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Germany

2023

including summary



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*European Commission
B-1049 Brussels*

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 2022 – 1 January 2023

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List of abbreviations

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

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. In recent decades, specifically because of a significant increase in asylum seekers and refugees, a development that was intensified in 2022 due to the Russian war of aggression against the Ukraine, a heterogeneous ethnic community has formed in Germany. Statistical data shows that about 22.6 million people living in Germany have a migration background.¹

The largest religious groups in Germany are the Catholic Church with about 21.6 million members and the Protestant churches with about 19.7 million members. The overall percentage of Muslims in Germany increased between 2015 and 2019, as the Muslim population grew by 0.9 million persons. The total number of Muslims (with or without citizenship) with a migration background living in Germany is estimated to be between 5.3 million and 5.6 million persons, which is approximately 6.4 % to 6.7 % of the total German population.² About 92 000 people in Germany are Jewish.³

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 and public bodies in Germany, this past creates a sense of responsibility for a strongly protected human rights culture.

Nevertheless, Germany must 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. Although there are only a few sound empirical studies on the matter,⁴ the available data suggests that human characteristics, such as

¹ See (in German): <https://de.statista.com/themen/125/religion/#editorsPicks>. It is worth mentioning that in recent years hundreds of thousands of people have left Germany's Catholic and Protestant churches. For more information see: <https://www.dw.com/en/germany-record-numbers-leaving-churches/a-62286684>. The German Bishop's Conference reported in its relevant publications that 359 338 persons left the German Catholic Church in 2021. See (in German), <https://www.dbk.de/presse/aktuelles/meldung/kirchenstatistik-2021>.

² For further insights regarding the life of Muslims in Germany, see: Pfündel, K., Sticks, A. And Tanis, K. (2021), *Muslimisches Leben in Deutschland 2020 - Studie im Auftrag der Deutschen Islam Konferenz* (Muslim life in Germany in 2020), Federal Office for Migration and Refugees, available in German at: <https://www.deutsche-islam-konferenz.de/SharedDocs/Anlagen/DE/Publikationen/Studien/mlid-2020-lang.pdf?blob=publicationFile&v=9>.

³ See (in German): <https://de.statista.com/themen/125/religion/#editorsPicks>.

⁴ See, for example, the substantive study, conducted by the author of this report in collaboration with Prof Dr Hubert Rottleuthner, Freie Universität Berlin: 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/doc/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. The Federal Antidiscrimination Agency provides a list of relevant publications, available in German at: http://www.antidiskriminierungsstelle.de/DE/Publikationen/publikationen_node.html. For views held about patterns of discrimination, cf. Eurobarometer 2019, <https://webgate.ec.europa.eu/ebsm/api/public/deliverable/download?doc=true&deliverableId=71149>.

religion and belief, disability, sexual orientation and age,⁵ also continue to be areas of on-going discrimination.

The most important developments in 2022 in the field of anti-discrimination law include the amendment to the General Act on Equal Treatment (AGG) of 23 May 2022, according to which the Federal Commissioner for Anti-Discrimination becomes the head of the Anti-Discrimination Agency (Section 25.3 AGG) who is elected by the Bundestag with a majority (more than half) of its members (Section 26.3 AGG) after nomination by the Federal Government (Section 26.1 AGG).

Furthermore, a law was passed on 10 November 2022 entailing amendments to the German Infection Protection Act (*Infektionsschutzgesetz*) (IfSG) regulating the distribution of scarce intensive care resources during a pandemic with a view to preventing discrimination in particular on the ground of disability.⁶

A significant development in 2022 was the appointment by the Federal Government of the first Federal Commissioner on Anti-Gypsyism, Dr Mehmet Daimagüler. In 2022, Reem Alabali-Radovan, Federal Commissioner for Migration, Refugees and Integration (*Staatsministerin beim Bundeskanzler und Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration*) became the first Federal Commissioner for Anti-Racism (*Beauftragte der Bundesregierung für Antirassismus*).⁷

Finally, another important development was the adoption of a national action plan for the protection and acceptance of gender and sexual identity (including sexual orientation)⁸ as well as the appointment by the Federal Government of Sven Lehmann as the first Federal Commissioner for the Acceptance of Sexual and Gender Diversity (*Queer-Beauftragter der Bundesregierung*).⁹

