Article 4(1) of Directive 2000/78/EC.[308] However, there are problems with regard to the details of the regulations. The AGG regulation is problematic in this respect. Section 9(1) AGG refers to the self-understanding or ethos (*Selbstverständnis*) or the nature of the particular activity, whereas Directive 2000/78/EC combines both. The requirement must be justified through a test of proportionality implied

[305] BVerfGE 70, 138, 164.
[306] BVerfGE 70, 138, 164.
[307] BVerfGE 70, 138, 168.
[308] On the complicated and unclear structure of the regime of exceptions on the grounds of religion and belief in Directive 2000/78/EC, cf. Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht*, Baden-Baden, Nomos Verlag, § 3, para. 110ff. Differentiation based on religious motives, e.g. with regard to sexual orientation, must be justified according to Article 4(1) Directive 2000/78/EC, not 4(2), as they are not differentiation on the ground of religion, but on the ground of sexual orientation.

in Article 4(2) Directive 2000/78/EC with regard to both the self-understanding and the kind of work concerned.[309]

A regulation such as Section 9(1) AGG, which does not appear necessarily to differentiate between kinds of work therefore does not seem to be in accordance with European law- an analysis confirmed by the CJEU, *Egenberger.*[310] It should be noted, however, that the Federal Constitutional Court accepted as constitutional that it is up to religious communities to determine to which kind of work their specific requirements apply, including the possibility that all requirements apply fully to all kinds of work.[311] Section 9(1) AGG refers only to justified (*gerechtfertigt*) not to legitimate and justified requirements, like the directive, although this might not lead to any difference in judicial interpretation.

After a preliminary reference of the Federal Labour Court to the CJEU, the CJEU circumscribed in *Egenberger* the possibilities of religious communities and affiliated organisations more narrowly than so far accepted in German constitutional law, demanding consideration of the kind of work concerned when the proportionality of the measure is assessed.[312] It is therefore argued that the CJEU acted *ultra vires* handing down the *Egenberger* decision. The case concerns an employer (defendant) who is affiliated with the Protestant Church in Germany and bound by the internal regulations on employment of the Protestant Church in Germany. The defendant had specified a Protestant confession as a hiring criterion for a job vacancy for a fixed-term contract. An applicant without religious affiliation, who had not been invited for a job interview regarding the advertised vacancy, consequently claimed financial compensation based on a violation of the principle of non-discrimination.

The Federal Labour Court has implemented this decision of the CJEU holding that Section 9(1) (first alternative) AGG is inapplicable because of a violation of EU law and that Section 9(2) (second alternative) has to be interpreted according to EU Law. Consequently, unequal treatment on the ground of religion is only permissible if religion constitutes, according to the nature of the professional activity or the circumstances of its exercise, an

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[309] BAG, 2 AZR 579/12, 25 April 2013: para. 46 has left it open whether Article 9 AGG is in breach of EU law or not.

[310] Court of Justice of the European Union (CJEU), C-414/16, *Egenberger v Evangelisches Werk für Diaonie und Entwicklung e.V.*, 17 April 2018, EU:C:2018:257.

[311] Cf. BVerfGE 70, 138, 162ff. It is a matter of controversial debate, whether this regime is in accordance with Directive 2000/78/EC and other regulations of EU law on the status of religious communities, including the (non-binding) 11th Declaration on the status of churches and non-confessional organisations annexed to the Treaty of Amsterdam and the corresponding regulation in Article 17 of the Treaty on the functioning of the European Union as amended by the Treaty of Lisbon, cf. for further details Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 3 para. 110ff. One case, Hamburg Labour Court (*Arbeitsgericht, AG*), Hamburg/20 Ca 105/07, 4 December 2007, has modified this approach, differentiating as to the kind of work concerned, concluding that under EU law it is not a justified requirement that for work which does not belong to the core area of the activity of a religious community only members of that religious community are employed. This decision was overturned by Hamburg Higher Labour Court (*Landesarbeitsgericht, LAG*), Hamburg/3 Sa 15/08, 29 October 2008. The reversal was confirmed by the BAG, 8 AZR 466/09, 19 August 2010.

[312] See Federal Labour Court (*Bundesarbeitsgericht, BAG*), 17 March 2016 – 8 AZR 501/14 (A) on the preliminary reference. The opinion of Advocate General Tanchev, 9 November 2017, Case C-414/16 (Egenberger) on this matter took already a more restrictive interpretation of the autonomy of religious communities in this respect. The decision circumscribed the autonomy of religious communities more narrowly than before accepted in German law: Court of Justice of the European Union (CJEU), C-414/16, *Egenberger v. Evangelisches Werk für Diaonie und Entwicklung e.V.*, 17 April 2018, EU:C:2018:257, http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0414&lang1=en&type=TXT&ancre=, para 69: 'Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.' These principles were confirmed by Court of Justice of the European Union (CJEU), C-68/17, *IR vs. JQ*, 11 September 2018, EU:C:2018:696, http://curia.europa.eu/juris/celex.jsf?celex=62017CJ0068&lang1=en&type=TXT&ancre=.

objective, legitimate and justified professional requirement in the light of the ethos of the religious community or institution.[313]

Another decision of the CJEU is relevant in this context, clarifying the normative parameters for dismissing an employee of an institution affiliated to the Catholic Church because of him remarrying contrary to Catholic religious prescriptions. The CJEU underlined that justified occupational requirements based on duties of loyalty depend on the specific professional duties of the employee, which have to be considered when answering the question whether such occupational requirements are proportional or not.[314] This reduces the freedom of a religious organisation to determine the content of such duties of loyalty on the basis of their ethos alone.

These developments have the potential to lead to significant changes in the German legal system regulating the justification of unequal treatment of persons by religious organisations on the ground of religion, challenging deeply-embedded constitutional principles that have been described above.

There are various unresolved problems in this area. For example, courts have ruled that an employee leaving a Christian church is a reason for terminating an employment contract, because the special duties and obligations of loyalty have been violated.[315]

As in German labour law, people who hold a religious office (e.g. priests) are regularly not regarded as employees and so the AGG does not apply to them. Although professional requirements in this core area of the activities of the religious community will be justifiable under Articles 4(1) and 4(2) Directive 2000/78/EC, the directive does not contain an exception in this respect.

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

In Germany, there is case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination.

A pertinent issue is an employee's homosexuality, which, if openly manifested, is interpreted by some religious organisations as a breach of such duties of loyalty. There is contesting case law on this matter. There is no recent case law clarifying these questions, not least because the major Christian churches have liberalised their internal rules and practice in this respect.[316] Given what has been said above, a practice that does not

[313] Federal Labour Court (*Bundesarbeitsgericht, BAG*), 25 October 2018, 8 AZR 501/14 (for details see case-law section 12.2 below). This decision overturned previous case law as outlined in footnote 312. above. It has to be seen how the Federal German Constitutional Court reacts to these developments.

[314] CJEU C-68/17, *IR v. JQ*, 11 September 2018, EU:C:2018:696, para. 61, holding that 'that a difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions according to the faith or lack of faith of those employees is consistent with that directive only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and is consistent with the principle of proportionality'. Court of Justice of the European Union (CJEU), C-68/17, *IR v. JQ*, 11 September 2018. http://curia.europa.eu/juris/celex.jsf?celex=62017CJ0068&lang1=en&type=TXT&ancre=.

[315] Cf. e.g. Rhineland-Palatinate Higher Labour Court (*Landesarbeitsgericht, LAG*), Rhineland-Palatinate/7 Sa 250/08, 2 July 2008: no discrimination if employee in a nursing home which is attached to a church is dismissed because the employee leaves the church, as this is justified by breach of duty of loyalty (parties settled at next instance, Germany, BAG, 2 AZR 516/09, 21 December 2010); BAG, 25.4.2013, 2 AZR 579/12, 25 April 2013, confirming that leaving a church forms a sufficient reason for the dismissal of an educational social worker, employed for social work without religious content with children in a state-financed institution run by a Catholic charity.

[316] On this matter, with reference to some case law, see Wedde, P. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 9 para 58. Cf. Baden-Württemberg Regional Labour Court (*Landesarbeitsgericht, LAG*), Baden-Württemberg/11 Sa 39/93, 24 June 1993, NZA 1994, 416 (homosexuality not sufficient reason for refusal to

differentiate between spheres of work, raises issues of proper implementation.

– Religious institutions affecting employment in state-funded entities

In Germany, religious institutions are permitted to select people (on the basis of their religion) to be hired or to be dismissed from a job when that job is in a state entity, or in an entity financed by the state.

According to Article 7(3) (second sentence) GG, religious instruction in state schools is, with the exception of non-denominational schools, organised in harmony with the principles of religious communities. This creates no directional authority for religious communities but implies various modes of influence, including agreement as to the appointment of teachers teaching the particular religion. The details are regulated in *Land* school laws or special agreements with the religious communities.

There are some equivalent rules regarding chairs in theology in state universities. Apart from this, on the basis of special contractual agreements (concordats) with the Holy See, the consent of the Catholic Church is needed in some *Länder* (mainly Bavaria) for the appointment of chairs of subjects other than theology (philosophy, history, pedagogy). In practice, these chairs are not necessarily limited to Catholic applicants, as a Protestant applicant has been appointed to one of these chairs with the consent of the Catholic Church.[317] The Catholic Church enjoys a veto in relation to the appointment but not the exercise of the professorship (e.g. the actual teaching content), which has no *missio canonica*.

In 1980, the Constitutional Court of Bavaria decided that these regulations do not violate constitutional norms, among them the neutrality of the state. The court argued that this form of cooperation with the church is necessary, in order to achieve the educational goals (*Bildungsziele*) in state schools laid down in Sections 131 and 135 of the Bavarian Constitution (among others the reverence for God, respect for religious convictions and human dignity, as well as an education according to the principles of the Christian faith).

The court held that, in order to be able to educate according to the principles of the Christian faith, it is necessary to provide corresponding course options at university level for future teachers.[318]

However, the question of the legitimacy of these chairs continues to be highly contentious. While proponents mainly follow the reasoning of the Bavarian Constitutional Court, arguing that as long as there is a need for teachers able to teach in accordance with the principles of the Christian faith these agreements are legitimate,[319] opponents criticise breaches of the constitutional principles of neutrality and separation of church and state, the constitutional guarantee of equal access to public employment irrespective of religious faith and the constitutional freedom of sciences, as well as of Directive 2000/78/EC and of the AGG.[320]

admit applicant for education as carer for disabled persons); Stuttgart Labour Court (*Arbeitsgericht, AG*) Stuttgart/14 Ca 1585/09, 28 April 2010, NJOZ 2011, 1309 (registered partnership justified reason not to employ applicant as head of Catholic kindergarten).

317 Cf. Tagesspiegel, 15 May 2012.

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

319 E.g. Unruh, P. (2018), in: Huber, P. M. and Voßkuhle, A. (eds.) in: *Mangoldt/Klein/Starck, Kommentar zum Grundgesetz: GG* III (7th ed.), Franz Vahlen Verlag, München, Article 136 WRV, para. 25-28 for philosophy and pedagogy but not history; Ehlers, D. (2018), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (8th ed.), München, Beck Verlag, Art. 140; 136 WRV, para. 3, both with further references to the extensive discussion.

320 Jeand'Heur, B. and Korioth. S. (2000), *Grundzüge des Staatskirchenrechts*, Stuttgart, Boorberg Verlag, para. 338ff; Morlok, M. (2018), in: Dreier, H. (ed.), *Grundgesetz Kommentar: GG III* (3rd ed.), Tübingen, Mohr Siebeck Verlag, Art. 136 WRV para. 17; Czermak, G. and Hilgendorf, E. (2018), *Religions- und Weltanschauungsrecht: Eine Einführung* (2nd ed.), Berlin/Heidelberg, Springer Verlag, para. 454, with further references.

In a relevant case, the actions of several applicants for an appointment to a professorship of philosophy for which the Catholic Church exercises a right of veto, were dismissed on the basis of procedural issues. The Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof, BayVerwGH*) stated, in addition, that given the non-discriminatory practice of the university not considering the religion of the applicants, no unequal treatment had been substantiated by the applicant.[321] In 2012, Catholic bishops announced that they would waive their right to give their consent to the appointment of candidates.

The Protestant Church has concluded agreements with Bavaria that the *Land* must take into account the needs of theology students when appointing chairs of church law at two of its universities.[322]

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

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

The Equal Treatment of Soldiers Act (*Soldatinnen- und Soldaten-Gleichbehandlungsgesetz, SoldGG*) covers all grounds with the exception of age and disability, taking advantage of the exception for military service in Article 3(4) of Directive 2000/78.

However, Section 18(1) SoldGG provides for a prohibition of discrimination for severely disabled soldiers provided that physical function, intellectual ability or mental health is not a genuine and determining occupational requirement for the military service. Section 18(2) SoldGG provides for compensation for a violation of this prohibition. It is unclear whether drafted persons or volunteers are covered by this prohibition.[323] The constitutional equality guarantee applies to all soldiers, irrespective, for instance, of degree of disability.

In addition, in the Legal Status of Military Personnel Act (*Soldatengesetz, SG*),[324] there is a legal prohibition of discrimination against soldiers on the grounds of sexual identity, parentage, race, faith, belief, religious or political opinion or ethnic origin, amongst others.[325] It should be noted, that the constitutional equality clause, Article 3(3) GG applies as well.

According to social law, the legal status of severely disabled soldiers is, with regard to certain legal provisions, the same as for other severely disabled people. The provisions for severely disabled people are applied insofar as they are compatible with the special requirements of military service.[326]

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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[321] Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof, BayVerwGH*), Bavaria/7 CE 09.661 and Bavaria/7 CE 09.662, 30 April 2009.

[322] Law on the concordat with the Holy See and the contracts with the Evangelical Churches (*Gesetz zu dem Konkordate mit dem Heiligen Stuhle und den Verträgen mit den Evangelischen Kirchen*), 15 January 1925, p. 53.

[323] It should be noted that the compulsory military service was suspended in 2011.

[324] Germany, Legal Status of Military Personnel Act (*Soldatengesetz, SG*), 30 May 2005.

[325] Section 3(1) SG: 'The soldier shall be appointed and utilised based on his/her suitability, ability and performance regardless of sex, sexual identity, decent, race, faith, belief, religious or political beliefs, homeland, ethnic or other origin.' There is very limited case law on the matter. For some examples cf. Klose, A. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 24 para. 101ff.

[326] Section 128(4) SGB IX.

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

In German law, as in other legal systems, there is a differentiated system for the treatment of non-German nationals. On the most fundamental level, the status of non-nationals is protected by fundamental rights in the German constitution, which are human rights and therefore applicable to every human being in their relations with the German state authorities. The most important of such rights is the guarantee of human dignity.[327] Only German nationals are entitled to a number of other fundamental rights, although special laws may grant the same rights to non-German citizens as well.[328]

Citizens of EU Member States are treated in the same way as Germans in most respects, due to EU law. Within this framework, German law differentiates between Germans and non-Germans in various legal spheres, such as residence rights, work permits and some social security rights.[329]

Some professions are open only to German nationals and specified groups of non-Germans, such as EU citizens and stateless people.[330] Nationality discrimination, including the example cited, can however be judged unlawful, if it is not justifiable under the general guarantee of equality.

In Germany, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.[331]

There are prohibitions of discrimination that list nationality as a proscribed ground, e.g. Section 75(1) Works Constitution Act. In other spheres of law, unequal treatment on the basis of nationality can be considered a breach of the general provisions of private law.

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

Under the AGG, discrimination on the ground of nationality is generally regarded as possible indirect discrimination on the basis of race or ethnic origin and, as such, is prohibited.[332]

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

a) Benefits for married employees

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[327] Article 1 GG.

[328] As, for example, in the case of freedom of assembly, see Section 1 Assembly Act (*Versammlungsgesetz, VersammlG*), 15 November 1978.

[329] Some examples: the federal scheme to support educational costs through grants is not only open to German nationals, but also to non-Germans of various legal statuses, as well as individuals entitled to asylum, refugees, long-term legal residents and people with exceptional leave to remain, see Section 8(1) Nr. 2 – Nr. 7; 8(2) Federal Law on Promotion of Education (*Bundesausbildungsförderungsgesetz, BaföG*), 7 December 2010. See also Section 63(1) and 63(2) SGB III.

[330] See Section 9 Nr. 1 German Judiciary Act: Germany, Judiciary Act (*Deutsches Richtergesetz, DRiG*), 19 April 1972; Section 37.1 Nr. 1 Legal Status of Military Personnel Act (*Soldatengesetz, SG)*, 30 May 2005. A similar regulation existed until recently for pharmacists: former Section 2.1 Nr. 1 Pharmacies Act (*Apothekengesetz, ApoG*), 15 October 1980. Cf. also the former Section 3.1 Nr. 1 Federal Medical Regulation (*Bundesärzteordnung, BÄO*), 16 April 1987, regarding medical professions: admission to medical practice only for German citizens, according to Article 116 GG, citizens of EU Member States, contractual parties to the Treaty on the European Economic Area, other contractual partners in this respect or stateless people.

[331] For a recent decision, see: Frankfurt am Main Regional Court (*Landesgericht, LAG*), Frankfurt am Main/2-24 O 37/17, 16 November 2017.

[332] Cf. Federal Labour Court (*Bundesarbeitsgericht*, *BAG*), 8 AZR 364/11, 21.6.2012. The case concerned an employee born in Turkey who claimed that she was not employed permanently because of her ethnic origin. The court held that an unequal treatment on the ground of nationality can be indirect discrimination on the ground of ethnic origin but saw no evidence that the decision of the employer was based on either of these grounds.

In Germany, it constitutes unlawful discrimination in national law if an employer provides benefits only to those employees who are married.

Due to the principle of freedom of collective bargaining,[333] contracting partners are free to include provisions based on marriage in collective agreements.

However, there must be a connection to professional tasks or working conditions.[334] Marriage in this context can only refer to family status, not to its reproductive function.

The family status of registered life partnerships (*eingetragene Lebenspartnerschaft*) is now covered by the law on the remuneration of civil servants.[335] Prior to the relevant legal amendment, the case law had been rather restrictive. Since the CJEU ruled that differential treatment of spouses and life partners within the scope of Directive 2000/78/EC must be considered as violating EU law,[336] the Federal Constitutional Court clarified, as mentioned above, that same-sex life partners and spouses who are in a comparable position for the purposes of the benefits must be treated equally.[337] Accordingly, the Federal Labour Court and other courts adapted their jurisprudence to follow this interpretation. It should be noted that, as of 2017, marriage is an option for same sex-couples.

b) Benefits for employees with opposite-sex partners

In Germany, it constitutes unlawful discrimination in national law if an employer provides benefits only to those employees with opposite-sex partners.