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.¹⁰ This act encompasses the General Act on Equal Treatment,¹¹ the Equal Treatment of Soldiers Act¹² 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*

⁵ It is noteworthy that according to the relevant and most recent data (2023) of the Federal Statistical Office (Statistisches Bundesamt, Destatis), over time persons aged 65 years or older will increasingly make up an even larger proportion of the total population in Germany. According to the population projection published by the Federal Statistical Office (Destatis) there will be about 21.2 million people aged 67 and over in 2070. See: https://www.destatis.de/EN/Themes/Society-Environment/Population/Population-Projection/_node.html. <https://www.destatis.de/DE/Themen/Querschnitt/Demografischer-Wandel/Aeltere-Menschen/bevoelkerung-ab-65-j.html>.

⁶ Bundestag (2022) 'Bundestag approves Infection Protection Act', press release, 10 November 2022, <https://www.bundestag.de/dokumente/textarchiv/2022/kw45-de-infektionsschutzgesetz-917438>.

⁷ Bundestag (2022) 'Federal Government appoints anti-Gypsy commissioner', press release, 9 March 2022, <https://www.bmfsfj.de/bmfsfj/aktuelles/presse/pressemitteilungen/bundesregierung-beruft-erstmalig-antiziganismus-beauftragten-193920>. For more information, see section 9, below.

⁸ For more information, see in German: <https://www.bmfsfj.de/resource/blob/205126/4826d1e00dc9d02e48f46fa47bb0c3e9/aktionsplan-queer-leben-data.pdf>.

⁹ For more information in German, <https://www.bmfsfj.de/bmfsfj/ministerium/behoerden-beauftragte-beiraete-gremien/queer-beauftragter-der-bundesregierung>.

¹⁰ 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.

¹¹ General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*) (AGG), 14 August 2006.

¹² Equal Treatment of Soldiers Act (*Soldatinnen- und Soldaten- Gleichbehandlungsgesetz*) (SoldGG), 14 August 2006.

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,¹³ is of central importance for understanding the German legal framework on discrimination, in particular the strong protection of fundamental rights, including the protection of human dignity, equality guarantees and prohibitions of discrimination. Unlike some other constitutions, the German Constitution is directly binding on all public authorities.

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 Act¹⁴ 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 persons with disabilities. 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 couples¹⁵ 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.

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.

¹³ Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*) (GG), 23 May 1949.

¹⁴ Works Constitution Act (*Betriebsverfassungsgesetz*) (BetrVG), 25 September 2001.

¹⁵ 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), new promulgated version of 2 January 2002.

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.¹⁶ 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)¹⁷ has led to significant changes in this area, curtailing the ability of religious organisations to justify unequal treatment on the ground of religion.¹⁸ 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 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

¹⁶ Federal Labour Court (*Bundesarbeitsgericht*) (BAG), 5 AZR 611/12, 24 September 2014 and related Federal Constitutional Court (*Bundesverfassungsgericht*) (BVerfG), 2 BvR 661/12, 22 October 2014, ECLI:DE:BVerfG:2014:rs20141022.2bvr066112.

¹⁷ 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.

¹⁸ Judgment of 17 April 2018, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, C-414/16, EU:C:2018:257, https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2018.200.01.0006.01.ENG. 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 were 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/document/document.jsf?text=&docid=205521&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3853280>. The courts have started to implement this case law of the CJEU, see: Federal Labour Court, 8 AZR 501/14, 25 October 2018, ECLI:DE:BAG:2018:251018.U8AZR501.14.0. (For details, see section 4.2 below.)

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 persons with severe disabilities and others of equal status.

The jurisprudence of the courts has confirmed some important interpretations of legal provisions relevant for discrimination in 2022. Age discrimination continues to be of substantial practical impact (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)¹⁹ 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 (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.

¹⁹ Protection against Dismissal Act (*Kündigungsschutzgesetz*) (KSchG), 25 August 1969.

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 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.²⁰ A form of limited class action has been introduced for consumer protection.²¹ It is an open question whether it will have any significance for matters of discrimination.

6. Equality bodies

The anti-discrimination law established the Federal Anti-discrimination Agency (*Antidiskriminierungsstelle des Bundes*, ADS) 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 (race or ethnic origin, religion or belief, disability, age, sexual identity), 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 (Section 26 AGG). According to the latest relevant amendment to the General Act on Equal Treatment (AGG), the Federal Commissioner for Anti-Discrimination becomes the head of the agency²² and is elected by the Bundestag with a majority (more than half) of its members (Section 26.3 AGG) after

²⁰ Equal Opportunities for Persons with Disabilities Act (*Behindertengleichstellungsgesetz*) (BGG), 27 April 2002, last amended on 2 June 2021.

²¹ Act to introduce civil model declaratory proceedings (*Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage*), 12 July 2018, with effect from 1 November 2018.

²² Before the amendment the head of the Federal Anti-Discrimination Agency was appointed by the Minister of Family Affairs, Senior Citizens, Women and Youth after a proposal by the Government. The post of the head of the Federal Anti-Discrimination Agency had not been properly occupied since the retirement of the previous head, Christine Lüders, in 2018, Bernhard Franke had been serving as the acting head, a fact that has over the years prompted some criticism.

nomination by the Federal Government (Section 26.1 AGG). The tenure of the head of the agency is five years (Section 26b.1 AGG) with the possibility of one re-election (Section 26b.2 AGG).²³ The head of the agency is independent and subject only to the law.

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. The agency can make 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, in 2021, the agency had a budget of EUR 5 094 000.²⁴ 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.²⁵ 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 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;

²³ For more details about the Federal Anti-discrimination Agency, see section 7.2.a of this report.

²⁴ See (in German), <https://dserver.bundestag.de/btd/20/019/2001995.pdf>. It is worth mentioning that the initial budget of the agency in 2016 was EUR 2 800 000.

²⁵ See Federal Participation Act (*Bundesteilhabegesetz*) (BTHG), 23 December 2016.

- 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 all fields covered by the directives for persons with disabilities.

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 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 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 tragic attack that struck Germany in 2016, which may augment these problems.

INTRODUCTION

The national legal system

The constitution of Germany, the Basic Law (*Grundgesetz*) (GG),²⁶ 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.²⁷ Fundamental rights are part of this directly effective constitutional order. They are binding on the legislature, executive, and judiciary as directly valid law.²⁸ 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*).²⁹ 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,³⁰ 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.³¹ 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.³² He or she is, in addition, protected against degrading or humiliating treatment.³³ 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.³⁴ Other important constitutional guarantees are the guarantee of equality³⁵ and special constitutional equality rights concerning children born outside of marriage,³⁶ equality of status and office³⁷ and equality of electoral rights.³⁸

Germany is a democratic and social federal state under the rule of law.³⁹ Given that it is a constitutional principle that Germany is a social state, Germany is obliged to promote the

²⁶ GG, 23 April 1949.

²⁷ Article 20(3) GG. Justice (*Recht*) refers according to a prevailing interpretation of general principles of legitimate law.

²⁸ Article 1(3) GG.

²⁹ Article 93(1)(4a) GG.

³⁰ Here understood in the narrow sense, excluding criminal law.

³¹ Article 1(1) GG: 'Human dignity is inviolable. To respect and protect it is the duty of all state authority.'

³² Settled case law, see e.g. Federal Constitutional Court, 1BvR 357/05, 15 February 2006, ECLI:DE:BVerfG:2006:rs20060215.1bvr035705.

³³ Federal Constitutional Court, 1BvR 357/05, 15 February 2006, ECLI:DE:BVerfG:2006:rs20060215.1bvr035705.

³⁴ 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.

³⁵ Article 3 GG.

³⁶ 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.'

³⁷ 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.

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

³⁹ Articles 20(1), 20(3) and 28(1) GG.

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 purpose of promoting the inclusion of groups that face discrimination.⁴⁰

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.⁴¹

List of main legislation transposing and implementing the directives

Official title of the law: Grundgesetz

Name used in this report: Basic Law

Abbreviation: GG

Date of adoption: 23 May 1949

Entry into force: 23 May 1949

Latest relevant amendment: 15 November 1994

Web link: <https://www.gesetze-im-internet.de/gg/>

Grounds covered: Sex, parentage, race, language, homeland and origin, faith, religious or political opinions, disability

Civil/administrative/criminal law: 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)

Official title of the law: Allgemeines Gleichbehandlungsgesetz

Name used in this report: General Act on Equal Treatment

Abbreviation: AGG

Date of adoption: 14 August 2006

Entry into force: 18 August 2006

Latest relevant amendment: 19 December 2022

Web link: <http://www.gesetze-im-internet.de/agg>

Grounds covered: Sex,⁴² race or ethnic origin, religious or belief (*Weltanschauung*), disability, age, sexual identity; belief not for civil law

Civil/administrative/criminal law: Civil and public law

Material scope: Access to employment, employment conditions, access to vocational training, membership in an organisation of workers or employers, social protection, social advantages, education, access to and supply of goods and services

Official title of the law: Soldatinnen- und Soldaten- Gleichbehandlungsgesetz

Name used in this report: 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 severe disability

Civil/administrative/criminal law: Public law

⁴⁰ See below for examples.