Such limitation could form discrimination, although there is no case law on that matter.

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

In Germany, there are exceptions in relation to disability and health and safety as allowed under Article 7(2) of the Employment Equality Directive.

Section 20 AGG describes permissible differences in treatment on the ground of disability when they are based on objective grounds. Specifically, such differences in treatment in relation to disability and health and safety are considered permissible under the provision when they 'serve the avoidance of threats, the prevention of damage or another purpose of a comparable nature' (Section 20(1)(1)) or when they satisfy the requirement of protection of personal safety (Section 20(1)(2)).

Exceptions in employment would have to be in accordance with Section 8 AGG on genuine and determining occupational requirements.

For disability, the duty of reasonable accommodation must be considered in this respect, in contractual relations stemming from Section 241(2) BGB (see section 2.6 above).[338]

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

[333] Article 9(3) GG.
[334] Germany, BAG, Az: 6 AZR 101/03, 29 April 2004.
[335] Germany, Civil Servants Remuneration Act (*Bundesbesoldungsgesetz, BBesG*), 19 June 2009, Sections 17b and 40.
[336] Court of Justice of the European Union (CJEU), C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, EU:C:2008:179, http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0267&lang1=en&type=TXT&ancre= (for case law on this matter cf. above, sections 2.3.c and 3.2.7).
[337] BVerfG, 1 BvR 1164/07 7 July 2009.
[338] BAG, 6 AZR 190/12, 19 December 2013, para. 53.

4.7.1 Direct discrimination

In Germany, national law provides for a specific exception for direct discrimination on the ground of age.

Section 10 AGG contains a detailed provision to justify direct discrimination on the ground of age.

a) Justification of direct discrimination on the ground of age

In Germany, national law provides for justifications for direct discrimination on the ground of age.

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

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

- the setting of special conditions on access to employment and vocational training, including special employment and work conditions, including remuneration and dismissal conditions, for young people, older workers and people with caring responsibilities, in order to promote their vocational integration or ensure their protection (Section 10 No. 1);
- the setting of minimum conditions of age, professional experience or seniority of service for access to employment or to certain advantages linked to employment (Section 10 No. 2);
- the setting of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement (Section 10. No. 3);
- the setting for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the setting under such schemes of different ages for employees or groups of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations (Section 10 No. 4);
- an agreement that provides for the termination of an employment relationship without dismissal at the time when the employee is entitled to apply for a pension on the ground of age, notwithstanding the regulations in Section 41 Social Code VI (*Sozialgesetzbuch VI, SGB VI*)[339] (Section 10 No 5);
- differentiation of benefits in compensation plans in the sense of the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*),[340] if the parties have created a settlement graduated according to age and staff membership in a firm, in which labour market opportunities, which are essentially dependent on age, are openly considered, or which exclude from the benefits of the compensation plan employees who are economically secure, as they are entitled to pensions, possibly following receipt of unemployment benefit (Section 10 No 6.).

Section 10 AGG implies a test of proportionality, which is at the core of the *Mangold* jurisprudence.[341]

The provisions in Section 10 No. 1-4) AGG follow those of the directives. Section 10 Nos. 5 and 6 AGG cover additional (exemplary) grounds. Section 10 No. 6 seems to be justifiable in the light of Article 6 of the directive, as opportunities in the labour market and levels of

[339] Germany, Social Code VI (*Sozialgesetzbuch VI, SGB VI*), 19 February 2002.
[340] Germany, Works Constitution Act, 25 September 2001.
[341] Court of Justice of the European Union (CJEU), C-144/04, *Mangold v. Helm*, 22 November 2005, EU:C:2005:709, http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0144&lang1=en&type=TXT&ancre=.

social security appear to be acceptable grounds for justification. It follows existing legal practice.[342] On Section 10 No. 5 on retirement ages, see section 4.7.4 below. Before the CJEU *Age Concern* decision,[343] and later clarifications by the CJEU on aims of social policy as a precondition for the application of Article 6 of the directive,[344] objective reasons were taken not to be limited to those contained in legislation or which are in the public interest. Entrepreneurial interests were regarded as being legitimate as well.[345] It has to be seen how this jurisprudence is adapted given the CJEU case law just mentioned. The various questions raised by this jurisprudence have not yet been clarified by the courts.

According to the equality guarantee, any different treatment on the ground of age as a personal unchangeable characteristic through legislation or other acts of the public authorities falls in principle under a strict scrutiny of proportionality. This matches the *Mangold* test,[346] which is a test of proportionality, like other existing case law.

b) Permitted differences of treatment based on age

In Germany, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

As explained, this possibility exists (Section 10 AGG), implementing the framework of Directive 2000/78/EC (Article 6) and its judicial interpretation.

c) Fixing of ages for admission or entitlement to benefits of occupational pension schemes

In Germany, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2) of Directive 2000/78/EC.

The provision in Section 10(4) AGG provides for this possibility.

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

In Germany, there are special conditions set by law for older and younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

There are various measures that aim to integrate older and younger workers.[347] There are provisions protecting people with caring responsibilities, e.g. parents, and, in addition, Section 10(1) AGG provides for the possibility for the preferential treatment of these people.

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[342] The issue is contentious in legal theory, for discussion cf. Brors, C. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 10 para. 102ff; Voggenreiter, C. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 8 para. 46 (both: admissible).

[343] Court of Justice of the European Union (CJEU), C-388/07, *Age Concern England v. Secretary of State for Business, Enterpreise and Regularory Reform*, 5 March 2009, EU:C:2009:128 http://curia.europa.eu/juris/celex.jsf?celex=62007CJ0388&lang1=en&type=TXT&ancre=.

[344] Cf. e.g. Court of Justice of the European Union (CJEU), C-447/09, *Prigge and Others v. Deutsche Lufthansa* AG, 13 September 2011, EU:C:2011:573 http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0447&lang1=en&type=TXT&ancre=.

[345] BAG, 8 AzR 906/07, 22 January 2009.

[346] Court of Justice of the European Union (CJEU), C-144/04, *Mangold v. Helm*, 22 November 2005, EU:C:2005:709, http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0144&lang1=en&type=TXT&ancre=.

[347] The provisions under scrutiny in the *Mangold* case (C-144/04, *Mangold v. Helm*, 22 November 2005, EU:C:2005:709) are an example of this. The legal provision at the centre of this case was introduced by the Part-Time and Fixed-Term Employment Act, (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge, TzBfG*), 21 December 2000.

4.7.3 Minimum and maximum age requirements

In Germany, there are exceptions permitting minimum and maximum age requirements in relation to access to employment (notably in the public sector) and training.

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

Examples include: Federal President, minimum - 40 years, no maximum entry age;[348] judges, maximum - varying *Land* laws exist, e.g. in Bayern it is 45 years;[349] federal judges, minimum - 35;[350] Federal constitutional judges, minimum - 40.[351][352] Section 5 of the Federal Police Career Structures Regulation[353] contains specific provisions for enforcement officers. The specific physical demands of police officers require the establishment of separate conditions of access to the police force than those for civil servants in general. The minimum age for commencing training for the Federal police service is 16 and the maximum age is 28 (up to the candidate's 28th birthday). Individuals eligible for training for the intermediate or higher police service in the Federal police must be under the age of 34. This maximum age limit can be adjusted up to a maximum of three years per child or per person being cared for after considering factors such as statutory maternity leave, childcare and the care of close relatives. However, in such cases the applicants should be under the age of 36 (middle grade of civil service) or 42 (higher intermediate and higher civil service).[354]

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[348] Article 54(1) GG

[349] Bavaria, Civil Service Act (*Beamtengesetz Bayern, BayBG*), 29 July 2008, Section 23.

[350] Germany, Courts Constitution Act (*Gerichtsverfassungsgesetz, GVG*), 9 May 1975, Section 125(2).

[351] Germany, Federal Constitutional Court Law (*Bundesverfassungsgerichtsgesetz, BverfGG*), 11 August 1993, Section 3(1).

[352] Federal civil servants: age requirement can be waived for official purposes, application for service training *(Vorbereitungsdienst)* in criminal investigation department, maximum: 33 years (Section 5(2) Regulation on service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung, KrimLV*), 18 September 2009). Promotion to a higher service level *(Aufstieg in eine höhere Laufbahn)* for public employees, maximum: 57 years (Section 36(2) Regulation on careers in public service (*Bundeslaufbahnverordnung, BLV*)). Federal Criminal Police Officers: maximum 52 years (Section 10 Regulation on Service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung, KrimLV*). Executive police service (*Polizeivollzug*), maximum: 62 years (Section 5(1) Federal Executive Police Service Act (*Bundespolizeibeamtengesetz, BpolBG*), 3 June 1976. Universal compulsory military service (*Wehrpflicht*), minimum: 17 (Section 3(2) Universal Compulsory Military Service Act (*Wehrpflichtgesetz, WpflG*), 15 August 2011), maximum: between 22 and 31 years (Section 5(1) Universal Compulsory Military Service Act (*Wehrpflichtgesetz, WpflG*). Military Service, common maximum: 62 years, maximum corresponding to the military rank: 40 to 65 years (Section 45 Legal Status of Military Personnel Act (*Soldatengesetz, SG*), 30 May 2005). Aircraft personnel, maximum: 60 years (Section 41(1) (sentence 2) Service Regulations on the Operation of Aircraft *(Betriebsordnung für Luftfahrtgerät, LuftBO*), 4 March 1970. Midwives, maximum: 70 years (Section 29 Midwives Act (*Hebammengesetz, HebG*), 4 June 1985). The minimum requirement of 17 years (former Section 7) was abrogated in 2008 (cf. amending law, 30.9.2008 BGBl I 2008, 1910). The former Section 9 Chimney Sweeps Act (*Schornsteinfegergesetz, SchfG*), 10 August 1998 which set the maximum age for chimney sweeps to 65 years ceased to be in effect on 01.01.2013 and was replaced by the *Schornsteinfeger-Handwerksgesetz, SchfHwG*, 26 November 2008 where in Section 12(1)(3) the maximum age is increased to 67 years. Educational funding (*Ausbildungsförderung*), maximum: 29 years (34 years for master's degree programmes) (Section 10(3) Federal Educational Support Act (*Bundesausbildungsförderungsgesetz, BaföG*), 7 December 2010). Federal Ombudsman on Data Protection: minimum 35 years (Section 11(1) Federal Data Protection Act (*Bundesdatenschutzgesetz. BDSG*), 30 June 2017). Notaries, maximum entry age: 60 (Section 6(1)), maximum age: 70 years (Section 48a Federal Notary Act (*Bundesnotarordnung, BNotO*), 13 February 1937). Bailiffs, varying Land laws, e.g. North-Rhine Westphalia, maximum: 40 – entry age for 20-month training period, minimum: 23 (Section 2(1) Nr. 3 Ordinance on Bailiffs North-Rhine Westphalia (*Verordnung über die Ausbildung und Prüfung für die Laufbahn des Gerichtsvollzieherdienstes des Landes Nordrhein-Westfalen, NRWGerVollzDAPO*), 14 March 2005), this provision was abrogated on 31.12.2017. Prosecutors, varying *Land* laws, e.g. in Bavaria maximum: 45 with the possibility of exceptions (Section 23 Bavaria Civil Service Act (*Beamtengesetz Bayern, BayBG*), 29 July 2008). It is worth noting that maximum age limits regulate access to employment – from this age onwards employment is not possible anymore.

[353] Germany, Federal Police Career Structures Regulation (*Bundespolizei-Laufbahnverordnung, BpolLV*), 2 December 2011.

[354] Such a provision seems to be in line with the case law of the CJEU on this matter, cf. e.g. Court of Justice of the European Union (CJEU), C-229/08, *Wolf v. Stadt Frankfurt am Main*, 12. January 2010, EU:C:2010:3, http://curia.europa.eu/juris/celex.jsf?celex=62008CJ0229&lang1=en&type=TXT&ancre=; Court of Justice of the European Union (CJEU), C-416/13, *Vital Pérez v. Ayuntamiento de Oviedo*, 13. November 2014, EU:C:2014:2371, http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0416&lang1=en&type=TXT&ancre=;

Exempted from this regulation are holders of certificates of inclusion and acceptance, in accordance with Section 9 of the Military Pensions Act (*Soldatenversorgungsgesetz, SVG*),[355] as well as participants in inclusion measures under Section 7(2) of the Military Pensions Act. The Federal Police Board has the authority to make an exception in specific cases.

4.7.4 Retirement

a) State pension age

In Germany, there is no state pension age at which individuals must begin to collect their state pensions.

If an individual wishes to work longer, the pension can be deferred.

An individual can collect a pension and continue to work.

In 2017, the 'flexi-pension' (*Flexi-Rente*) was implemented.[356] The legal regulation in Section 41(3) Social Code VI (SGB VI) enables employers and employees to defer the termination date of employment and the beginning of state pension by mutual agreement. During such an employment relationship it is possible to defer the state pension for several times. If a state pension is deferred after reaching state pension age, the subsequent pension increases per deferred month.[357]

After a reform in 2008, the normal state pension age for both women and men is 67 (instead of 65).[358] However, the new threshold applies fully only to those who were born in 1964 or later. The state pension age for age cohorts from 1947 to 1963 will be raised gradually. Employees are entitled to a (reduced) pension from the age of 63 if they decide to stop working after they have worked for 35 years or more.

There is no restriction on individuals working while receiving a normal state pension after the age of 67. However, there is a limit on how much money may be earned if an individual is receiving a pension before this age.[359]

b) Occupational pension schemes

In Germany, there is a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.[360]

If an individual wishes to work longer, payments from such occupational pension scheme can be deferred.

An individual can collect a pension and still work.

Usually such payments start at the same time as state pensions.[361] It was ruled to be constitutional to regulate occupational pension schemes according to the state pension

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Court of Justice of the European Union (CJEU), C-258/15, *Salaberria Sorondo v. Academia Vasca de Policía y Emergencias*, 15. November 2016, EU:C:2016:873 http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0258&lang1=en&type=TXT&ancre=.

355 Germany, Military Pensions Act (*Soldatenversorgungsgesetz, SVG*), 16 September 2009.

356 Cf. Germany, Act on improving pension benefits (*RV-Leistungsverbesserungsgesetz*), 23 June 2014, with effect from 1 January 2017 and the Flexible Pension Act (*Flexirentengesetz,* FlexiRG), 8 December 2016, with effect from 1 July 2017.

357 Germany, SGB VI, Section 77(3) (third sentence) (subparagraph 3).

358 Germany, SGB VI, Section 35(2)

359 Germany, SGB VI, Section 34(2).

360 The legal entitlement of employees to an occupational pension by converting an amount of their salary is compatible with the Constitution, BAG, Az.: 3 AZR 14/06, 13 June 2007.

361 See Sections 2 and 6 of the German Occupation Pension Act (*Betriebsrentengesetz, BetrAVG*), 19 December

regulation. Furthermore, the Federal Labour Court ruled that if an employer promises an employee a total pension provision (*Gesamtversorgung*) it is usually to be assumed that the employee can only claim the occupational pension if he receives, at the same time, a pension from the state pension system.[362]

c) State imposed mandatory retirement ages

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

There is no general state-imposed mandatory retirement age, but there are various special regulations for particular professions.[363] The regulation on retirement in the civil service law mirrors the general pension age of 67 (Section 51, BBG).

d) Retirement ages imposed by employers

In Germany, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and collective bargaining.

German law allows for employment contracts to be ended at a certain age by individual agreement and by collective bargaining. In both cases, an objective reason must exist for the respective agreements to be valid, with exceptions for fixed term contracts for employees above the age of 52.[364]

Such objective reasons are widely held to exist for ending an employment contract at the age of 65, subject to reconsideration, given the pension age.[365]

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.

Nevertheless, exceptions exist (see section 4.7.1.a above). The right to a state pension does not constitute a reason for dismissal by the employer.[366] Age is a factor within social choice (*Sozialauswahl*): age is a legitimate factor in selection for dismissal on social grounds in the sense that older employees may legitimately be retained in preference to others.[367] However, the entitlement to state pension, and therefore the age of an employee, can count as a consideration within social choice (*Sozialauswahl*) facilitating privileged dismissal.
The interest of the employer in maintaining an age balance among employees was also held to be reasonable.[368] The regulation in this respect can be interpreted in accordance

1974, and on the correlation between state pension and occupational pension the decision of the BAG, Az.: 3 AZR 11/10, 15 May 2012.

362 BAG, Az.: 3 AZR 894/12, 13 January 2015. See for the prohibition of discriminatory age limits for entering a company's occupational pension scheme, BAG, 3 AZR 69/12, 18 March 2014.

363 See section 4.7.3 of this report.

364 Germany, Part-Time and Fixed-Term Employment Act, (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge, TzBfG*), 21 December 2000, see Section 14(1). No such objective reason is needed if the employee is older than 52 (Section 14(3) TzBfG), though there are some qualifications.

365 Reasons cover entitlement to a state pension and consequently social security, decreased performance typical of this age and the need for intergenerational planning of the workforce, Müller-Glöge, R. (2019), in: Müller-Glöge, R., Preis, U. and Schmidt, I. (eds.), *Erfurter Kommentar zum Arbeitsrecht* (19th ed.), München, Beck Verlag, § 14 TzBfG para. 56ff; BAG, Az.: 7 AZR 135/93, 20 October 1993; BAG, 7 AZR 428/93, 1 December 1993; BAG, 7 AZR 296/03, 19 November 2003; before that age, special requirements can justify early retirement.

366 Germany, SGB VI, Section 41.

367 See Germany, Protection against Dismissal Act (*KSchG*), 25 August 1969, Section 1(3) (first sentence). In a case of dismissal due to urgent entrepreneurial reasons, the dismissal is, among other reasons, not justified if the employer does not take sufficient account of the age of the individual concerned.

368 BAG, Az.: 2 AZR 533/99, 23 November 2000: employee working in a kindergarten.

with EU law as a realisation of the general clause of Article 6 Directive 2000/78/EC, as long as there is no schematic preferential treatment of age groups.[369] On the regulations of the AGG, see section 4.7.2 above.

f) Compliance of national law with CJEU case law

In Germany, national legislation is in line with the CJEU case law on age regarding mandatory retirement.