⁴¹ Articles 70-74 GG.

⁴² The German term '*Geschlecht*', translated as 'sex', but also sometimes as gender, encompasses gender identity/expression and sex characteristics. The report adopts the standard translation of the Basic Law of '*Geschlecht*' as 'sex'.

Material scope: Soldiers: employment; (continuing) education; membership in union
Principal content: prohibition of discrimination

Official title of the law: Sozialgesetzbuch IX

Name used in this report: Social Code IX

Abbreviation: SGB IX

Date of adoption: 23 December 2016

Latest relevant amendment: 2 June 2021

Entry into force: 1 January 2018

Web link: www.gesetze-im-internet.de/sgb_9_2018/BJNR323410016.html

Grounds covered: Disability

Civil/administrative/criminal law: Labour law, Social law

Material scope: Public and private employment

Principal content: General legal protection of persons with (severe) disabilities

Official title of the law: Berliner Landesantidiskriminierungsgesetz⁴³

Name used in this report: Berlin State Non-Discrimination Law

Abbreviation: LADG

Date of adoption: 11 June 2020

Latest relevant amendment: N/A

Entry into force: 21 June 2020

Web link: <https://gesetze.berlin.de/bsbe/document/jlr-ADiskrGBErahmen>

Grounds covered: sex, ethnic origin, racial attribution, antisemitic attribution, language, religion, belief (*Weltanschauung*), disability, chronic illness, age, sexual identity, gender identity, social status

Civil/administrative/criminal law: Civil and administrative law

Material scope: Public administration and all public bodies in *Land* Berlin

Principal content: prohibition of discrimination, damages

Official title of the law: Berlin Partizipationsgesetz

Name used in this report: Berlin State Participation Act

Berlin State Participation Act

Abbreviation: PartMigG

Date of adoption: 5 July 2021

Latest relevant amendment: N/A

Entry into force: 16 July 2021

Web link: <https://www.berlin.de/lb/intmig/themen/partizipation-in-der-migrationsgesellschaft/>

Grounds covered: Racial or ethnic origin, language, religion.

Civil/administrative/criminal law: Administrative law

Material scope: Public administration and all public bodies in *Land* Berlin

Principal content: Promotion and implementation of the participation of persons with a migration background in all areas of social, cultural, economic and political life in a Berlin shaped by migration (migration society)

⁴³ The *Berliner Landesantidiskriminierungsgesetz* and the Berlin *Partizipationsgesetz* are the most far-reaching innovative pieces of legislation on the Land Level and therefore important.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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 themselves. 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.

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 equality⁴⁵ 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.

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, that is, transsexuals who are attracted to their own gender, 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.

The provisions are directly applicable.

These provisions cannot be enforced against private individuals (although they can be enforced 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.

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, 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.

⁵³ Federal Constitutional Court, 1 BvR 400/51, 15 January 1958, ECLI:DE:BVerfG:1951:rs19580115.1bvr040051: BVerfGE 7, 198, settled case law. A possible exception to this rule is Article 1 GG.

2 THE DEFINITION OF DISCRIMINATION

2.1 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.⁵⁴

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,⁵⁵ which has an impact on the legal terminology used in (draft) legislation dealing with the matter.⁵⁶ The persistent calls to remove the term 'race' from the German Constitution – revived by the climate of international protests against racism in the aftermath of the killing of George Floyd in the USA and the existing right-wing extremist and racist encounters in Germany – were effectively met in 2020, when the Federal Government took action and publicly announced various measures to combat right-wing extremism and racism, including the reformulation of the Basic Law.⁵⁷

In the explanatory report to the AGG it is explained that the term 'race' does not imply the acceptance of racist theories.

Race is defined in legal doctrine as actual or alleged characteristics that are biologically inherited.⁵⁸ 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.⁵⁹ 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,⁶⁰ or the law on restitution for victims of persecution during the period

⁵⁴ See Bundestag, *Bundestagsdrucksache 16/1780, 31*.

⁵⁵ 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 in German at: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Policy_Paper/policy_paper_16_ein_grundgesetz_ohne_rasse.pdf.

⁵⁶ The Federal German Constitutional Court uses the term 'racial' (*rassisch*) only in quotation marks, cf. BVerfGE 23, 98, 105 et seq.

⁵⁷ The detailed list of the measures was published on November 25, 2020, and is available in German at: <https://www.bundesregierung.de/resource/blob/997532/1819984/4f1f9683cf3faddf90e27f09c692abed/2020-11-25-massnahmen-rechtsextremi-data.pdf>. No concrete formulation of a possible amendment to the Basic Law has been determined as of yet. The latest relevant publication of the German Institute for Human Rights was published in September 2020: Cremer, H. (2020), *Das Verbot rassistischer Diskriminierung: Vorschlag für eine Änderung von Artikel 3 Absatz 3 Grundgesetz*, Analyse, Berlin, Deutsches Institut für Menschenrechte, available in German at: <https://www.institut-fuer-menschenrechte.de/publikationen/detail/das-verbot-rassistischer-diskriminierung>. The Federal Anti-Discrimination Agency, which favours the relevant amendment of the Basic Law, held a panel discussion on the topic on September 29, 2020, available at: <https://www.youtube.com/watch?v=mCvchUq9A3c>.

⁵⁸ Nußberger, A. (2021), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (9th ed.), München, Beck Verlag, Art. 3, para. 295.

⁵⁹ See BVerfGE 23, 98; Federal Constitutional Court, 1 BvR 1056/95, 6 September 2000, DE:BVerfG:2000:rk20000906.1bvr105695.

⁶⁰ E.g. 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.

of the Nazi Government.⁶¹ In criminal law, there are provisions penalising incitement to racial hatred.⁶² 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.⁶³

Membership of indigenous minorities (i.e. the Danish minority, the Sorbian people, the Frisians in Germany and the German Sinti and Roma)⁶⁴ is determined in *Land* law with reference to subjective standards such as self-definition and other indicators, such as language.⁶⁵

b) Religion or belief

Religion

The interpretation of the guarantee of freedom of religion⁶⁶ 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.⁶⁷ Often, religion and belief are taken to be any specific views in relation to the world as a whole and the origin and purpose of humankind, which give sense to human life and the world.⁶⁸

For example, the Federal Constitutional Court accepted as self-evident that Bahá'í is a religion.⁶⁹ It relied in this context on current trends in society, cultural tradition and the understanding of religion in general and in religious studies.⁷⁰ Beyond that, a teleological interpretation of the fundamental freedom of religion is regarded as being decisive.⁷¹

⁶¹ E.g. Property Law (*Vermögensgesetz*) (VermG), 9 February 2005, Section 1(6).

⁶² Criminal Code (*Strafgesetzbuch*) (StGB), 13 November 1998, Section 130.

⁶³ See Federal Labour Court (*Bundesarbeitsgericht*) (BAG), 8 AZR 364/11, 21 June 2012.

⁶⁴ 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_en_Viqueur=false&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=GER&coeconventions_WAR_coeconventionsportlet_codeNature=10.

⁶⁵ See section 3.2.8 below and references.

⁶⁶ Article 4(1) GG.

⁶⁷ 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.

⁶⁸ BVerfGE 90, 112 (115).

⁶⁹ BVerfGE 83, 341 (353).

⁷⁰ BVerfGE 83, 341 (353).

⁷¹ BVerfGE 83, 341 (353).

Freedom of religion encompasses both the freedom of belief (*forum internum*) and its exercise (*forum externum*).