As mentioned above, there is a plethora of regulations on age limits. In recent years there have been major adoptions of such regulations on age limits, not least in the laws regulating public service, which are now in line with the jurisprudence of the CJEU, although details and specific age limits may be open for debate (see section 4.7.3 above). The courts also follow the standards set out by the CJEU.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Germany, national law permits age or seniority to be taken into account in selecting workers for redundancy.
The laws on protection against dismissal apply in principle to all ages, although exceptions exist. The right to a state pension does not constitute a reason for dismissal by the employer.[370] Age is a factor within social choice (*Sozialauswahl*): age is a legitimate factor in selection for dismissal on social grounds in the sense that older employees may legitimately be retained in preference to others.[371] However, the entitlement to state pension, and therefore indirectly the age of an employee, can count as a consideration within social choice (*Sozialauswahl*) facilitating privileged dismissal. Before the age of entitlement to pension, age might have a similar effect within selection procedures for redundancy, although there is conflicting case law.[372]

The interest of the employer in maintaining an age balance among employees was also held to be reasonable in this context.[373] This provision can be interpreted in accordance with EU law as a realisation of the general clause of Article 6 Directive 2000/78/EC, as long as there is no schematic preferential treatment of age groups.[374]

b) Age taken into account for redundancy compensation

In Germany, national law provides compensation for redundancy. Such compensation is affected by the age of the worker.

[369] Cf. Brors, C. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 10 para. 13.
[370] Germany, SGB VI, Section 41.
[371] Germany, KSchG, Section 1(3) (first sentence). In a case of dismissal due to urgent entrepreneurial reasons, the dismissal is, among other reasons, not justified if the employer does not take sufficient account of the age of the individual concerned.
[372] See Lower Saxony Higher Labour Court (*Landesarbeitsgericht, LAG*), Lower Saxony/Az.: 10 Sa 2180/03, 28 May 2004, arguing that a guideline according to which employees over the age of 55 can be more easily dismissed is not in violation of Directive 2000/78, because these employees can live more easily with a higher risk of unemployment, due to social security. See Düsseldorf Higher Labour Court (*Landesarbeitsgericht, LAG*), Düsseldorf/ Az.: 12 Sa 1188/03, 21 January 2004: proximity to pension age is no reason for choosing older employees for dismissal. This holds true even for small businesses, BAG, Az.: 6 AZR 457/14, 23 July 2015.
[373] BAG, Az.: 2 AZR 533/99, 23 November 2000: employee working in a kindergarten.
[374] Cf. Brors, C. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 10 para. 13.

Age can and does play a role in redundancy compensation plans, which are contractual agreements between unions and employers. Age is one factor taken into account in a weighing and balancing exercise of different interests of affected employees that aims for an equitable solution that is mindful of the different needs of the employees. How this balance is to be struck depends on the particular mix of interests in the situation that gives rise to the need for such a redundancy compensation scheme.[375]

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

In Germany, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

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

4.9 Any other exceptions

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

[375] Cf. for an example Federal Labour Court (*Bundesarbeitsgericht, BAG*), 9 AZR 20/18, 18 September 2018 (see also section 12.2 on case law below).

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

a) Scope for positive action measures

In Germany, positive action is permitted in national law in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

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

Positive action by public authorities, including legislation, must be reconcilable with the constitutional guarantee of equality.[376] Explicit regulations make permissible positive action promoting the equality of men and women and disabled people.[377] There is debate over whether positive action is permissible within the scope of the guarantee of equality for other written and unwritten grounds of discrimination (the latter cover, for example, sexual orientation).[378] This has not been authoritatively clarified by the Federal Constitutional Court. Positive action in the form of preferential employment is legally regulated in accordance with the relevant CJEU case law,[379] which permits such treatment in principle, as long as the schemes allow for individual cases to be assessed.[380]

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

There are provisions on positive action, including institutional arrangements, for indigenous minorities, the promotion of their language, the protection of their territory, etc.,

[376] Article 3, 33(2) and 33(3) GG.

[377] Article 3(2) sentence 2, Article 3(3) sentence 2 GG. Article 31 GG: 'Federal law shall take precedence over Land law.' However, Article 142 GG states that, notwithstanding the provision of Article 31, provisions of *Land* constitutions guaranteeing basic rights in conformity with Articles 1 to 18 of the Federal Constitution remain in force. The disability law provides for the explicit admissibility of positive action, see Section 7(1) BGG.

[378] See: Nußberger, A. (2018), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (8th ed.), München, Beck Verlag, Art. 3 para. 264ff.

[379] See Court of Justice of the European Union (CJEU), C-450/93, *Kalanke v. Bremen*, 17 October 1995, ECLI:EU:C:1995:322, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993CJ0450&from=DE; Court of Justice of the European Union (CJEU), C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 11 November 1997, EU:C:1997:533, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0409&from=GA; Court of Justice of the European Union (CJEU), C-407/98, *Abrahamsson and Anderson v. Fogelqvist* , 6 July 2000, EU:C:2000:367, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61998CJ0407. Cf. Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch,* Baden-Baden, Nomos Verlag, § 3 para. 70.

[380] Compare for such legislation e.g. Federal Civil Service Act (*Bundesbeamtengesetz, BBG*), 5 February 2009, Section 9 (second sentence).

preferential rules for political representation and so on,[381] constitutionally buttressed by basic policy clauses of the *Länder* constitutions.[382]

Work councils and the staff councils of public authorities have the competence to promote the integration of disabled people, older and foreign workers and to initiate measures against racism and xenophobia.[383]

Social security law grants state funding to help people with disabilities participate in working life in areas such as training and education, equipment and transport,[384] and also gives financial assistance to the employer for costs such as training and education, equipment and costs relating to integration.[385] A disabled person can claim preferential treatment regarding promotion and training. The employer is under a duty to check whether qualified people with disabilities are available for vacant posts.[386] Employers are under a duty to communicate and cooperate with public authorities. People with disabilities have the right to part-time work if it is necessary for reasons related to their disability.[387] Furthermore there is a duty to conclude integration agreements,[388] which are particular, binding legal provisions. There exists a right to such agreements, but the law does not offer a mechanism to resolve conflicts in cases where no agreement is reached.[389] There is an obligation to create a representative body for severely disabled people if there are at least five severely disabled workers.[390] Severe disability must be taken into account within social choice (*Sozialauswahl*) in relation to dismissals (*betriebsbedingte Kündigungen*).[391]

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[381] See on the regulations of the *Land* constitutions, Article 31 GG: 'Federal law shall take precedence over Land law.' However, Article 142 GG states that, notwithstanding the provision of Article 31, provisions of *Land* constitutions guaranteeing basic rights in conformity with Articles 1 to 18 of the Federal Constitution remain in force. For *Land* laws, e.g. Law on the Rights of the Sorbs (Wends) in the Land of Brandenburg (*Gesetz zur Ausgestaltung der Rechte der Sorben (Wenden) im Land Brandenburg, Sorben [Wenden]-Gesetz, SWG*), 7 July 1994; Brandenburg/Saxony: State Agreement on the Establishment of a 'Foundation for the Sorbian People' (*Gesetz zum Staatsvertrag über die Errichtung der "Stiftung für das sorbische Volk", SorbVoStiftStVG*), 9 December 1998; Saxony: Law on the Rights of the Sorbs in the Free State of Saxony (*Gesetz über die Rechte der Sorben im Freistaat Sachsen, SächsSorbG*), 31 March 1999; Schleswig-Holstein: Law on the Promotion of Frisian in the Public Sphere (*Gesetz zur Förderung des Friesischen im öffentlichen Raum, FriesischG*), 13 December 2004; Schleswig-Holstein: Schleswig-Holstein School Law (*Schleswig-Holsteinisches Schulgesetz, Schleswig-Holstein SchulG*), 24 January 2007; Law on the Legal Status and Financing of Parliamentary Groups in the Schleswig-Holstein Parliament (*Gesetz zur Rechtsstellung und Finanzierung der Fraktionen im Schleswig-Holsteinischen Landtag, FraktionsG*), 18 December 1994; Electoral Law for the Schleswig-Holstein Parliament (*Wahlgesetz für den Landtag Schleswig-Holstein, Schleswig-Holstein LWahlG*), 7 October 1991.

[382] On *Land* constitutions: Article 31 GG: 'Federal law shall take precedence over Land law.' However, Article 142 GG states that, notwithstanding the provision of Article 31, provisions of *Land* constitutions guaranteeing basic rights in conformity with Articles 1 to 18 of the Federal Constitution remain in force. Brandenburg: Constitution of Brandenburg (*Verfassung des Landes Brandenburg, BbgVerf*), 20 August 1992: Article 25: Rights of the Sorbs (Wends) (*Rechte der Sorben [Wenden]*). Law on the Rights of the Sorbs in the Land of Brandenburg (*Gesetz zur Ausgestaltung der Rechte der Sorben (Wenden) im Land Brandenburg, SWG*), 7 July 1994: Section 1: Right to national identity; Section 2, Sentence 3: no disadvantage because of commitment to ethnic group; Section 5: Council for Sorbian Affairs; Section 10: Education, see 3.2.8; Schleswig-Holstein: Danes, Frisians: Article 6 Constitution of Schleswig-Holstein (*Verfassung des Landes Schleswig-Holstein, SHVerf*), 2 December 2014: minorities and ethnic groups (*Minderheiten und Volksgruppen*).

[383] Section 80.1 BetrVG: Nr. 4 integration of severely disabled people; Nr. 6: integration of older employees; Nr. 7: integration of foreign workers, initiating measures against racism and xenophobia. See also Section 68 Nrs. 4, 5, 6 Federal Personnel Representation Act.

[384] Section 49 SGB IX.

[385] Section 50 SGB IX.

[386] Section 164.1 SGB IX.

[387] Section 164.5 sentence 3 SGB IX.

[388] Section 166 SGB IX.

[389] On all this, see section 2.6 above.

[390] Section 177 SGB IX. The new 178(2) (third sentence) SGB IX reads as follows: 'The dismissal of a person with severe disabilities by the employer without participation according to sentence 1 is ineffective.' Previously the norm (former Section 95(2) SGB IX to which the above sentence was added) corresponded to the settled case law of the Federal Labour Court that even without the participation of the representatives of severely disabled persons a dismissal was not ineffective for the failure to include the representatives in the process of dismissal and could be remedied by subsequently including them in the process. Therefore, the new rule strengthens the rights of the person with severe disabilities.

[391] Germany, KSchG, Section 1(3) (first sentence).

There is a special procedure involving the public authorities in the case of an ordinary dismissal of a disabled person.[392] The employer is under an obligation to cooperate with the representative body for people with disabilities and the integration authority to avoid dismissal.[393]

It should be noted that representatives of the Sinti and Roma community have voiced scepticism to this author about the usefulness of quotas for Sinti and Roma in the German situation, because of potential labelling and anti-integrational effects of such measures. The Sinti and Roma community pursues a decisively integrational policy, which focuses on non-discrimination, rather than positive action. In consequence, there are no quotas for Sinti and Roma or other 'hard' positive action measures. However, in the context of positive action, it is notable that there are some state policies by the Federation and the *Länder* which foster the acknowledgement of Sinti and Roma culture and history.[394]

b) Quotas in employment for people with disabilities

In Germany, national law provides for a quota for people with disabilities in employment.

As mentioned above, Section 154(1) in conjunction with Section 156 Social Code IX (SGB IX) establishes the duty of any employer with more than 20 employees to employ at least 5 % severely disabled people. This rule is interpreted as not being directly prejudicial for individual claims, as it establishes only a general duty for the employer. The fact that the employer does not fulfil this duty does not necessarily mean that discrimination has occurred in a specific case.[395] If the quota is not met, there are potential penalties/payments up to EUR 320 for every disabled person who should have been employed, Section 160, SGB IX. Under Section 161 SGB IX, a special fund uses the money to foster the employment of persons with severe disabilities.

Section 9 (second sentence) of the Federal Civil Service Act also provides for legal measures for the enforcement of equality in employment, in particular by way of introducing quotas for persons with disabilities.

[392] Section 168ff SGB IX. There is a period of three months between dismissal and conclusion of employment (comparable with a period of notice) (Section 172(1) SGB IX); an extraordinary dismissal is nevertheless admissible.

[393] Section 167 SGB IX.

[394] See the publications of the German Federal Agency for Civic Education (*Bundeszentrale für politische Bildung*) (2015), Mengersen, O. (ed.*), Sinti und Roma. Eine deutsche Minderheit zwischen Diskriminierung und Emanzipation;* Benz, W., *Sinti und Roma: Die unerwünschte Minderheit. Über das Vorurteil Antiziganismus*. For a recent update on Government measures ranging from general support of integration of foreigners including Sinti and Roma, to measures in the framework of the federal programme '*Demokratie leben*' [To live democracy], the support for the Sinti and Roma organisations and institutions, the conference 'Everyday is Roma day' at the occasion of the fifth anniversary of the establishment of the memorial of the Sinti and Roma murdered under National Socialism or support for the European Rome Institute for Arts and Culture (ERIAC), established 2017 in Berlin, see 'Situation von Sinti und Roma in Deutschland', *Bundestagsdrucksache* 18/13498 (05.09.2017), available at: http://dipbt.bundestag.de/doc/btd/18/134/1813498.pdf.

[395] There are modifications for smaller companies. As of 2017, according to the Federal Agency of Labour, 1.1 million persons with severe disabilities were employed. That is a quota of 4.6 %.

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

In Germany, the following procedures exist for enforcing the principle of equal treatment:

According to Section 13 AGG, employees have the right to complain to the competent body within the enterprise. In the case of harassment, they have the right to withhold their services insofar as this is necessary for their protection (Section 14 AGG).

There are no special procedures for discrimination claims, only the general procedures. Matters of employment are dealt with by labour courts, general contract law in civil courts and public law matters (including social law, public education and public employment) by administrative review. All these procedures finally lead to binding court decisions. There is the possibility of alternative dispute resolution. There is increasing interest in Germany in mediation procedures, which would encompass matters covered by discrimination law.

Administrative acts and court decisions are binding. The binding power of alternative dispute resolution depends on the circumstances. Mediation often (although not always) leads to a binding settlement.

b) Barriers and other deterrents faced by litigants seeking redress

The litigants in discrimination cases face the same problems that any litigant faces. A lawyer must be instructed in some procedures, such as higher instance civil procedures.

However, there is a well-developed system of legal aid in Germany and no problems related to infrastructure issues (location of courts etc).

There is no explicit time limit for a complaint, according to Section 13 AGG.

According to Sections 15(4) and 21(5) AGG, there is a time limit of two months for claiming material or non-material damages in labour or civil law. The time limit, as set out in Section 15(4) AGG, begins with receipt of the rejection of a job application or promotion, or, in other cases, with the knowledge of the disadvantageous behaviour.[396]

A claim can be brought after employment has ended, within the limits of general law, especially the statute of limitations.[397]

The empirical research in this area indicates more informal, but important problems of access to justice, among them the fear endangering an employment relationship through litigation and problems of proof, e.g. as to the causality of ground protected for a

[396] Given the CJEU jurisprudence - among others - on the matter of effective pursuit of claims, there is an argument that the rule must be interpreted in such a manner that the earliest beginning of the time limit is the receipt of the refusal. Otherwise the rule is contrary to European Law, cf. Deinert, O. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden - Baden, Nomos Verlag, § 15 para. 120. The shortness of the time limit should be a matter of concern anyway. On this matter cf. the preliminary reference by Hamburg Higher Labour Court (*Landesarbeitsgericht Hamburg, LAG Hamburg*), Hamburg/5 Sa 3/09, 3 June 2009: Court of Justice of the European Union (CJEU), C-246/09, *Bulicke v. Deutsche Büro Service* GmbH, 8 July 2010, EU:C:2010:418 http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0246&lang1=en&type=TXT&ancre=. The CJEU ruled that the principle of equivalence does not require Member States to extend their most favourable procedural rules to actions for safeguarding rights deriving from EU law.

[397] A dismissal protection case must be brought within three weeks, Section 4 KSchG; partly specific regulations for disabled people, Sections 4 (fourth sentence) KSchG in conjunction with Section 168 SGB IX.

disadvantageous decision.[398]

c) Number of discrimination cases brought to justice

In Germany, statistics are available on the number of cases related to discrimination brought to justice.

The statistics on the number of discrimination cases brought to justice are, however, limited. The most extensive empirical study up to now in Germany was conducted between summer 2006 and December 2009. It showed that 147 courts (and 1 385 judges) reported 1 113 cases related to discrimination. Nearly 90 % of the cases fell under the jurisdiction of the labour courts. However, it was extrapolated that only an estimated 0.2 % of all incoming cases at German labour courts relate to the AGG.[399] This is a rather small number.

d) Registration of discrimination cases by national courts

In Germany, discrimination cases are not registered as such by national courts.

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

a) Engaging on behalf of victims of discrimination (representing them)

In Germany, associations, including trade unions, are not entitled to act on behalf of victims of discrimination. The initial draft of the AGG provided for the possibility of representation of complainants in court proceedings. This provision was changed due to last-minute political compromise.

Section 23 AGG provides for legal support through anti-discrimination associations (*Antidiskriminierungsverbände*) but does not include legal representation in court proceedings.

b) Engaging in support of victims of discrimination (joining existing proceedings)

In Germany, associations are entitled to act in support of victims of discrimination.

Anti-discrimination associations are defined as associations of people which, in accordance with their charter, promote the interests of people or groups of people discriminated against on the grounds covered by the AGG on a non-commercial basis (Section 23(1) AGG). They must have at least 75 members or be an association of seven associations with the same purpose. Legal personality of these associations is not a precondition. They must operate permanently and not just on an ad hoc basis to support one claim.[400] Trade unions as such are not associations in this sense.

There is no centralised procedure for acceptance as an anti-discrimination association; a legitimate interest seems to be presumed if the membership requirement is met. The status of an anti-discrimination association has to be verified by the court in a specific

[398] Cf. Rottleuthner, H. and Mahlmann, M. (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Baden-Baden, Nomos Verlag, including interviews with advocates dealing with discrimination cases.

[399] In the empirical study by the author and Prof Dr Hubert Rottleuthner mentioned above, commissioned by the EU and the German Government, data were collected in this respect. See the executive summary (in German): http://ec.europa.eu/ewsi/UDRW/images/items/docl_16487_986472583.pdf. Rottleuthner, H. and Mahlmann, M. (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Baden-Baden, Nomos Verlag. Age played a prominent role, for details Rottleuthner, H. and Mahlmann, M. (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Baden-Baden, Nomos Verlag.

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

case.[401] No relevant case law on the type of proof has yet been reported.

The associations are limited to advising during court proceedings (Section 23(2) AGG). In this case, Section 90(2) ZPO provides that the actions of the counsel are taken as actions of the party, if the latter does not contradict them.[402] These rules apply to other court proceedings as well.