Belief

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.⁷² This distinction is contested in detail in legal science, but these debates have little practical relevance.

c) Disability

Section 2, Social Code IX (*Sozialgesetzbuch IX*) (SGB IX)⁷³ and Section 3 of the Equal Opportunities for Persons with Disabilities Act (*Behindertengleichstellungsgesetz*) (BGG)⁷⁴ 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),⁷⁵ entered into force on 1 January 2018 and amended Social Code IX. According to the revised version of Section 2(1) SGB IX and Section 3 BGG, 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.⁷⁶ According to the explanatory report to the AGG, disability is to be understood as in Section 2 SGB IX⁷⁷ and Section 3 BGG.⁷⁸ This reference was upheld by the Federal Labour Court (BAG).⁷⁹

The wording of the revised definition⁸⁰ 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,⁸¹ incorporated into EU law as interpreted by the CJEU and ratified by Germany. The reference to six months may be less strict than the phrase 'long-term', used by the UN Convention and the CJEU.⁸²

The Federal Labour Court has considered some issues deriving from the earlier definition

⁷² BVerfGE 90, 112 (115).

⁷³ SGB IX, 23 December 2016.

⁷⁴ BGG, 27 April 2002, last amended on 2 June 2021.

⁷⁵ BTHG, 23 December 2016, with effect from 1 January 2018.

⁷⁶ 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 Judgment of 11 April 2013, *Ring*, C-335/11 and *Werge*, C-337/11, EU:C:2013:222 para. 41, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136161&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3960308>. Judgment of 11 July 2006, *Navas*, C-13/05, EU:C:2006:456, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56459&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3960462>.

⁷⁷ SGB IX, 23 December 2016 and BTHG, 23 December 2016.

⁷⁸ BGG, 27 April 2002.

⁷⁹ Federal Labour Court, 8 AZR 642/08, 22 October 2009.

⁸⁰ The old version of Section 2(1) SGB IX referred to an actual impairment of participation in society rather than a potential one.

⁸¹ 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.

⁸² Judgment of 11 April 2013, *Ring*, C-335/11 and *Werge*, C-337/11, EU:C:2013:222, para. 41, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136161&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3961423>. Judgment of 11 September 2019, *DW*, C-397/18, EU:C:2019:703, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-397/18> para 44, 45. In CJEU, C-13/05 (*Navas*) an illness lasting eight months was not regarded as sufficient: Judgment of 11 July 2006, *Navas*, C-13/05, EU:C:2006:456, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56459&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3961675>.

of disability in the old version of Section 2(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 and that may impair a person are not excluded from the outset as a possible disability factor. These formulations of the court mean that such physical states can form the ground for assuming a disability, depending, however, on the circumstances of the case. The Federal Labour Court explicitly states in considering discrimination on the ground of disability – 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.⁸³ 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.⁸⁴ 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 states that are typical at a particular age, which are included in the new definition, will play in the future interpretation of Section 2(1) SGB IX, as this may enlarge the scope of the definition of disability to the benefit of people who experience certain, at least partly age-dependent impairments.

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.⁸⁵ The degree of disability is established by the relevant administrative authorities,⁸⁶ 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.⁸⁷ 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* laws regulating various aspects of disability follow the revised definition of disability contained in Section 2 SGB IX.⁸⁸

⁸³ Federal Labour Court, 6 AZR 190/12, 19 December 2013, para. 43ff.

⁸⁴ 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: Judgment of 1 December 2016, *Daouidi*, C-395/15, ECLI:EU:C:2016:917, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185743&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3961908>; Judgment of 15 July 2021, *Tartu Vangla*, C-795/19, ECLI:EU:C:2021:606, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244186&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1941023>, Judgment of 21 October 2021, *Komisa za zashitita ot diskriminatsia*, C-824/19, ECLI:EU:C:2021:862, para 39, https://curia.europa.eu/juris/document/document_print.jsf?docid=247862&text=&dir=&doclang=EN&part=1&occ=first&mode=lst&pageIndex=0&cid=1916192.

⁸⁵ Section 2(3) SGB IX.

⁸⁶ Section 152(1) SGB IX.

⁸⁷ Section 152 (1) 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, latest relevant amendment on 9 December 2020, with effect for the calendar year 2021.

⁸⁸ For reference to attitudinal and environmental barriers, see Section 3 Berlin Act on Promoting Equality for Persons with and without Disabilities (*Berliner Landesgleichberechtigungsgesetz*) (LGBG Berlin), 27 September 2021; Section 2 Saxony-Anhalt Act on Equal Opportunities for Persons with Disabilities (*Behindertengleichstellungsgesetz Sachsen-Anhalt*) (BGG LSA), 16 December 2010; Section 4 Bremen Act on Equal Opportunities (*Bremisches Behindertengleichstellungsgesetz*) (BremBGG), 18 December 2018; Section 3.1 Brandenburg Act on Equal Opportunities for Persons with Disabilities

d) Age

Age is generally understood as biological age.⁸⁹

e) Sexual orientation

Like the AGG, other laws refer to sexual identity (*sexuelle Identität*) rather than sexual orientation.⁹⁰ According to the explanatory report, sexual identity includes – in addition to heterosexual – homosexual, bisexual, transsexual and intersexual people. In legal commentary, transsexuality is regarded as a matter of gender, not sexual identity.⁹¹ The Federal Constitutional Court refers to both as (distinct) and equally protected aspects of the individual's autonomous personality.⁹² This provides authoritative guidance for the courts. This encompasses homosexuality and transsexuality, without excluding any other imaginable orientation or identity.⁹³

2.2 Multiple and intersectional discrimination

In Germany, multiple discrimination is prohibited by law.

In Germany, intersectional discrimination is not prohibited by law, depending on judicial interpretation.

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 (*Antidiskriminierungsstelle 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

(*Brandenburgisches Behindertengleichstellungsgesetz*) (BbgBGG), 11 February 2013; Section 3.1 Baden-Württemberg Act on Equal Opportunities for Persons with Disabilities (*Landes-Behindertengleichstellungsgesetz Baden-Württemberg*) (L-BGG Baden-Württemberg), 17 December 2014; Section 2 Saxony Act on Strengthening Inclusion of Persons with Disabilities in Saxony (*Sächsisches Inklusionsgesetz*) (SächsInklusG), 2 July 2019; Section 3 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), 30 July 2019; Section 3 Hamburg Act on Equal Opportunities for Persons with Disabilities (*Hamburgisches Behindertengleichstellungsgesetz*) (HmbGGbM), 19 December 2019; Section 3 Saarland Act Nr. 1541 on Equal Opportunities for Persons with Disabilities (*Saarländisches Behindertengleichstellungsgesetz*) (SBGG), 26 November 2003; Section 3.1 Rhineland-Palatinate Act on Equal Opportunities, Inclusion and Participation of Persons with Disabilities (*Rheinland-Pfalz Landesinklusionsgesetz*), 17 December 2020; Section 2 Hessen Act on Equal Opportunities for Persons with Disabilities (*Hessisches Behinderten-Gleichstellungsgesetz*) (HessBGG), 20 December 2004; Section 2.2 Lower Saxony Act on Equal Opportunities (*Niedersächsisches Behindertengleichstellungsgesetz*) (NBGG), 25 November 2007 For a general reference to interaction with various barriers, see Section 2 (in the new version since 1 August 2020) Bavaria Act on Equal Opportunities, Integration and Participation for Persons with Disabilities (*Bayerisches Behindertengleichstellungsgesetz*) (BayBGG), 9 July 2003. The former definition of the old version of 2.1 SGB IX is still to be found in: Section 3 Mecklenburg-Vorpommern Act on Equal Opportunities, Equal Participation and Integration for Persons with Disabilities (*Mecklenburg-Vorpommern Landesbehindertengleichstellungsgesetz*) (LBGG M-V), 10 July 2006; Section 2.1 Schleswig-Holstein Act on Equal Opportunities for Persons with Disabilities (*Schleswig - Holstein Landesbehindertengleichstellungsgesetz*) (LBGG S-H), 18 November 2008.

⁸⁹ 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.

⁹⁰ See Article 10(2) Constitution of Berlin (*Verfassung von Berlin*) (VerfBE), 23 November 1995. There is no clear reason for this particular choice of terms.

⁹¹ 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).

⁹² See Federal Constitutional Court, 1 BvL 3/03, 6 December 2005, ECLI:DE:BVerfG:2005:ls20051206.1bvl000303, para. 48; Federal Constitutional Court, 1 BvR 2019/16, 10 October 2017, ECLI:DE:BVerfG:2017:rs20171010.1bvr201916, para 38ff (*geschlechtliche Identität*). 'Geschlechtlich' refers as 'sexuelle Identität' both to aspects of sex and gender.

⁹³ Federal Constitutional Court, 1 BvL 3/03, 6 December 2005, ECLI:DE:BVerfG:2005:ls20051206.1bvl000303, para. 48 ff. On transsexuals, see BVerfGE 49, 286;96; 56; 115,1.

allow such cases to be dealt with.