Anti-discrimination associations may support claimants in court proceedings even if representations through advocates are mandatory. They are then able to act in support of the claimant in addition to an advocate.[403]

Associations are allowed to conduct other legal matters for the claimant (Section 23.3 AGG), most importantly to give legal advice.

Although the AGG does not contain an explicit provision, it is generally held that anti-discrimination associations always need the consent of the victim when acting in support of the victim.[404] In cases where obtaining formal authorisation is problematic, the general rules of German civil law apply. In Germany, there is no special duty for associations to act in support of victims of discrimination.

Section 23(2) AGG does not contain any explicit limitation on certain types of proceedings. However, according to the explanatory report, associations may not engage in criminal proceedings.[405]

The works council or a union represented in enterprises that are subject to the Works Constitution Act have the right to take court action against severe cases of discrimination (Section 17(2) AGG in conjunction with Section 23(3) Works Constitution Act). The complainant in these cases is neither representing a victim of discrimination nor acting in support of the victim (Section 17(2)(3) explicitly excludes the possibility of pursuing of the victim's claim). Rather, in this *sui generis* legal procedure, the complainant is entitled to force the employer to abide by the obligations under the AGG by legal action in qualified cases.

c) Actio popularis

In Germany, national law allows associations to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

Actio popularis is possible in the field of disability.

In disability law, associations have legal standing, given that representative action is possible in this field. This relates to the duties of public bodies to provide an accessible environment, as specified in various legal regulations and anti-discrimination law relating to people with disabilities.[406]

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

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

403 Advocates are mandatory in various instances, in civil law e.g. for all cases pending before a regional court (*Landgericht*) and a higher regional court (*Oberlandesgericht*), Section 78(1) (first sentence) of the Civil Procedure Code (*Zivilprozessordnung, ZPO*).

404 Schlachter, M. (2019), in: Müller-Glöge, R., Preis, U. and Schmidt, I. (eds.), *Erfurter Kommentar zum Arbeitsrecht (*19th ed.), München, Beck Verlag § 23 AGG, para. 1.

405 Cf. *Bundestagsdrucksache* 16/1780, 26, 48.

406 Germany, Equal Opportunities for Persons with Disabilities Act, 27 April 2002, Section 14. (*Behindertengleichstellungsgesetz, BGG*): right to action against violation of law. If the case also concerns an individual, the right only exists if the case has general importance; Section 85 SGB IX - Right of Action by Organisations (*Klagerecht der Verbände*): organisation has legal standing in place of disabled person with their consent.

In addition, there are general regulations concerning standard form contracts (*Allgemeine Geschäftsbedingungen*). A violation of the AGG can give rise to an action by associations seeking an injunction against this violation of the AGG. The association must be included in the relevant register for this purpose.[407] Similar possibilities exist with regard to consumer protection.[408] Such instruments could be used for cases involving discrimination, e.g. in standard form contracts.

d) Class action

In Germany, national law allows associations to act in the interest of more than one individual victim (class action) for claims arising from the same event.

Until 2018 there had been no class action in German law. Since 1 November 2018, consumer class actions have been allowed under the new Act to introduce civil model declaratory proceedings[409] amending the Civil Procedure Code (*Zivilprozessordnung,* ZPO).[410] Potentially, such class actions could become relevant for discrimination law. In terms of the act, certain qualified institutions are authorised to sue a company on behalf of consumers before the higher regional court (*Oberlandesgericht, OLG*). The definition of 'qualified' is formulated in Section 606 ZPO and describes institutions that:

- are composed of at least 10 other consumer protection associations or at least 350 natural persons;
- have been on the list of associations qualified to bring an action under Section 4 Injunctive Relief Act[411] or the list of the European Commission for entities qualified to bring an action under Article 2 of Directive 2009/22/EC on injunctions for the protection of consumers' interests for at least four years;
- generally, protect consumer interests in the execution of their statutory tasks on a non-profit basis by carrying out educational or advisory tasks;
- do not engage in model declaratory proceedings for profit;
- do not receive more than 5 % of their financial resources from businesses.

As already stated above, it is an open question whether the new class action will have any significance for matters of discrimination.

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

In Germany, national law permits a shift of the burden of proof from the complainant to the respondent.

Section 22 AGG regulates the burden of proof.[412] According to this norm, the complainant must prove facts of circumstantial evidence that make it reasonable to assume unequal treatment on one of the grounds covered by the AGG, so that the defendant carries the burden of proof that no violation of the regulations providing protection against discrimination has occurred.

There is some debate about how this clause should be interpreted. There is general agreement that a number of elements must be distinguished: the unequal treatment, the causality of the characteristic and the objective reasons or justification for the unequal treatment that may be given. It is mostly argued by courts and doctrine that the claimant

[407] Cf. for details: Germany, Prohibitory Action Act (*Unterlassungsklagengesetz, UklaG*), 27 August 2002.
[408] Cf. for details: Germany, Act against unfair competition (*Gesetz gegen den unlauteren Wettbewerb, UWG*), 3 March 2010.
[409] Germany, Act to introduce civil model declatory proceedings (*Gesetz zur Einführung einer Musterfeststellungsklage*), 12 July 2018, with effect from 1 November 2018.
[410] Civil Procedure Code (*Zivilprozessordnung, ZPO*), 5 December 2005.
[411] Germany, Injunction Relief Act (*Unterlassungsklagengesetz*, *UKlaG*), 27 August 2002.
[412] For case law on Section 22 AGG, see the ruling of the Federal Labour Court, BAG, 8 AZR 736/15, 26 January 2017 and the case law section of this report.

has to fully prove the unequal treatment. However, in contrast, the claimant must only prove the preponderant probability of the causality of the characteristic for the unequal treatment. If this is achieved, the defendant must fully prove the existence of objective or justifying reasons for the treatment.[413]

In public law proceedings inquisitorial principles are applied. Under Section 24 AGG, Section 22 AGG is applicable to lawsuits arising under civil service law. The regulation suggests that, in such cases, the burden of proof may be modified according to the inquisitorial system.[414] However, also in this context, a preponderant probability of the causality of the characteristic is enough, whereas the unequal treatment and the existence of objective reasons or justification must be proved to the full conviction of the court. In addition, the regulationis relevant in *non liquet* situations.[415]

The directives provide for the possibility of the non-application of the burden of proof regulations in inquisitorial proceedings (Article 8(5) Directive 2000/43/EC and Article 10(5) Directive 2000/78/EC). It is thus in accordance with European law that the burden of proof rule is not extended to all lawsuits under public law, especially with regard to social benefits, education and the provision of goods and services in the case of discrimination on the ground of race and ethnic origin, as these lawsuits are inquisitorial proceedings.

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

In Germany, there are legal measures of protection against victimisation.

Section 16 AGG prohibits victimisation in employment relations. The employer is not allowed to disadvantage employees because they claim rights flowing from the AGG or because they refuse to follow an order contrary to the AGG (Section 16(1) (first sentence) AGG).

The same principle holds for witnesses or people who support the employee (Section 16(1) (second sentence) AGG). Section 16(2) AGG provides that the rejection or toleration of a discriminatory act is not to be used as the basis of a decision against the employee. Parallel provisions exist in Section 13 SoldGG.

There are further prohibitions of victimisation in other legal norms.[416] There is no special prohibition in civil law as set out in Article 9 Directive 2000/43/EC, which constitutes a deficit in implementation.[417] Apart from civil service law (through Section 24 AGG) and public employees directly covered by the AGG, there is no regulation of victimisation in other public law areas (e.g. social law, public education, and provision of goods and services through public bodies). However, given the authoritative standards of the rule of

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[413] Cf. e.g. Germany, BAG, 9 AZR 791/07, 16 September 2008; Bertzbach, M. and Beck, T. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 22 for discussion, arguing that in terms of the establishment of the unequal treatment, a preponderant probability suffices, para. 33ff.

[414] Some state disability laws contain such regulations for public law, see Section 3.2 [Berlin] Act on Promoting Equality between People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung, Landesgleichberechtigungsgesetz (LGBG)*), 28 September 2006 ; Section 8(3) Law of Saxony-Anhalt on Promoting the Equality of People with Disabilities *(Gesetz des Landes Sachsen-Anhalt zur Gleichstellung von Menschen mit Behinderungen, Behindertengleichstellungsgesetz Sachsen-Anhalt (BGG LSA)*), 16 December 2010; Section 7(2) Thuringian Law on Promoting Equality and Improving the Integration of People with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderung, ThürGlG*), 16 December 2005.

[415] Cf. Mahlmann, M. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 24 para. 79ff.

[416] For example, prohibition on reprimand and disciplinary action in cases where employees pursue their lawful enjoyment of rights in the Civil Code, Section 612a BGB; persons of confidence (people representing the interests of the disabled employees) are specially protected in disability law so that they are not discriminated against because of their function, Section 179 SGB IX.

[417] Cf. Armbrüster, C. (2007), in Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 9 para. 6.

law (Article 20(3) GG), any victimisation is illegal. It is thus tenable to assume that no breach of European law exists in this respect. There is no special regulation on a shift of the burden of proof in the case of victimisation.

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

a) Applicable sanctions in cases of discrimination – in law and in practice

Section 15 AGG provides regulation of compensation. Where there has been discrimination, the victim is entitled to damages for material loss if the employer is liable for the breach of duty (wilful or negligent wrongdoing) (Section 15(1) (second sentence) AGG). There is strict liability for damages for non-material loss (Section 15(2) (second sentence)). If the employer applies collective agreements, the employer is only liable in the case of gross negligence or intent (Section 15(3) AGG).

The AGG does not establish a duty to establish a contractual relationship, unless such a duty is derived from other parts of the law, such as tort law (Section 15(6) AGG).

These norms are applied analogously according to civil service law (Section 24 AGG).[418]

In the case of a violation of the prohibition of discrimination in general civil law, the victim has a claim of forbearance (that the discriminatory act be stopped) and removal of the disadvantage and can sue for an injunction (Section 21(1) AGG). The discriminator is liable to pay damages for material loss caused by the breach of duty (wilful or negligent wrongdoing) (Section 21(2) (second sentence) AGG). There is strict liability for damages for non-material loss (Section 21(2) (third sentence) AGG).

Given the case law of the CJEU,[419] demanding strict liability in the case of damages awarded in civil law for discrimination, the regulations in Section 15(1) (second sentence) and Section 21(2) (second sentence) AGG are in breach of European law.[420]

In addition, other norms of law can form the basis of compensation (Section 15(5) AGG). Section 21(3) AGG mentions only tort law, although other claims are not excluded by the application of the AGG.[421]

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

b) Ceiling and amount of compensation

The amount of compensation for non-material damage under labour law must be appropriate. If the discrimination was not a causal factor in the decision not to recruit an individual, the compensation for non-material loss is limited to a maximum of three months' salary (Section 15(2) (second sentence) AGG).

In civil law, the compensation for non-material damage must also be appropriate (Section 21(2) (third sentence) AGG). It has been held that the damages due to discrimination do not encompass the difference between the salary of the previous employment and the lower, current salary until retirement.[422]

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[418] For details, cf. Mahlmann, M. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 24 para. 66ff.

[419] Cf. Court of Justice of the European Union (CJEU), C-180/95, *Draehmpaehl v. Urania Immobilienservice* OHG, 22 April 1997, EU:C:1997:208, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0180&from=GA, para. 37.

[420] It may be argued that the same extends to Section 15(3) AGG in relation to collective agreements.

[421] For comments on civil law, cf. Armbrüster, C. (2007), in: Rudolf, B. and Mahlmann, M. (eds.) *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 7 para. 199ff.

[422] Cf. Wiesbaden Labour Court (*Arbeitsgericht, AG*), Wiesbaden/5 Ca 46/08, 18 December 2008, (the parties

c) Assessment of the sanctions

There is some experience with existing rules (not including on the ground of sex, which is not covered by this report), for example on disability discrimination.[423] In another recent case, the Federal Labour Court awarded two months' salary because of discrimination on the ground of religion.[424] However, it is difficult to extrapolate any average patterns from the case law.

The norms of the AGG would enable the courts to apply sanctions that are effective, proportionate and dissuasive, as required by the directives, in the many differentiated spheres of law, with their particular standards and demands, where anti-discrimination law is applicable.

settled in the next instance: Hessen Higher Labour Court (*Landesarbeitsgericht, LAG*), Hessen/12 SA 68/09 and Hessen/12 Sa 94/09).

[423] Berlin Labour Court (*Arbeitsgericht, AG*), Berlin/Az.: 91 Ca 17871/03, 10 October 2003, held that a general minimum for cases in which a disabled applicant would possibly have been employed is the equivalent of three months' salary; Berlin Labour Court, Berlin/Az.: 86 Ca 24618/04, 13 July 2005: non-material damages: three months' salary, finally (after decision by the BAG) confirmed by the Berlin Higher Labour Court (*Landesarbeitsgericht Berlin, LAG Berlin*), Berlin/5 Sa 1755/07, 31 January 2008. Frankfurt am Main Labour Court, Frankfurt am Main/Az.: 17 Ca 8469/02, 19 February 2003: 1.5 months' salary as compensation for mere failure to give reasons for the rejection of a disabled applicant, cf. Düwell, jurisPR-ArbR (juris Praxis Arbeitsrecht) 1/2004 Anm. 6.

[424] Federal Labour Court (BAG), 25 October 2018, 8 AZR 501/14. For further examples see section 12.2 on case law below.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes, ADS)[425] was established in August 2006 in Berlin, under Section 25 AGG. There are also various agencies with roles related to discrimination on the federal and regional level, most notably the Federal and Land Commissioners for Migration, Refugees and Integration and the Federal Government Commissioner for Matters Related to Ethnic German Resettlers and National Minorities (*Beauftragter für Aussiedlerfragen und nationale Minderheiten*), for Matters relating to Persons with Disabilities (*Beauftragte der Bundesregierung für die Belange behinderter Menschen*) and the German Institute for Human Rights (Deutsches Institut für Menschenrechte), which undertake advisory work for the Government and other public bodies, publish (extensive) reports and, to a limited degree, provide individual advice to victims of discrimination.

b) Political, economic and social context for the designated body

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

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

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

c) Institutional architecture

In Germany, the designated body does not form part of a body with multiple mandates.

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

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

i) Status of the body

The Federal Anti-Discrimination Agency (ADS) is organisationally associated with the Ministry of Family Affairs, Senior Citizens, Women and Youth (Section 26 AGG). The head of the agency is appointed by the Minister of Family Affairs, Senior Citizens, Women and Youth after a proposal by the Government. Funding is provided through the Ministry of Family Affairs, but the financial resources

[425] Website: http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html. In English: http://www.antidiskriminierungsstelle.de/EN/Home/home_node.html.

(about EUR 4 400 000) are administered independently by the ADS. It can recruit and manage staff. It is legally accountable to the ministry, although the ministry cannot give political directives concerning the operations of the ADS.

ii) Independence of the body

The head of the ADS is independent and subject only to the law. The tenure of the head of the agency is the same as the legislative period of the Bundestag. This could raise concerns with regard to the independence of the head of the body. Given the period of tenure, the head will always be appointed by the Government of the time. This is a source of possible informal influence on the policies of the agency by the Government. However, since the head is by explicit regulation legally independent and can only be removed in exceptional circumstances of breach of official duties, the agency may still be regarded as independent in the terms of the directives.

e) Grounds covered by the designated body/bodies

The role of the agency is to support people to protect their rights against discrimination on all grounds regulated by the AGG (race, ethnic origin, sex, religion, belief, disability, age and sexual identity), notwithstanding the powers of specialised governmental agencies dealing with related subject matters. In recent years, the agency's thematic activity has focused on a particular characteristic in each year (age in 2012, disability in 2013, ethnic origin and race in 2014, sex in 2015, religion and belief in 2016 and sexual orientation in 2017). In 2018 it conducted research on sexual harassment and on the prohibited grounds of discrimination. Any special activities of the ADS (e.g. commissioned studies) are devoted to the characteristic that is that year's theme. However, the ADS has no policy of concentrating its overall activities on any of these grounds specifically. The same is true for questions of intersectional discrimination. Some activities are driven by the need to react to current political affairs, such as the refugee crisis. Overall, the ADS has developed a differentiated pattern of attention to the different grounds, the emphasis depending on the chosen focus of that year.

As discrimination against migrants may raise questions of discrimination on the grounds of race, ethnic origin, religion and belief in particular, the agency deals with this issue.

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

i) Independent assistance to victims

- Independence

In Germany, the designated body has the competence to provide independent assistance to victims. Under Section 27(2) of the AGG, the agency will give independent assistance to persons addressing themselves to the agency in asserting their rights to protection against discrimination. Such assistance may, among other things, involve: providing information concerning claims and possible legal action based on legal provisions; providing protection against discrimination; arranging for advice to be provided by another authority; and endeavouring to achieve an out-of-court settlement between the parties involved.

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

- Effectiveness

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

- Resources

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

ii) Independent surveys and reports

- Independence

  In Germany, the designated body does have the competence to conduct independent surveys, produce scientific studies and publish independent reports (Section 27(3) AGG). The ADS, the relevant Federal Government Commissioner and the Parliamentary Commissioner of the Bundestag jointly submit reports to the Bundestag every four years concerning cases of discrimination on any of the grounds covered by the AGG and make recommendations regarding the elimination and prevention of such discrimination. They may jointly carry out academic studies into such discrimination (Section 27(4) AGG).

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

- Effectiveness

  The agency exercises this duty effectively. This is confirmed by the fact that, over the years, the ADS has commissioned many substantial studies.

- Resources

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

iii) Recommendations

- Independence

  In Germany, the designated body has the ability to issue independent recommendations on discrimination issues, including but not limited to, recommendations in the report to the Bundestag (Articles 27(3) and 27(4), AGG).

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

- Effectiveness

The ADS has worked effectively in this context, given that it has no ability to force public authorities to follow its recommendations.

- Resources

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

iv) Other competences

Its further responsibilities include publicity work (Section 27(3) AGG) and taking action for the prevention of discrimination (Section 27(3) AGG).

The agency can demand a position statement from the alleged discriminator, if the alleged victim of discrimination agrees (Section 28(1) AGG).

g) Legal standing of the designated body/bodies

In Germany, the designated body does not have legal standing to:

- bring discrimination complaints on behalf of identified victims to court;
- bring discrimination complaints on behalf of non-identified victims to court;
- bring discrimination complaints ex officio to court;
- intervene in legal cases concerning discrimination, such as *amicus curiae*.

The agency has no legal standing in cases of discrimination and cannot *ex officio* bring cases to court. Possible victims of discrimination can contact the agency and submit a query or complaint. The online contact form is mostly used for this purpose. The agency will then, if necessary, provide referrals to other anti-discrimination bodies. The complainants are informed by the agency with regard to their rights based on the AGG. The agency has no power to intervene in court proceedings, though it can voice legal opinions, there being no formal *amicus curiae* procedure in this respect.

h) Quasi-judicial competences

In Germany, the body is not a quasi-judicial institution. Where legal claims can be pursued, the agency seeks amicable settlement between the parties. The agency can demand a position statement from the alleged discriminator, if the alleged victim of discrimination agrees.[426] However, there is no legal duty for the submission of such statements.[427] Other public agencies have a duty to cooperate with the agency (Section 28(2) AGG). The agency can make recommendations.

Assistance provided to victims does not typically lead to court proceedings or tribunals, as the agency endeavours to achieve out-of-court settlements between the parties involved.[428] As the agency cannot issue binding decisions and does not possess the power to impose any sanctions against the parties, it cannot be regarded as a quasi-judicial institution.

There have been several conflicts settled in advance by the intervention of the agency. The agency engages in informal conflict resolution processes between parties, which appears

[426] Section 28(1) AGG.
[427] Ernst. H. (2018), in: Däubler, W. and Bertzbach, M. (eds.), *Allgemeines Gleichbehandlungsrecht: Handkommentar* (4th ed.), Baden-Baden, Nomos Verlag, § 28 para. 1.
[428] Section 27(2)(3) AGG.

to be done on a case-by-case basis. There is no larger scale conflict resolution practice in place.

The agency has contributed to the legal discourse on discrimination through its activities, e.g. commissioned studies and reports. Given its powers, the agency does not take action on its own initiative in court proceedings and is not active in strategic litigation.

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

In Germany, the body registers the number of complaints of discrimination made, and decisions (by ground, field, type of discrimination, etc).

These data are only partially and not systematically available to the public.

Between 2013 and 2016, the Federal Anti-Discrimination Agency received a total of 9 099 inquiries on possible discriminatory situations regarding one or multiple discriminatory features. In 6 474 cases, the inquirers were suspected of being disadvantaged because of one or more of the discriminatory grounds mentioned in Section 1 AGG. Conversely, this means that in 2 625 cases the described facts did not relate to any of the grounds protected by the AGG.[429] In 2018, 3 455 inquiries reached the agency.[430]

As already mentioned, these data are only partially and not systematically available to the public, depending on occasional need e.g. they are available in the context of thematic studies.[431]

j) Stakeholder engagement

In Germany, the designated body does engage with stakeholders as part of implementing its mandate.

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

Depending on the project, the agency engages with civil society associations, employers, public bodies, local government and trade unions. Examples of such work include: a map of organisations providing independent advice; a study on anonymous employment applications in collaboration with employers; setting up a 'coalition against discrimination', engaging *Länder* and local government.

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

[429] See the report to the German Bundestag, *Bundestagsdrucksache* 18/1360, p. 41.
[430] See Antidiskriminierungstelle des Bundes (2019), *Jahresbericht*, 1 April 2019: 31 % of these inquiries concerned race and ethnic origin; 29 % sex/gender; 26 % disability; 14 % age; 7 % religion; 5 % sexual identity; and 2 % philosophical belief.
[431] See, for example, the relevant publications that present anti-discrimination cases, available at: http://www.antidiskriminierungsstelle.de/DE/Publikationen/publikationen_node.html.

k) Roma and Travellers

The body has not yet developed any special programme with regard to Sinti and Roma in Germany.[432] However, a representative of the Sinti and Roma community is part of the advisory body. Various activities address the topic, e.g. in the context of international Roma day. In 2015, the Association for Solidarity with Sinti and Roma in Europe (Bündnis für Solidarität mit den Sinti und Roma Europas), which unites NGOs, religious groups, cultural and public institutions, including the Federal Anti-Discrimination Agency, was founded with a special focus on, although not limited to, the international Roma day in 2016. The association carried out many activities, including public discussions, art campaigns etc.[433] On international Roma day 2017, the head of the ADS[434] warned against the dangers of stereotyping.[435] In 2017, the agency organised a public discussion on police and anti-Gypsyism.[436] The international Roma day 2018 was celebrated in Berlin with a parade (as part of the first Roma Biennale), from the Monument of the Murdered Sinti and Roma of Europe to the Maxim Gorki Theater.

In 2014, the agency published a study regarding the opinions and attitudes of the German people towards Sinti and Roma.[437] The study concluded that various forms of distance and rejection towards Sinti and Roma exist in Germany.

[432] The current report by Germany (Ministry of the Interior, 2011) to the European Commission in the context of the EU Framework for National Roma Integration Strategies (available at: http://ec.europa.eu/justice/discrimination/files/roma_germany_strategy_en.pdf) was extensively questioned by the relevant 2012 assessment by the European Commission, as stated in the National Roma Strategy – Country Factsheet Germany (available at: http://ec.europa.eu/justice/discrimination/files/roma_country_factsheets_2013/germany_en.pdf) where, of 22 check points assessing progress in implementing the National Roma Integration Strategy, according to the Commission only one was met (allocation of resources to local and regional authorities).

[433] See www.romaday.org/Buendnis.

[434] The Federal Anti-Discrimination Agency is a member of the Alliance for Solidarity with the Sinti and Roma of Europe.

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

[436] See www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2017/20171017_Veransaltung_Polizei_und_Antiziganismus.html.

[437] Federal Anti-Discrimination Agency (2014), *Zwischen Gleichgültigkeit und Ablehnung - Bevölkerungseinstellungen gegenüber Sinti und Roma* (Between indifference and rejection - Population attitudes towards Sinti and Roma)*, available at:* www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Bevoelkerungseinstellungen_gegenueber_Sinti_und_Roma_20140829.html;jsessionid=5E9577EF246F7504031322D4400DA9A2.2_cid322?nn=4193516.

8 IMPLEMENTATION ISSUES

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

a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Anti-Discrimination Agency has produced information material, commissioned studies and held conferences on discrimination matters.[438]

The German Institute for Human Rights (Deutsches Institut für Menschenrechte) has launched a special website for an online manual with the title *Active against Discrimination*.[439]

The Federal Agency for Civic Education (Bundeszentrale für politische Bildung, BPB) offers comprehensive information on the topic of discrimination, which is available either on its website or in various print publications.[440]

Furthermore, the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice provide online access to up-to-date national law free of charge.[441]

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

There are various anti-discrimination initiatives in Germany, most importantly relating to discrimination on the grounds of race and ethnic origin including (institutionalised) cooperation with NGOs and social partners.[442] Legislative consultation processes routinely include a wide range of NGOs.

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

The Anti-Discrimination Agency, for example, has sought to communicate the value of anti-discrimination policies for an efficient economy through a conference on the matter and related publications.

d) Addressing the situation of Roma and Travellers

As already mentioned, the agency has no special programme concerning Sinti and Roma, although it has various activities relating to their situation. A representative of Germany's Sinti and Roma community is a member of the agency's advisory committee.

The Documentation and Cultural Centre of German Sinti and Roma (Dokumentations- und Kulturzentrum Deutscher Sinti und Roma) in Heidelberg focuses on the documentation of and scientific work on the history, culture and presence of the Sinti and Roma and is

[438] On the activities of the agency, see www.antidiskriminierungsstelle.de/DE/Home/home_node.html.
[439] See www.aktiv-gegen-diskriminierung.de.
[440] For more information see www.bpb.de.
[441] See www.gesetze-im-internet.de.
[442] One example is the Alliance for Democracy and Tolerance (*Bündnis für Demokratie und Toleranz*), founded in 2000, which with active support from the German state, currently brings together hundreds of initiatives working against racism and xenophobia, amongst other things: www.buendnis-toleranz.de. For other examples of initiatives against discrimination including social partners see chapter 10 below. The programme 'Live democracy' (*Demokratie leben*) supports a variety of initiatives to combat racism and other patterns of discrimination, see www.demokratie-leben.de/en/federal-programme/about-live-democracy.html.

supported by the Federal Government Commissioner for Matters Related to Ethnic German Resettlers and National Minorities (*Beauftragter für Aussiedlerfragen und nationale Minderheiten*).[443]

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

a) Mechanisms

Section 7(2) AGG provides that (individual or collective) agreements contrary to the prohibition of discrimination in labour law are null and void. According to Section 21(4) AGG, the discriminating party cannot rely on a discriminating agreement in civil law matters. Section 134 BGB, which makes such acts null and void, is applicable in civil law only for unilateral legal acts and agreements with discriminatory effects on third parties.[444] The common rules to solve clashes of legal rules apply.[445]

b) Rules contrary to the principle of equality

As explained, in the view of the author, certain laws may be considered to be in breach of the directives. There has been no systematic survey by the public authorities as to whether or not norms exist that are contrary to the directives.

[443] See www.sintiundroma.de/start.html.

[444] Cf. Bundestag, *Bundestagsdrucksache* 16/1780, p. 47; Armbrüster, C. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 7 para. 202ff.

[445] There are transitional rules for contractual obligations created before the coming into force of the AGG: Article 33(2) AGG: 'As regards discrimination on the grounds of race or ethnic origin, Sections 19 to 21 shall not apply to relationships under the law of obligations entered into prior to 18 August 2006.The first sentence shall not apply to subsequent changes to continuous obligations.' Article 33(3): 'As regards discrimination on the grounds of sex, religion, disability, age or sexual orientation, Sections 19 to 21 shall not apply to relationships under the law of obligations entered into prior to 1 December 2006. The first sentence shall not apply to subsequent changes to continuous obligations.' Article 33(4): 'As regards relationships under the law of obligations whose object is a private law insurance, Section 19(1) shall not apply where these were entered into prior to 22 December 2007. The first sentence shall not apply to subsequent changes to such obligations.'

9 COORDINATION AT NATIONAL LEVEL

There is no body that has centralised authority in this regard. The authorities concerned with issues of discrimination include the Federal ministries, the Federal Anti-Discrimination Agency, the Commissioner for Migration, Refugees and Integration and the committees of the German Parliament, to name just a few.

In 2017, the Federal Government adopted a national action plan against racism – *Positions and Measures to deal with Ideologies of Inequality and Related Discrimination* (*Nationaler Aktionsplan gegen Rassismus – Positionen und Massnahmen zum Umgang mit Ideologien der Ungleichwertigkeit und den darauf bezogenen Diskriminierungen*), which includes homophobia and transphobia.[446] Specific measures include: improved information; training of administration and the judiciary; improved documentation; prevention and prosecution of hate crimes; expansion of cooperation of police and civil society; political education, including for the German armed forces; increased diversity in the civil service; guidelines for the administration to help civil servants who are transgender express their identity; measures to deal with discriminatory ideologies on the internet; and dialogue with researchers and expanded research. The national action plan was introduced as an additional step towards strengthening social cohesion. It is an expansion of the first national action plan against racism, xenophobia, antisemitism and related intolerance (*Nationaler Aktionsplan der Bundesrepublik Deutschland zur Bekämpfung von Rassismus, Fremdenfeindlichkeit, Antisemitismus und darauf bezogene Intoleranz*), which was launched in 2008 to prevent violence and discrimination by emphasising that neither society nor politics are willing to tolerate such phenomena, to integrate minorities and to promote 'politics of recognition' of diversity. However, the plan has been criticised for mainly containing descriptions of already existing political and legal measures to combat racism, xenophobia and antisemitism.[447]

Due to the refugee crisis faced by Europe and Germany in particular, the Federal Government adopted a national integration action plan in 2015.[448]

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[446] See BT Drs. 18/7936. See the *2017 Action Plan*: www.bmfsfj.de/blob/116798/5fc38044a1dd8edec34de568ad59e2b9/nationaler-aktionsplan-rassismus-data.pdf. In English, available at: www.bundesregierung.de/breg-en/service/information-material-issued-by-the-federal-government/national-action-plan-against-racism-1525904. LGBT organisations have made the criticism that the plan contains no specific measures and continues to have no sufficiently tangible obligations.

[447] Follmar-Otto/Cremer (2009), *Der Nationale Aktionsplan der Bundesrepublik Deutschland gegen Rassismus. Stellungnahme und Empfehlungen*, Deutsches Institut für Menschenrechte, Policy Paper Nr. 12, January 2009. Available at: https://www.institut-fuer-menschenrechte.de/publikationen/show/policy-paper-no-12-der-nationale-aktionsplan-der-bundesrepublik-deutschland-gegen-rassismus-stel/.

[448] See www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/neustart-in-deutschland--integrationsplan-vorgestellt/90032.

10 CURRENT BEST PRACTICES

Relevant best practices include the following:

- In 2018, the Federal Anti-Discrimination Agency launched the largest nationwide anti-discrimination campaign to date, a call for young people to share discrimination experiences across areas, *#Darüber Reden/Aufruf an junge Menschen, Diskriminierungserfahrungen zu teilen* (Talking about it/Appeal to young people to share experiences of discrimination).[449]

- In 2018, the Federal Anti-Discrimination Agency issued a practical guide meant to help recognise and avoid discrimination in schools.[450]

- Addressing the issue of discrimination against refugees and new immigrants, the Federal Anti-Discrimination Agency published a guide in English with the title, 'Protection against Discrimination in Germany. A Guide for Refugees and New Immigrants'.[451]

- There are many initiatives for the integration of migrants that offer support in various spheres of life, tailored to the needs of migrants with the aim of fostering equal standing in society – from after school tuition to sport.[452] It is notable that in December 2018, employment agencies or job centres provided guidance to 175 000 refugees, while a total of about 372 000 refugees were registered as underemployed in December 2018.[453] Furthermore, in September 2018, 77 000 refugees were supported by labour market policy measures. In an encouraging pattern, the number of young refugees who sought dual vocational training from October 2017 to September 2018 with the support of a job agency or job centre increased significantly from 11 900 to 38 300.[454] The state provides numerous funding opportunities for companies hiring refugees, ranging from language courses to integration grants. Recognised refugees can directly enter the labour market. Asylum seekers and persons with provisional residence status are not allowed to work for the first three months of legal residence in Germany. Thereafter, there is limited access to the labour market. Specifically, this means that before the start of employment, the Immigration Authority must allow employment. The approval of the Federal Employment Agency is generally required for the work permit, which is the first step. As a rule, asylum seekers can also begin vocational training after three months and those with provisional residence status can begin such training from the first day of the confirmation of their status. The training must lead to a recognised professional qualification. There are numerous programmes to support companies offering such training.[455]

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[449] Website: www.darueberreden.de.

[450] Antidiskriminierungsstelle des Bundes (2018), *Diskriminierung an Schulen erkennen und vermeiden-Praxisleitfaden zum Abbau von Diskriminierungen in der Schule*, 3rd edition, available in German at: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Leitfaeden/Leitfaden_Diskriminierung_an_Schulen_erkennen_u_vermeiden.pdf?__blob=publicationFile&v=2.

[451] Available at: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Refugees/Fluechtlingsbroschuere_englisch.pdf?__blob=publicationFile&v=13.

[452] Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF), www.bamf.de/EN/Willkommen/Integrationsprojekte/integrationsprojekte-node.html.

[453] Federal Employment Agency (Bundesagentur für Arbeit, Statistik/Arbeitsmarktberichterstattung) (2018), *Fluchtmigration,* Nürnberg, Berichte: Arbeitsmarkt compact, available at: https://statistik.arbeitsagentur.de/Statischer-Content/Statistische-Analysen/Statistische-Sonderberichte/Generische-Publikationen/Fluchtmigration.pdf.

[454] Federal Employment Agency (2018), *Fluchtmigration,* Nürnberg, Berichte: Arbeitsmarkt compact, available at: https://statistik.arbeitsagentur.de/Statischer-Content/Statistische-Analysen/Statistische-Sonderberichte/Generische-Publikationen/Fluchtmigration.pdf.

[455] See www.bundesregierung.de/Content/DE/Artikel/2017/04/2014-04-13-integration-am-arbeitsplatz.html.

- Furthermore, in 2018, the Federal Anti-Discrimination Agency published a study on the evaluation of job advertisements in terms of discrimination, mechanisms of exclusion and positive action[456] as well as the results of an on-going survey regarding illegitimate job interview questions.[457]

- The Anti-Discrimination Agency commissioned a legal report concerning the rights of people with disabilities to workplace and everyday business barrier-free accessibility, which was published in 2018 under the title 'Reasonable accommodation as a dimension of discrimination in law. Human rights claims in respect of the General Equal Treatment Act'.[458] The main results were made available online, in simple language.[459]

- In 2018 German Chancellor, Angela Merkel, met with 50 teachers from all over Germany so that they could engage in a constructive exchange of best practice methods for 'Strengthening integration at schools, preventing violence and discrimination'.[460]

- Since 2017, the National Integration Award[461] forms the Federal Government's highest honour for valuable work on integration. In 2018, IsraAID was presented with the award in recognition of the Israeli humanitarian NGO's work with Syrian, Iraqi and Afghan refugees in Germany.

Specifically, regarding the Sinti and Roma:

- The Federal Government announced that the appointment of an expert commission on anti-Gypsyism (as agreed in the coalition agreement between the Christian Democratic Union, the Christian Social Union and the Social Democratic Party), should be completed by the end of the first quarter of 2019 at the latest. With regard to the content and structural design of the expert commission, in August 2018, an initial discussion took place at State Secretary level with the Chairman of the Central Council of German Sinti and Roma at the Federal Ministry of the Interior, Building and Community.[462]

- In 2013, Baden-Württemberg became the first federal state of Germany to sign a state treaty with the Sinti and Roma association. This treaty was a pilot project with a five-year term. In 2018, a second joint state treaty with a fifteen-year term was signed.

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[456] Antidiskriminierungsstelle des Bundes (2018), *Diskriminierung in Stellenanzeigen. Studie zur Auswertung von Stellenanzeigen im Hinblick auf Diskriminierung, Ausschlussmechanismen und positive Maßnahmen (Discrimination in job advertisements. A study on the evaluation of job advertisements in terms of discrimination, exclusion mechanisms and positive action*), available in German at: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Stellenanzeigen.pdf?__blob=publicationFile.

[457] Antidiskriminierungsstelle des Bundes (2018), *Was Arbeitgeber fragen (dürfen). Ergebnisse einer Umfrage zu unzulässigen Fragen in Vorstellungsgesprächen*, available in German at: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Bewerbungsgespraeche.pdf?__blob=publicationFile.

[458] Eichenhofer, E. (2018), *Angemessene Vorkehrungen als Diskriminierungsdimension im Recht. Menschenrechtliche Forderungen an das Allgemeine Gleichbehandlungsgesetz*, Antidiskriminierungsstelle des Bundes, Baden-Baden, Nomos Verlag, available in German at: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Rechtsgutachten/Rechtsgutachten_Angemessene_Vorkehrungen.html?nn=6575434.

[459] Available in German at: http://www.antidiskriminierungsstelle.de/DE/Service/LeichteSprache/LS_angemessene_Vorkehrungen/LS_angemessene_Vorkehrungen_node.html.

[460] See https://www.bundesregierung.de/breg-de/suche/integration-an-schulen-staerken-1528576.

[461] See https://www.bundesregierung.de/breg-de/themen/nationaler-integrationspreis-der-bundeskanzlerin/idee-und-hintergrund-424234.

[462] See https://www.bundestag.de/presse/hib/569346-569346.

Bavaria signed a similar state treaty in 2018 and Hessen in 2018. Framework agreements also exist in Bremen (2012), Thuringia (2015), Brandenburg (2018) and Rhineland- Palatinate (2015).

Within the terms of these treaties, the various *Länder* commit inter alia to work together in common councils with the Sinti and Roma associations, to protect and promote the German Sinti and Roma's own Romani language, to foster the memory of the history of persecution of the Sinti and Roma at schools, to support initiatives and projects and to promote the participation of Sinti and Roma in cultural, social and economic life.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

It is intended that the AGG and the accompanying legislation should provide a full transposition of the directives. However, in the view of the author, there are some shortcomings.[463] Several problematic issues have been identified in this report, but the main points are:[464]

a) the exception of dismissal from the application of the prohibition of discrimination, Section 2(4), AGG, though mitigated by case law (see section 3.2.3);
b) the possible non-application of the AGG to occupational pension schemes, Section 2(2), AGG, depending, however, on the judicial interpretation of the relevant norm (see section 3.2.3);
c) the exception from the material scope of the provision of goods and services of all transactions concerning a special relationship of trust and proximity between the parties or their family, including the letting of flats on the premises of the landlord for all grounds including race and ethnic origin, Section 19(5), AGG, which raises problems under the Racial Equality Directive, albeit depending on its contentious interpretation in this respect, (see sections 3.2.9 and 3.2.10);
d) the exception in relation to housing, including unequal treatment on the grounds of race and ethnic origin, to provide for socially and culturally balanced settlements, Section 19(3), AGG, depending on judicial interpretation (see section 3.2.10);
e) the formulation of the justification of unequal treatment for religion and belief, depending on judicial interpretation, Section 9(1), AGG, which has not been abrogated despite CJEU jurisprudence in this respect (see section 4.2);
f) Section 622(2) (second sentence), BGB provides that employment periods under the age of 25 are not taken into account when determining notice periods. This regulation is – as the CJEU has ruled[465] – not reconcilable with Article 6 of Directive 2000/78/EC (see section 4.7.5.a) and is no longer applied by German courts (see section 12.2);
g) there is no special prohibition of victimisation in civil law, as set out in Article 9, Racial Equality Directive (2000/43/EC) (see section 6.4);
h) the dependence of compensation for material damage on fault (wilful or negligent wrongdoing) or gross negligence respectively, Sections 15(1), 15(3) and 21(2) AGG,

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[463] Assuming that European law demands a differentiated transposition, see Court of Justice of the European Union (CJEU), C-49/00, *Commission v. Italy*, 15 November 2001, EU:C:2001:611, para 21ff, http://curia.europa.eu/juris/celex.jsf?celex=62000CJ0049&lang1=en&type=TXT&ancre=; Court of Justice of the European Union (CJEU), C- 236/95, *Commission v. Hellenic Republic*, 19 September 1996, EU:C:1996:341, para 13, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0236&from=EN; Court of Justice of the European Union (CJEU), C-38/99, *Commission v. French* Republic, 7 December 2000, EU:C:2000:674, para 53, http://curia.europa.eu/juris/celex.jsf?celex=61999CJ0038&lang1=en&type=TXT&ancre=; Court of Justice of the European Union (CJEU), C-144/99, *Commission vs. Kingdom of the Netherlands*, 10 May 2001, EU:C:2001:257, para 17, http://curia.europa.eu/juris/celex.jsf?celex=61999CJ0144&lang1=en&type=TXT&ancre= : 'It should be borne in mind, in that connection that according to settled case law, whilst legislative action on the part of each Member State is not necessarily required in order to implement a directive, it is essential for national law to guarantee that the national authorities will effectively apply the directive in full that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before national courts.' With regard to case law the Court continues, '...even where the settled case law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive that cannot achieve the clarity and precision needed to meet the requirement of legal certainty', Ibid, para 21.

[464] For the following list in the main text it is assumed that Article 3 GG protects adequately against discrimination on the ground of race and ethnic origin, religion, belief and disability explicitly or through the open-textured guarantee of equality in Article 3(1), GG for the grounds of age and sexual orientation in public law through a strict test of proportionality for the justification of any unequal treatment. This interpretation is contentious in detail, but tenable in the light of the jurisprudence of the BVerfG.

[465] Court of Justice of the European Union (CJEU), C-555/07, *Kücükdeveci v. Swedex GmbH & Co. KG*, 19 January 2010, EU:C:2010:21, http://curia.europa.eu/juris/celex.jsf?celex=62007CJ0555&lang1=en&type=TXT&ancre=.

is contrary to CJEU jurisprudence in this respect but continues to be valid law (see section 6.5);

i) in public law, there is no comprehensive implementation of anti-discrimination law with regard to harassment and the instruction to discriminate regarding race and ethnic origin in the areas of social protection and social advantages, education and the provision of goods and services, depending on judicial interpretation (see sections 3.2.4 and 3.2.6 – 3.2.9);

j) there is no general regulation of reasonable accommodation of disability (see section 2.6.a).

11.2 Other issues of concern

The two attempts to transpose the directives that are the subject of this report met considerable resistance in the public and legal spheres, which in part was directed at the details of the transposition and in part against the project as such.[466] This background is still relevant for the problems that the transposition and implementation of the directives face. A particular point of contention was the attempt not only to implement the directives, but to create a consistent regime of anti-discrimination law beyond the demands of European law, especially to include all grounds in the prohibition of discrimination in civil law, and not only race and ethnic origin. The tone of some participants in the debate was very harsh, although today – in light of the by-now extensive experience of the law – this has broadly changed. There is enough empirical evidence of discriminatory opinions and behaviour in Germany to be concerned about the problem, although methodologically sound studies on many grounds of discrimination are rare.[467] There are some empirical studies about the particular experiences of discrimination of migrants and refugees confirming the existence of discrimination on a significant scale.[468] The substantial amount of violence against shelters of refugees and refugees themselves in the context of the arrival of refugees in Germany adds further reason for concern.

As indicated in the overview of the context of anti-discrimination law in Germany, the guarantee of human dignity is the most fundamental provision of German law. This makes discrimination against human beings because of any characteristics, such as race, ethnic

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[466] On the debate see e.g. the overview in Bauer, J.-H./Krieger, St., AGG, 4th ed. 2015, para 32b-32g; Braun, J. (2002) 'Forum: Übrigens – Deutschland wird wieder totalitär', in *Juristische Schulung* 2002, p. 424ff. Säcker, F.-J. (2002) '"Vernunft statt Freiheit" – Die Tugendrepublik der neuen Jakobiner', in *Zeitschrift für Rechtspolitik* 2002, p. 286. See Baer, S. (2002) '"Ende der Privatautonomie" oder grundrechtlich fundierte Rechtsetzung? – Die deutsche Debatte um das Antidiskriminierungsrecht', in *Zeitschrift für Rechtspolitik* 2002, p. 290ff; Mahlmann, M. (2002) 'Gleichheitsschutz und Privatautonomie', in *Zeitschrift für europarechtliche Studien* 2002, p. 407ff; Mahlmann, M. (2003) 'Gerechtigkeitsfragen im Gemeinschaftsrecht', in *Loccumer Protokolle* 40/03, p. 47ff.

[467] Cf. Klose, A. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch,* Baden-Baden, Nomos Verlag, § 10. A substantive study was conducted by the author of this report in collaboration with Prof Dr Hubert Rottleuthner, Freie Universität Berlin (*Diskriminierung in Deutschland*, 2011), financed by the European Union and the German government to provide further information. See Rottleuthner, H. and Mahlmann, M. (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Baden-Baden, Nomos Verlag. The executive summary (in German) is available here: http://ec.europa.eu/ewsi/UDRW/images/items/docl_16487_986472583.pdf. The Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*) commissioned similar work, see e.g.: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/BT_Bericht/Gemeinsamer_Bericht_zweiter_2013.pdf?__blob=publicationFile. First results of another study are available under, Antidiskriminierungsstelle des Bundes (2017), *Diskriminierungserfahrungen in Deutschland - Ergebnisse einer Repräsentativ- und einer Betroffenenbefragung*, December 2017: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Diskriminierungserfahrungen_in_Deutschland.html.

[468] For example, Antidiskriminierungsstelle des Bundes (2016), *Diskriminierungsrisiken für Geflüchtete in Deutschland: Eine Bestandsaufnahme der Antidiskriminierungsstelle des Bundes*, 2016, www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Diskriminierungsrisiken_fuer_Gefluechtete_in_Deutschland.html. The Federal Agency has published a guide to inform refugees and immigrants about their rights under anti-discrimination law: Antidiskriminierungsstelle des Bundes (2016) 'Protection against Discrimination in Germany. A Guide for Refugees and New Immigrants'. www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Refugees/Fluechtlingsbroschuere_englisch.pdf?__blob=publicationFile&v=7.

origin, religion, belief, disability, age or sexual orientation, impermissible on the most fundamental level. The directives aim to provide legal tools protecting individuals against such discrimination in the public and private spheres.[469] The values the directives aim to protect are therefore part of the core of the German legal system. In addition, the regime of legal provisions envisaged by the directives was already in part a reality of Germany's legal system, as regards discrimination based on sex (which is not covered by this report) and disability. These regulations and their interpretation by federal courts include the definition of discrimination, the shift of the burden of proof, legal standing and a regime of sanctions. Therefore, the final implementation of the directives through the AGG and accompanying legislation was not a radical new start for German law, but rather the further development of relevant parts of the existing law.[470]

In principle, Germany has established a comprehensive legal framework to combat acts of discrimination. There are some shortcomings, as reported in the section on potential breaches of the directives, (see section 11.1 above). The challenge ahead is to interpret and apply this legal framework in a consistent way, realising the purposes of anti-discrimination law that are, as indicated above, part of fundamental values enshrined in the German constitutional order, the foremost of which is human dignity. The case law is still limited, in absolute terms. There are reasons to believe, as reported above, that this is due to informal barriers to access to justice and problems of proof. Another issue of concern is the need to prevent attitudes that give rise to discrimination. Recent events, including xenophobic demonstrations of a significant scale, and the electoral success of xenophobic political parties despite the strong reaction by civil society, Government and political actors, give reason to believe that persistent efforts in this respect may be of great importance.

[469] See: McCrudden, C. (ed.) (2004), *Anti-discrimination law*, 2nd edition, Ashgate, Aldershot; Fredman, S. (2011), *Discrimination Law*, 2nd ed. Oxford, Oxford University Press. Fredman, S. (2001), 'Equality: A new generation?', in *Industrial Law Journal* 2001, pp. 145, 154ff; Baer, S. (1995), *Würde oder Gleichheit*, Baden-Baden, Nomos; Schiek, D. (2000), *Differenzierte Gerechtigkeit* Baden-Baden, Nomos Verlag; Bell, M. (2002), *Anti-discrimination Law and the European Union*, Oxford, Oxford University Press, p. 52; For some more technical remarks on the German situation, see Mahlmann, M. (2005), 'Prospects of German anti-discrimination law', in *Transnational law and contemporary problems*, p. 1045; for a general criticism from the point of view of the economic analysis of law: Epstein, R. A. (1992), *Forbidden grounds: The case against anti-discrimination law*, Cambridge, Ma, Harvard University Press; Grünberger, M. (2013), *Personale Gleichheit*, Baden-Baden, Nomos Verlag.

[470] Cf. on the legal ethics of anti-discrimination law, Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 1.

12 LATEST DEVELOPMENTS IN 2018

12.1 Legislative amendments

The most important legislative amendments in anti-discrimination law that entered into force in 2018 are:

- Federal Participation Act

The Act on strengthening the participation and self-determination of persons with disabilities, referred to as the Federal Participation Act (*Bundesteilhabegesetz, BTHG*),[471] entered into force on 1 January 2018 and amended, among other things, Social Code IX (*Sozialgesetzbuch IX, SGB IX*). The Federal Participation Act has been greeted as one of the most significant efforts to reform the legal participation rights of people with disabilities, as its main goal has been to strengthen the participation in society of people with disabilities as well as their self-determination.

The new Section 2(1) SGB IX provides a new definition of disability, adapted to the UN Convention on the Rights of Persons with Disabilities:[472]

> 'Persons with disabilities are persons who have physical, mental or sensory impairments which, in interaction with various barriers, whether attitudinal or environmental, may hinder their full and effective participation in society for more than six months.'

Since 2018, benefits for participation in education have formed a separate benefit group within the system of integration assistance.[473] They are intended to give people with disabilities equal access to the general educational system.

On the basis of a new model of 'independent advice' (*unabhängige Beratung*), beneficiaries are also provided with an independent point of contact, which informs them about possible benefits and participation in general.[474] The amended Social Code IX also provides for the beneficiaries to access independent advice.[475]

Since 1 January 2018, under amended Social Code IX, the representatives of disabled persons (*Schwerbehindertenvertretungen*) must be included in the process before the dismissal of a severely disabled person.[476]

- Act to Introduce Civil Model Declaratory Proceedings

As of 1 November 2018, the new Act to introduce civil model declaratory proceedings[477] amending the Civil Procedure Code (*Zivilprozessordnung,* ZPO),[478] allows consumer class actions, for the first time. Under the act, certain qualified institutions are authorised to sue a company on behalf of consumers before the higher regional court (*Oberlandesgericht, OLG*).

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[471] Germany, Federal Participation Act (*Bundesteilhabegesetz, BTHG*), 23 December 2016, with effect from 1 January 2018.
[472] United Nations (UN), Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006, https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html.
[473] Section 75 SGB IX.
[474] Section 32 SGB IX.
[475] Section 106(4) SGB IX (enters into force 2020).
[476] Section 178(2) (third sentence) SGB IX.
[477] Germany, Act to introduce civil model declaratory proceedings (*Gesetz zur Einführung einer Musterfeststellungsklage*), 12 July 2018, with effect from 1 November 2018.
[478] Civil Procedure Code (*Zivilprozessordnung, ZPO*), 5 December 2005.

The Federal Association of Consumer Associations (Verbraucherzentrale Bundesverband) has criticised the fact that the requirements for qualified institutions, as explained above, prohibit smaller regional or specialised institutions from filing suits on behalf of consumers.[479]

As already stated above, it is an open question whether the new class action will have any significance for discrimination matters.

- Act Implementing the Directive (EU) 2017/1564[480]

The Act implementing the Marrakesch - directive of 28 September 2018 aims to improve access to literature for the blind, visually impaired and print-impaired persons. It amended the Act on copyright and related rights (*Urhebergesetz, UrhG*),[481] which now incorporates a provision in favour of people with disabilities.[482] It has been greeted as a further positive development in the field of literary works.

[479] See the relevant Press Release in German at: https://www.vzbv.de/pressemitteilung/musterfeststellungsklage-verabschiedet.

[480] Directive (EU) 2017/1564 of the European Parliament and the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 242, pp. 6-13, https://eur-lex.europa.eu/eli/dir/2017/1564/oj.

[481] Germany, Act on copyright and related rights (*Urhebergesetz, UrhG*), 9 September 1965.

[482] Section 45a UrhG.

12.2 Case law

Religion and belief

Name of the court: Administrative Court Kassel (*Verwaltungsgericht Kassel, VG Kassel*)
Date of decision: 28 February 2018
Name of the parties: N/A[483]
Reference number: 1 K 2514/17.KS
Address of the webpage:
www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:8063235
Brief summary: The case concerns the wish of a civil servant to wear a headscarf because of her faith as a Muslim during working hours. The court decided that the employer is not permitted to prohibit the wearing of such a headscarf with a view to the duty of neutrality derived from civil service law. The employer justified this prohibition because the civil servant works in an area that involves contact with the general public. In this specific case, the civil servant worked for the communal social services. The court regarded such a prohibition as a disproportionate interference with the freedom of religion of the civil servant. Because of the violation of freedom of religion, the court considered it unnecessary to decide whether the matter in question constituted discrimination on the ground of religion as well. To avoid such interference and the potential violation of the prohibition of discrimination on the ground of religion, a specific threat to the neutrality of the state or the fundamental rights of third parties has to be made plausible.

Name of the court: Nürnberg Higher Labour Court (*Landesarbeitsgericht Nürnberg, LAG Nürnberg*)
Date of decision: 27 March 2018
Name of the parties: N/A
Reference number: 7 Sa 304/17
Address of the webpage:
https://www.lag.bayern.de/imperia/md/content/stmas/lag/nuernberg/entscheidungen/2018/7_sa_304_17.pdf
Brief summary: The decision concerns an instruction of an employer's rule that a shop assistant must not wear during her working hours a headscarf that she wears because of her religious faith. The court argued that such an instruction is indirect discrimination on the ground of religion and thus void. That is because it was based on the enterprise's policy of prohibiting the visible display of all religious and other philosophical beliefs by symbols of a particular religious or philosophical creed. However, it disproportionately affected women of Muslim faith. The court stated that there are no objective reasons for the indirect discrimination referring to the recent case law of the CJEU (CJEU, 14 March 2017, C-157/15, *Achbita*; CJEU, 14 March 2017, C-188/15, *Bougnaoui*). It argued that the employer had, in the particular circumstances of the case, no economic interest nor other reasons worthy of protection in prohibiting the display of religious symbols. There were no detrimental economic effects to be feared, as the retail business employee did not have particularly close contact with the customers nor were there any indications that the wearing of religious symbols would cause conflicts within the enterprise. In addition, the instruction violated the freedom of religion of the employee. The court regarded it as disproportionate to prohibit the wearing of the headscarf, given that no economic disadvantages were to be expected nor was it made plausible that conflicts because of the display of religious symbols were likely to arise.

Name of the court: Administrative Court Berlin (*Verwaltungsgericht Berlin, VG Berlin*)
Date of decision: 18 April 2018
Name of the parties: N/A
Reference number: 28 K 6.14

[483] In Germany, court decisions do not publish the names of the parties.

Address of the webpage: www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=JURE180008816&doc.part=L&doc.price=0.0#focuspoint
Brief summary: The case concerns discrimination on the grounds of religion and belief and age. The complainant applied for a post as civil servant in the Federal Ministry of the Interior for two consecutive job openings. In both cases he was not considered as a suitable candidate. After the termination of the employment process, leading media in Germany reported that, in the Federal Ministry of the Interior, candidates were deliberately selected according to political opinions, certain religious beliefs and their political views. In the framework of an unrelated lawsuit, a representative of people with severe disabilities in the Ministry of the Interior stated that in the ministry's selection processes the ranking of qualified applicants was arbitrarily changed to fit political purposes. In answer to a parliamentary request for information on this matter, the Federal Government of Germany stated that young lawyers were recruited to balance the age structure of the ministry.

The court held that these news reports and the statement of the representative of people with severe disabilities in a lawsuit were not sufficient to provide facts substantial enough to shift the burden of proof according to Section 22 AGG. They were not enough to create a sufficient probability that the applicant was indeed discriminated against on the grounds of his religion and political beliefs. It underlined that this would still be the case if one took political views as beliefs in the sense of Section 1 AGG, which the court thought was not a convincing interpretation of the law. The reference to young lawyers in the answer to the parliamentary request for information was interpreted by the court as post-factum information about the recruitment policies of the ministry, irrelevant to the question whether discrimination had occurred during the prior selection process.

Name of the court: Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof, BayVGH*)
Date of decision: 7 September 2018
Name of the parties: N/A
Reference number: 3 BV 16.2040
Address of the webpage: http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2018-N-7009?hl=true&AspxAutoDetectCookieSupport=1
Brief summary: The case concerns the wearing of a headscarf due to the Muslim belief of a woman serving as trainee lawyer during the practical part of the German law education, the *Referendariat*. During this training period she worked as a law clerk in a court. She was ordered not to wear her headscarf by the court when present during the oral proceedings in judicial-like functions, for example representing a prosecutor in criminal proceedings or interrogating witnesses in civil proceedings. After her training period as a law clerk, the order was rescinded.

The case concerns a particular feature of German administrative procedural law. Under certain circumstances even after a public act has ceased to have any effects on a claimant, a claimant can demand that the court ascertains that an infringement of her or his rights has taken place. There are certain procedural preconditions for such an ascertainment by a court, including a qualified interest of the complainant in the decision of the court. The Bavarian Higher Administrative Court decided that in this particular case an interest to ascertain the illegality of the prohibition against wearing a headscarf under these particular circumstances did not exist. In particular, it argued that the instruction had no discriminatory effect and did not constitute a severe violation of the human rights of the complainant. It argued that the order was the expression of the principle of the neutrality of the state, which is particularly important in judicial proceedings. It considered in particular, whether these findings would be in breach of Article 9(1) of Directive 2000/78/EC. It argued that the complainant enjoyed sufficient and effective legal remedies against the prescription. The remedies in her case were equivalent to other remedies, including administrative judicial review, in comparable circumstances. They were equally

effective as it was not impossible for the complainant to pursue her case in court. The court therefore dismissed the lawsuit of the complainant.

Name of the court: Federal Labour Court (*Bundesarbeitsgericht, BAG*)
Date of decision: 25 October 2018
Name of the parties: N/A
Reference number: 8 AZR 501/14
Address of the webpage: https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2019&nr=21978&linked=urt
Brief summary: The defendant (Diakonisches Werk) is an organisation of the Protestant Church in Germany and in 2012 advertised a position as 'a speaker' (60 %) for a fixed term of two years. The main focus of job was the preparation of the parallel report on the German state report on the implementation of the UN Convention against Racism, as well as statements and expert contributions and the project-related representation of Diakonie Germany vis-à-vis political actors, the public and human rights organisations as well as participation in committees. The parallel report was to be prepared in consultation with human rights organisations and other stakeholders. The advertisement also stated: 'We require membership in a Protestant Church or the working group of Christian Churches in Germany and identification with the diaconal mission. Please include your denomination in the curriculum vitae.' The claimant, who had no religious affiliation, applied for the position. She was not invited to a job interview. The defendant hired a member of the Protestant Church.

The claimant sued for compensation for damages pursuant to Section 15(2) AGG. The claimant argued that she was not employed because of her lack of religious affiliation.

The Federal Labour Court ruled that the defendant had directly discriminated against the applicant because of her religion. The discrimination was not justified under Section 9(1) AGG, which reads:

> 'Notwithstanding Section 8, a difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination [alternative 1] or by the nature of the particular activity [alternative 2].'

Section 9(1) (first alternative) AGG is not open to interpretation in accordance with Article 4(2) of Directive 2000/78/EC and therefore must not be applied in the light of the decision of the CJEU, C-414/16, 17 April 2018, C-414-6, *Egenberger*. According to Section 9(1) (second alternative) AGG - interpreted in line with EU law – unequal treatment on the ground of religion is only permissible if religion constitutes, according to the nature of the professional activity or the circumstances of its exercise, an objective, legitimate and justified professional requirement in the light of the ethos of the religious community or institution.

The BAG argued that given the kind of employment (work on the specific report on the UN Convention on Racism) there was no reason to assume that religious affiliation to a Christian church was necessary to fulfil the professional duties of the advertised job or that an employee without religious affiliation would endanger the ethos of the organisation. The BAG decided therefore that the defendant was obliged to pay compensation of two months' salary.

Name of the court: Hamm Higher Labour Court (*Landesarbeitsgericht Hamm, LAG Hamm*)
Date of decision: 8 November 2018
Name of the parties: N/A
Reference number: 18 Sa 639/18
Address of the webpage:
https://www.justiz.nrw.de/nrwe/arbgs/hamm/lag_hamm/j2018/18_Sa_639_18_Urteil_20181108.html
Brief summary: The case dealt with a nurse who worked for a hospital run by the Protestant Church. She accepted the contractual obligation to work according to the ethos of the Protestant Church. After maternal leave she informed the employer that she intended to work with a headscarf because of religious reasons. The employer decided not to let her resume her work.

The court ruled that, if a non-Christian employee has committed herself to working according to the ethos of the Protestant Church, she is prevented from wearing a headscarf displaying her Muslim faith. The obligation imposed on the employee to refrain from wearing headscarves or similar headgear during working hours is suitable, necessary and proportionate and thus justified according to Section 9(2) AGG, interpreted in the light of CJEU, C-68/17, 11 September 2018, *IR/JQ*.

Name of the court: Hamburg Labour Court (*Arbeitsgericht Hamburg, ArbG Hamburg*)
Date of decision: 21 November 2018
Name of the parties: N/A
Reference number: 8 Ca 123/18
Address of the webpage: http://www.rechtsprechung-hamburg.de/jportal/portal/page/bsharprod.psml?showdoccase=1&doc.id=JURE190001061&st=ent
Brief summary: The complainant works as a therapist in a childcare facility. At the beginning of 2016 she decided to wear a headscarf expressing her belief as a Muslim. During her parental leave, the defendant adopted an internal regulation which, inter alia, states:

- Employees do not express any political, ideological or religious views to parents, children and third parties in the workplace.
- Employees wear no signs of their political, ideological or religious beliefs visible for parents, children and third parties at the workplace.
- Employees do not follow any rituals based on their belief in the workplace visible to parents, children and others.'

The defendant informed the employees that no Christian cross, Muslim headscarf or Jewish kippah could be worn at work.

The complainant refused to remove her headscarf and received several warnings from her employer. The complainant argues that, despite the general prohibition of visible signs of political, ideological or religious conviction, the prohibition was directed against the Muslim headscarf. In addition, she argues that the headscarf ban applies exclusively to women and constitutes discrimination because of her sex. Moreover, a headscarf ban disproportionately affects women with a migrant background, so that discrimination based on ethnic origin also should be considered.

The Hamburg Labour Court has formulated a preliminary reference to the CJEU, asking the following questions:

1. Does an instruction of an employer that prohibits the wearing of any visible sign of political, ideological or religious beliefs directly discriminate against workers, who follow certain dress codes because of their religion within the meaning of Articles 2(1)

and 2(2)(a) of Directive 2000/78/EC of 27 November 2000 establishing a general framework for the implementation of equal treatment in employment and occupation?

2. Does such a instruction discriminate against a female worker who wears a headscarf because of her Muslim belief indirectly because of her religion and/or because of her sex?

   (a) In accordance with Directive 2000/78/EC, may a difference of treatment on grounds of religion and/or sex be justified by the employer's subjective desire to pursue a policy of political, ideological and religious neutrality, if the employer would like to meet the subjective wishes of his customers?

   (b) Do Article 8(1) of Directive 2000/78/EC and/or the fundamental right of freedom to conduct a business under Article 16 of the Charter of Fundamental Rights of the European Union preclude national legislation that provides, in order to protect the fundamental right of religious freedom, that a ban on religious clothing cannot be justified on the grounds of its abstract ability to endanger the employer's neutrality, but only because of a sufficiently concrete risk, in particular a specific economic disadvantage for the employer or a third party concerned?

Name of the court: Berlin-Brandenburg Higher Labour Court (*Landesarbeitsgericht Berlin-Brandenburg, LAG Berlin-Brandenburg*)
Date of decision: 27 November 2018
Name of the parties: N/A
Reference number: 7 Sa 963/18
Address of the webpage: www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=JURE190002596&doc.part=L&doc.price=0.0#focuspoint
Brief summary: An applicant for a teaching position at a public school claimed that her application had been unsuccessful because she wears a Muslim headscarf and that therefore she was unlawfully discriminated against on the ground of religion. The court ruled that she had been discriminated against in the sense of Section 7 AGG. The Berlin Neutrality Act (Act on Article 29 of the Constitution of Berlin of 27 January 2005, GVBl. 2005, 92) according to which no religious or ideological symbols should be worn at schools by teachers which the defendant (the *Land* Berlin) invoked, offered no justification for her treatment. The court argued that this act has to be interpreted in accordance with the jurisprudence of the Federal German Constitutional Court (BVerfG, 1 BvR 471/10, 1 BvR 1181/10, 27 January 2015), which held that an abstract, general ban on religious symbols worn by teachers is unconstitutional. An exception to this rule is only possible if there is a situation of specific threats to the peace of the school or state neutrality. In the view of the court there was no such danger under the circumstances of the case. The court awarded the complainant compensation.

Disability

Name of the court: Berlin-Brandenburg Higher Labour Court (*Landesarbeitsgericht Berlin-Brandenburg, LAG Berlin-Brandenburg*)
Date of decision: 8 January 2018
Name of the parties: N/A
Reference number: 4 Ta 1489/17
Address of the webpage: Not available
Brief summary: The case concerns a complainant who is severely disabled according to German disability law. The complainant applied for employment. Two of the criteria demanded for the position were a polytechnical degree and very good knowledge in Turkish

or Turkish-Kurdish and German. The applicant took a language test with the employer but failed to achieve the necessary results to prove – as demanded – very good knowledge of the relevant languages. His application was consequently not further considered by the employer. The complainant argued that he had to be invited to an interview according to Section 82 (second sentence) SGB IX (Section 165 (third sentence) SGB IX new version), establishing the duty of public employers to invite an applicant with severe disabilities for an interview. In his view, the fact that this was not the case indicated discrimination on the ground of disability.

The court argued that an invitation for an interview pursuant to Section 82 (second sentence) SGB IX is not necessary if the applicant is evidently not qualified to fulfil the requirements of the employment position in question. It argued that the failure of the applicant to pass the language test showed that this was the case. The court could not detect any causal relation between the decision not to invite the applicant for an interview and his disability. It dismissed the argument that the language test already formed part of the interview and underlined that it was instead a precondition for being invited to such an interview. Section 82 (second sentence) SGB IX was consequently not violated.

Name of the court: Mecklenburg – Western Pomerania Higher Labour Court (*Landesarbeitsgericht Mecklenburg-Vorpommern, LAG Mecklenburg-Vorpommern*)
Date of decision: 23 January 2018
Name of the parties: N/A
Reference number: 2 Sa 166/17
Address of the webpage: www.landesrecht-mv.de/jportal/portal/page/bsmvprod.psml;jsessionid=0.jp35?showdoccase=1&doc.id=JURE180007596&st=ent
Brief summary: The case concerns a person with severe disabilities according to German disability law. The complainant applied for employment in the public administration. Requirement for this employment was the second legal state exam of Germany or an equivalent academic degree with a specialisation in public administration. The complainant had not yet passed the second state exam at the time of the application. When he subsequently followed up his application by sending the certificate that he had passed the exam, the employer informed him that a decision about the advertised employment had already been taken. The complainant argued that there was discrimination on the ground of disability and demanded damages because he was not invited to an employment interview pursuant to Section 82 (second sentence) SGB IX (Section 165 (third sentence) SGB IX new version), establishing the duty of public employers to invite an applicant with severe disabilities. The court dismissed the lawsuit. It argued that there was no obligation to invite the complainant for a job interview because he was objectively not suitably qualified for the particular job, as he had not yet passed the second state exam. In addition, a master's degree specialising in advocacy and the practice of advocacy that the claimant had already acquired formed in the view of the court no equivalent to an academic degree specialising in public administration. It is up to the person with severe disabilities to inform a prospective potential employer about newly acquired qualifications. The court held that, if the employer has already taken a decision before such information is provided, the employer is under no obligation to reconsider the already-taken decision to employ another candidate.

Name of the court: Federal Labour Court (*Bundesarbeitsgericht, BAG*)
Date of decision: 25 April 2018
Name of the parties: N/A
Reference number: 2 AZR 6/18
Address of the webpage: http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=20737
Brief summary: The case concerns an extraordinary dismissal of an employee working as a nurse due to continuous and repetitive illnesses. The court ruled that continuous and

repetitive illnesses can form reasons for an extraordinary dismissal of the employee. In an employment relationship regulated by the collective labour agreement concerning public service in the German *Länder*, the reference period for assessing the preconditions of such extraordinary dismissals are the last three years before the dismissal. The court argued that if the employer had to pay the salary of the employee for more than a third of the yearly working days during his illness, an extraordinary dismissal can be justified. It underlined, however, that the situation could be different if the illness is caused by a disability in the sense of Directive 2000/78/EC. In that case, other standards might apply to avoid discrimination on the ground of disability. The court left open the question of what nature these standards might be. The case was handed back to the lower courts for further consideration.

Name of the court: Düsseldorf Higher Labour Court (*Landesarbeitsgericht Düsseldorf, LAG Düsseldorf*)
Date of decision: 24 July 2018
Name of the parties: N/A
Reference number: 3 Sa 257/17
Address of the webpage:
http://www.lag-duesseldorf.nrw.de/beh_static/entscheidungen/entscheidungen/sa/0257-17.pdf
Brief summary: The case concerns a contractual agreement between an employee with severe disabilities and an employer that terminated the employment of the employee at the time when he became entitled to receive early retirement benefits. As a severely disabled person, he was entitled to receive such benefits at the age of 60 and thus at an earlier age in comparison to other employees who are entitled to receive such benefits at the age of 63. The court argued that such a rule is discrimination on the ground of disability. This is so because the person with severe disabilities suffers a disadvantage from this rule in comparison to persons without disabilities. Persons without disabilities are entitled to work longer and suffer from a lower reduction of their pension entitlement due to their early retirement. The complainant in contrast retires earlier and suffers a higher reduction of his pension entitlements because of this early retirement. The court argued that, because there are no justifying reasons for such unequal treatment, the rule forms an unjustified discrimination on the ground of disability.

Name of the court: Köln Higher Labour Court (*Landesarbeitsgericht Köln, LAG Köln*)
Date of decision: 23 August 2018
Name of the parties: N/A
Reference number: 6 Sa 147/18
Address of the webpage:
https://www.justiz.nrw.de/nrwe/arbgs/koeln/lag_koeln/j2018/6_Sa_147_18_Urteil_20180823.html
Brief summary: The case concerns a person with severe disabilities who applied for employment by a public authority. Due to organisational deficiencies of the employer his application was not considered. As a consequence, he was not invited for an interview. The court decided that not inviting the applicant for an interview in breach of the obligation to do so pursuant to Section 82 (second sentence) SGB IX (Section 165 (third sentence) SGB IX new version), establishing the duty of public employers to invite an applicant with severe disabilities, constituted discrimination on the ground of disability. The effect of not inviting the applicant for an interview was sufficient to result in such discrimination irrespective of the reasons that led to the applicant not being invited. The court argued that, in addition, further discrimination on the ground of disability was caused by the selection process as such. Not inviting an applicant contrary to the legal obligation of Section 82(2) SGB IX formed sufficient facts to shift the burden of proof according to Section 22 AGG that the applicant was not considered for the job because of his severe disability. As the reason for not considering the applicant were organisational deficiencies on the side of the employer, the employer was unable to prove that there were objective reasons unrelated to the disability of the applicant that led to the decision of the employer not to employ the

applicant. Otherwise, organisational deficiencies of an employer could always be used to justify discriminatory behaviour. The court decided that the employer therefore had to pay damages pursuant to Section 15(2) AGG (EUR 3 717.20).

Name of the court: Bavaria Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof, BayVGH*)
Date of decision: 3 December 2018
Name of the parties: N/A
Reference number: 3 ZB 16.581
Address of the webpage: http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2018-N-32462
Brief summary: The complainant is a teacher with severe disabilities employed in public education. Because of her severe disability her working hours are reduced. In 2013, public authorities recognised that she had a higher degree of severe disability (70 % instead of 50 %). She informed the school that she was working at about this in 2015. As a consequence, her working hours were further reduced. The complainant argued that it was discrimination on the ground of disability that her working hours were not already reduced in 2013.

The court argued that discrimination in the sense of Section 791) AGG presupposes the knowledge of the particular employer of the changed degree of severe disability. It is the duty of the employee to provide this information. Other public authorities are not allowed to do this due to the principle of the secrecy of social data (*Sozialgeheimnis*), Section 35 Social Code I (*Sozialgesetzbuch I, SGB I*). The court argued that, as the employer had no knowledge of the changed degree of severe disability before 2015 and adopted the working hours when it obtained this information, there was no discrimination on the ground of disability.

Age

Name of the court: Federal Labour Court (*Bundesarbeitsgericht, BAG*)
Date of decision: 20 February 2018
Name of the parties: N/A
Reference number: 3AZR 43/17
Address of the webpage: http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=20063
Brief summary: The case concerns a regulation in an occupational pension scheme, which excluded from the benefits of the scheme those married partners who were more than 15 years younger than the deceased employee. The wife of a deceased employee filed suit claiming discrimination based on the ground of age. The Federal Labour Court decided that there was direct discrimination on the ground of age. It held, however, that the unequal treatment is justified according to Section 10 AGG. It argued that the interest of the employer to be able to calculate the financial burdens of the occupational pension scheme is an objective, appropriate and legitimate aim justifying such unequal treatment pursuant to Section 10 AGG. It argued that the employer needs to limit and calculate the possible costs incurred by the occupational pension schemes. It argued that, given the substantial age difference between the spouses of more than 15 years, the spouse of the deceased is in a position to foresee that he or she will spend a significant time of his or her life without the partner and can plan accordingly.

Name of the court: Federal Administrative Court (*Bundesverwaltungsgericht, BVerwG*)
Date of decision: 28 March 2018
Name of the parties: N/A
Reference number: 1WB8.17
Address of the webpage: https://www.bverwg.de/280318B1WB8.17.0
Brief summary: The case concerns a soldier of the German army seeking access to the possibility to qualify as an officer in the army. His application was dismissed based on a

regulation that a precondition for qualification as an officer is a 15-year period of further service in the German army after admission to the career of an officer. Because of his age he could not meet this condition before reaching the retirement age. The Federal Administrative Court ruled that the regulations on particular age limits cannot be based on an executive order but must be regulated by statute because of the importance for the individual concerned. Given that the German anti-discrimination law exempted the law of soldiers from the prohibition of discrimination on the ground of age, following Article 3(4) Directive 2000/78/EC, only Article 3(1) GG is relevant for the evaluation of possible age limits. The court argued, first, that possible justifications for age limits are the costs caused by training for a particular occupation. These costs justify that this training is put to use for a sufficiently long period of time. Secondly, specific physical demands of the service in the army can justify such age limits. Given the decision of the Federal Administrative Court, the legislature has to regulate age limits in this area by statute instead of executive order. The German Ministry of Defence has to reconsider its decision about the application of the complainant in light of the reasoning of the court.

Name of the court: Federal Labour Court (*Bundesarbeitsgericht, BAG*)
Date of decision: 26 April 2018
Name of the parties: In Germany, court decisions do not publish the names of the parties.
Reference number: 3 AZR 19/17
Address of the webpage: http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=20482
Brief summary: The case concerns a regulation in an occupational pension scheme that limits the contribution of the employer to the pension scheme to the period up to when employees reach the age of 60. The pension scheme concerns higher executives of the enterprise. The court decided that such a regulation forms direct discrimination on the ground of age because it makes the reception of a financial benefit dependent on an absolute age limit. It argued, however, that such discrimination is justified under Article 10 AGG. This is so because there is an objective, appropriate and proportionate reason for such a regulation. The regulation has the aim of limiting the voluntarily incurred financial burdens of the employer. It helps to calculate the possible financial costs incurred by the occupational pension scheme. There are no particular interests of the employee that would render this regulation inappropriate or disproportionate. Creating an occupational pension scheme with contributions of the employer up to the age of 60 allows the employee to build up a sufficient level of financial security for his or her retirement. It took into consideration that the relevant provisions apply to employees with salaries considerably above the average, which allows for appropriate measures to secure sufficient financial means during their retirement. Furthermore, the court took into account that, for the relevant group of employees in executive functions in the enterprise, the usual age for terminating work is 60.

Name of the court: Hessen Higher Labour Court (*Landesarbeitsgericht Hessen, LAG Hessen*)
Date of decision: 18 June 2018
Name of the parties: N/A
Reference number: 7 Sa 851/17
Address of the webpage: http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:8147598
Brief summary: In 2009, the complainant applied for a trainee programme in an insurance company, which advertised for applicants with university degrees. He has been a fully qualified lawyer since 2001. The advertisement for the programme stated as a requirement for employment that the university degree was not obtained more than one year before applying for the programme. The court held that this advertisement formed indirect discrimination on the ground of age, as disproportionally many persons with a university degree obtained not more than one year before application are of a

comparatively young age whereas disproportionally many persons who cannot fulfil this requirement are of an older age. It argued that there were no objective reasons for this requirement for the programme. It decided that there were no indications that there was an abuse of the complainant's rights. The defendant did not substantiate sufficiently that the complainant did apply only to be able to claim discrimination. The complainant credibly argued that his intention was to find work. The court decided therefore that the defendant had to pay damages (EUR 14 000).

Name of the court: Low Saxony Higher Labour Court (*Landesarbeitsgericht Niedersachsen, LAG Niedersachsen*)
Date of decision: 1 August 2018
Name of the parties: N/A
Reference number: 17 Sa 1302/17
Address of the webpage:
http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=JURE180013609&st=null&showdoccase=1
Brief summary: The case concerns the application of a person already receiving an old-age pension for employment for which he was sufficiently qualified. His application was not considered by the employer who argued that a rule of a collective agreement that terminated work relations with the beginning of the entitlement to receive an old-age pension was applicable. As the complainant had already passed this age and received a pension, the employer regarded him as not eligible for the post. The court argued that this formed direct discrimination on the ground of age. It argued that the discrimination was not justified according to Section 10 AGG. In the view of the court, the rule of the collective agreement concerned only the termination of existing employment relations. It did not apply to the question of whether a person receiving an old-age pension could be considered as a candidate for a job vacancy. The court argued that the employer did not provide any reasons why the applicant was not suitable for the post concerned. General remarks about the aim of preserving the age structure of the workforce of the employer were not sufficient. The court argued that the employer had to specify why employing the complainant would jeopardise this aim. The court decided therefore that the complainant was entitled to damages according to Section 15(2) AGG (one month's salary).

Name of the court: Federal Labour Court (*Bundesarbeitsgericht, BAG*)
Date of decision: 18 September 2018
Name of the parties: N/A
Reference number: 9 AZR 20/18
Address of the webpage: http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=21831
Brief summary: The case concerns the dismissal of an employee. The dismissal was based on an agreement between the work council and the employer about the criteria for dismissal. This regulation included as criteria, according to the respective statutory demands of the Protection against Dismissal Act (*Kündigungsschutzgesetz*) Section 1(3), the time of employment in the respective enterprise, age, obligations to pay alimony and disability. The complainant argues that the decision of the employer to dismiss him and not another employee was based on an inappropriate disregard of his time of employment with the employer and of his age. The Federal Labour Court argued that this was not the case. Within the statutory framework of the Protection against Dismissal Act the criteria of time of employment in a respective enterprise, age, obligations to pay alimony and disability had to be taken into consideration. These criteria were in fact included in the agreement between the work council and the employer. The court found no fault in the weighing and balancing of the different criteria in the complainant's specific case. In particular, there was no discrimination on the ground of age according to Section 7(1) AGG. Age and the time of employment in the enterprise were taken into consideration by the employer. In the view of the court there are no facts that would indicate that other criteria, like the duty to pay alimony, were given a disproportionate weight that could indicate discrimination on the ground of age to the disadvantage of the complainant.

Name of the court: Federal Administrative Court (Bundesverwaltungsgericht)
Date of decision: 20 September 2018
Name of the parties: N/A
Reference number: 2 A 9/17
Address of the webpage: https://www.bverwg.de/200918U2A9.17.0
Brief summary: The case concerns an age limit of 50 years for admission to the civil service of the Federal Republic of Germany according to Section 48 Federal Budget Law (*Bundeshaushaltsordnung 2017, BHO 2017*). The complainant, who has passed the age of 50, argued that this regulation unjustly discriminated against him on the ground of age. The court argued that such an absolute age limit is direct discrimination on the ground of age. Such direct discrimination is, however, justified according to Section 10 AGG. The legitimate aim pursued by this regulation consists in the maintaining of an appropriate relation between the time of employment in the civil service and the time of retirement. It argued that it is a legitimate interest that the time served in the civil service is not too short in comparison to the consequent time of retirement. Giving the rules on pensions for civil servants, it regarded as a general rule the age of 50 as an absolute time limit for admission to the civil service of the Federal Republic of Germany as still being appropriate. This is so not the least because the provision of Section 48 BHO 2017 included special rules for exceptional cases. In the case at hand, however, there were no reasons to consider such exceptional circumstances, which include in particular an overwhelming interest of the Federation in the employment of the respective candidate.

Name of the court: Federal Labour Court (*Bundesarbeitsgericht, BAG*)
Date of decision: 16 October 2018
Name of the parties: N/A
Reference number: 3 AZR 520/17
Address of the webpage: http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=21815
Brief summary: The case concerns an occupational pension scheme providing that the pension for a spouse is reduced by 5 % for every year that the spouse of the deceased is more than 15 years younger than the deceased spouse. The court ruled that such a regulation is not unjustified discrimination on the ground of age. It argued that such a regulation forms direct discrimination on the ground of age. It is, however, justified according to Section 10 AGG. The unequal treatment is objective and appropriate and justified by a legitimate aim, the court argued. The employer has a legitimate interest to limit the possible costs of the occupational pension scheme. In marriages with an age difference of more than 15 years, it has to be expected that the younger spouse will spend a larger period of his or her life without the financial support of his or her spouse. It is regarded as legitimate by the court that the employee does not carry the financial risks immanent in this particular life situation.

Name of the court: Federal Administrative Court (*Bundesverwaltungsgericht, BVerwG*)
Date of decision: 20 October 2018
Name of the parties: N/A
Reference number: 2 B 46/18
Address of the webpage: https://www.bverwg.de/301018B2B46.18.0
Brief summary:
The case concerns a regulation of the Local and Regional Election Law (*Gemeinde- und Landkreiswahlgesetz Bayern*), Section 39(2), (second sentence), which provides for an age limit of 67 to professionally fulfil the duties of a mayor in Bavaria. The claimant argued that such a rule leads to discrimination on the ground of age that is not justified. The court held that this rule forms direct discrimination on the ground of age, but is justified by Article 6(1) Directive 2000/78/EC. The rule of the Local and Regional Election Law pursues a legitimate, objective and appropriate aim. The age limit serves the purpose, in the view of the court, to secure with proportionate means that the elected civil servant serving as a mayor enjoys the necessary physical abilities to fulfil his or her demanding tasks.

Name of the court: Berlin - Brandenburg Higher Labour Court (*Landesarbeitsgericht Berlin-Brandenburg, LAG Berlin-Brandenburg)*
Date of decision: 11 November 2018
Name of the parties: N/A
Reference number: 26 Sa 681/18
Address of the webpage: http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=JURE190000086&doc.part=L&doc.price=0.0#focuspoint
Brief summary: The case concerns a job application after a job advertisement that included the phrase that the post was part of 'a cool and young team'. The court ruled that such an advertisement can be a violation of Section 11 AGG, which prohibits job advertisements contrary to the prohibition of discrimination on the ground of age. Such job advertisements can create facts that may shift the burden of proof according to Section 22 AGG. In the case at hand, however, the employer showed that it had employed another candidate before it had received the application of the complainant. The court saw no special circumstances that would make it necessary to consider discrimination against the complainant despite this fact.

Name of the court: Federal Labour Court (*Bundesarbeitsgericht, BAG*)
Date of decision: 11 December 2018
Name of the parties: N/A
Reference number: 3 AZR 400/17
Address of the webpage: https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2019&nr=21879&linked=urt
Brief summary: The case concerns a provision in an occupational pensions scheme that the pension of a spouse of a deceased employee is reduced by 5 % for every year that the surviving spouse is more than 10 years younger than the deceased employee. In the case at hand the age difference was 15 years.

The Federal Labour Court ruled that discrimination because of age by this clause is justified according to Section 10 AGG. The employer has a legitimate interest in limiting the financial risk of the pension scheme. The clause is also appropriate and necessary. The judgment pointed out that the clause does not unduly harm the legitimate interests of the spouse. The court argued that, given the age difference, the surviving spouse has to be prepared to live for a longer period without the financial support of the deceased partner.

Race and ethnic origin

Name of the court: Münster Higher Administrative Court (*Oberverwaltungsgericht Münster, OVG Münster*)
Date of decision: 7 August 2018
Name of the parties: N/A
Reference number: 5 A 294/16
Address of the webpage: https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2018/5_A_294_16_Urteil_20180807.html
Brief summary: The complainant was asked by Federal Police officers at Bochum's main railway station to show his ID when he was picking up his partner. The reason for this check was (in the eyes of the police officers) the attempt to hide his face and – in the words of the court - his 'dark skin colour'.

The Higher Administrative Court (*OVG*) ruled that a police check solely based on the skin colour of a person (racial profiling) forms discrimination on the grounds of race and ethnic origin contrary to Article 3(1) of the Basic Law, guaranteeing equality before the law, and Article 3(3) of the Basic Law, prohibiting discrimination on the grounds of race and ethnic

origin. There is no justification for such discrimination. The skin colour of a person can only be taken into account by police officers if it does not form the only reason but one of several reasons for the police check. Other reasons must include specific facts that make it sufficiently plausible that a particular ethnic group violates the law at the place of the check. In light of these standards, the check on the complainant was a violation of Article 3(1) and Article 3(3) of the Basic Law, as no substantial reasons were given by the defendant as to why the complainant had been checked apart from his skin colour. The aim of the complainant was for the court to ascertain the illegality of the act. The court ruled accordingly.

Sexual orientation

Name of the court: Schleswig-Holstein Higher Labour Court (*Landesarbeitsgericht Schleswig-Holstein, LAG Schleswig-Holstein*)
Date of decision: 12 April 2018
Name of the parties: N/A
Reference number: 5 Sa 438/17
Address of the webpage:
http://www.gesetze-rechtsprechung.sh.juris.de/jportal/portal/t/2o3m/page/bsshoprod.psml;jsessionid=C7DDBE0C3F649416A2D2BE582B113E12.jp14?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=JURE180009919%3Ajuris-r02&doc.part=L&doc.price=0.0&doc.hl=1
Brief summary: The case concerns the dismissal of the complainant as a marketing executive of the respondent. The complainant argued that there was a case of discrimination on the ground of sexual orientation. He relied on the following incident to substantiate his claim. At some stage in the past, the executive of the enterprise asked him who the 'woman' in his homosexual relationship was. The insult of a fellow employee referring to his sexual orientation led to no further measures taken by the employer despite being informed about it. The court decided that these incidents do no shift the burden of proof pursuant to Section 22 AGG, as these events had no temporal nexus with the dismissal.

On another occasion the complainant informed other employees of the enterprise that his partner had been diagnosed as HIV-positive and that he himself had to undergo examinations as well. The court argued that these incidents did not shift the burden of proof pursuant to Section 22 AGG, either. They were not sufficient to show that the particular act of dismissal was based on the sexual orientation of the employee. It relied on the testimony of other employees. In addition, it argued that it was known to the enterprise at the time of the employment of the complainant that he was homosexual. The fact that colleagues may have assumed a higher risk that the complainant was HIV-positive because of the health status of his partner was not regarded as sufficient to show that the dismissal was based on such considerations. The court argued that a clear and sufficient nexus between the facts adduced to make discrimination on the ground of sexual orientation plausible and the discriminatory act has to be substantiated.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: **Germany**
Date: **31 December 2018**

Title of the law: Basic Law Abbreviation: GG Date of adoption: 23 May 1949 Latest relevant amendment: 15 November 1994 Entry into force: 23 May 1949 Web link: http://www.gesetze-im-internet.de/gg Grounds covered: Sex, parentage, race, language, homeland and origin, faith, religious or political opinions, disability Constitutional law Material scope: Public authorities, indirect horizontal effect between private parties Principal content: General equality clause (Article 3.1); specific anti-discrimination clause (Article 3.3)
Title of the law: General Act on Equal Treatment Abbreviation: AGG Date of adoption: 14 August 2006 Latest relevant amendment: 3 May 2013 Entry into force: 18 August 2006 Web link: http://www.gesetze-im-internet.de/agg Grounds covered: Race or ethnic origin, sex, religion or belief (Weltanschauung), disability, age, sexual identity; belief not in civil law Civil and administrative law, esp. labour law (public and private), partially private contract law (not belief) Material scope: Relationship between public and private employers and employees, incl. civil servants and judges; partially contractual relationship between private parties Principal content: prohibition of discrimination, damages, anti-discrimination body
Title of the law: Act on Equal Treatment of Soldiers Abbreviation: SoldGG Date of adoption: 14 August 2006 Latest relevant amendment: 31 July 2008 Entry into force: 18 August 2006 Web link: http://www.gesetze-im-internet.de/soldgg Grounds covered: Race or ethnic origin, religion, belief, sexual identity, partly severely disability Public law Material scope: Soldiers: employment; (continuing) education; membership in union Principal content: prohibition of discrimination
Title of the law: Act on Equal Opportunities for Persons with Disabilities Abbreviation: BGG Date of adoption: 27 April 2002 Latest relevant amendment: 10 July 2018 Entry into force: 1 May 2002 Web link: http://www.gesetze-im-internet.de/bgg Grounds covered: Disability

Public law Material scope: Barrier free access Principal content: Prohibition of discrimination, obligation to provide barrier free access; specialised body
Title of the law: Social Code IX Abbreviation: SGB IX Date of adoption: 23 December 2016 Latest relevant amendment: 28 November 2018 Entry into force: 1 January 2018 Web link: www.gesetze-im-internet.de/sgb_9_2018/BJNR323410016.html Grounds covered: Disability Labour law, Social law Material scope: Public and private employment Principal content: General legal protection of (severely) disabled

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: **Germany**
Date: **31 December 2018**

Instrument	**Date of signature**	**Date of ratification**	**Derogations/ reservations relevant to equality and non-discrimination**	**Right of individual petition accepted?**	**Can this instrument be directly relied upon in domestic courts by individuals?**
European Convention on Human Rights (ECHR)	04/11/1950	05/12/1952	N/A	N/A	Yes
Protocol 12, ECHR	04/11/2000	Not ratified	N/A	N/A	N/A
Revised European Social Charter	29/06/2007	Not ratified	N/A	Ratified collective complaints protocol? Not ratified	N/A
International Covenant on Civil and Political Rights	09/10/1968	17/12/1973	N/A	Yes	No
Framework Convention for the Protection of National Minorities	11/05/1995	10/09/1997	N/A	N/A	No
International Covenant on Economic, Social and Cultural Rights	09/10/1968	17/12/1973	N/A	No	No
Convention on the Elimination of All Forms of Racial Discrimination	10/02/1967	16/05/1969	N/A	Yes	No

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Elimination of Discrimination Against Women	07/07/1980	10/07/1985	N/A	Yes	No
ILO Convention No. 111 on Discrimination	25/06/1958	15/06/1961	N/A	N/A	No
Convention on the Rights of the Child	26/01/1990	06/03/1992	N/A	Yes	No
Convention on the Rights of Persons with Disabilities	30/03/2007	24/02/2009	N/A	Yes	No

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