In Germany, multiple discrimination⁹⁴ is recognised by law. Although a number of cases have concerned several grounds,⁹⁵ the courts usually do not categorise (in legal terms) these as cases of 'multiple discrimination', but instead focus on one ground independently of other grounds. Thus, there is no recent case law clarifying the legal concept, in particular its relation to the concept of intersectionality. In addition, there is as yet no case law on amounts of damages in cases of multiple discrimination.

Furthermore, it is worth mentioning that the detection of multiple and/or intersectional discrimination is often a difficult task.⁹⁶

In Germany, the following case law deals with multiple discrimination:

Relevant discrimination grounds: age/sex

Koblenz Labour Court (*Arbeitsgericht Koblenz*) (AG Koblenz) decided in its ruling of 9 February 2022,⁹⁷ that the advertisement of a job as a mechanic using the description 'cool blokes' (*'coole Typen'*) does not imply discrimination on the ground of age since the reference to 'cool blokes' is not limited to younger people but describes a certain attitude toward life. The court granted, however, compensation for discrimination on the ground of sex. This ground is, however, not the object of this report. The claimant had argued that the advertisement formed discrimination both on the ground of age and sex. As discrimination on the ground of age was denied by the court, however, no question of multiple discrimination was decisive for the outcome of the case.

In Germany, there is no relevant case law dealing with intersectional discrimination.

⁹⁴ Two expert reports, commissioned by the Federal Anti-Discrimination Agency, were published on the agency website 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., Bittner, M., Göttsche, A. L. (2010), *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse*, Antidiskriminierungsstelle des Bundes, https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/expertise_mehrdimensionale_diskriminierung_jur_analyse.html, as well as Dern, S., Inowlocki, L. and Oberlies, D. (2010), *Mehrdimensionale Diskriminierung – Eine empirische Untersuchung anhand von autobiographischen narrativen Interviews*, Antidiskriminierungsstelle des Bundes, http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/expertise_mehrdimensionale_diskriminierung_empirische_untersuchung.pdf?__blob=publicationFile. 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. As to the question of discrimination on the ground of religion and gender, see section 4.2 below.

⁹⁵ For example, Cologne Labour Court (*Arbeitsgericht Köln*) (ArbG 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., Bittner, M., Göttsche, A. L. (2010), *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse*, Antidiskriminierungsstelle des Bundes, https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/expertise_mehrdimensionale_diskriminierung_jur_analyse.html, p. 53 ff.

⁹⁶ See (in German), <https://www.institut-fuer-menschenrechte.de/themen/rechte-von-menschen-mit-behinderungen/diskriminierungsschutz>.

⁹⁷ Koblenz Labour Court (*Arbeitsgericht Koblenz*) (AG Koblenz), 7 Ca 2291/21, 9 February 2022, ECLI:DE:ARBGKOB:2022:0209.7Ca2291.21.00, available in German at: <https://www.landesrecht.rlp.de/bsrp/document/JURE220027024>. For more details, see section 12.2 on case law, below.

2.3 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.⁹⁸ Depending on judicial interpretation, German law is in line with EU law and the jurisprudence of the CJEU in this respect.

2.4 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

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

The AGG contains the following definition of direct discrimination, following the German version of the directives: 'Direct discrimination shall be taken to occur where a person is treated less favourably than another is, has been or would be treated in a comparable situation on the basis of any of the [prohibited grounds]'.⁹⁹ 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.¹⁰⁰

The guarantee of equality establishes the principle of equal treatment as a fundamental right at the constitutional level.¹⁰¹ 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.¹⁰² This case law forms the blueprint for the concept of discrimination as used in other areas of the law as well.

⁹⁸ Däubler, W. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th 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.

⁹⁹ Section 3(1) (first sentence) AGG. Within the meaning of the provision a 'person' is a natural person.

¹⁰⁰ Federal Labour Court, 9 AZR 141/17, 21 November 2017, ECLI:DE:BAG:2017:211117.U.9AZR141.17.0, para. 21: 'untrennbar', literally 'inseparably'. The court referred to CJEU, judgment of 12 October 2010, *Andersen*, C-499/08, EU:C:2010:600,) 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.

¹⁰¹ Article 3 GG.

¹⁰² Article 3(2) and 3(3) GG.

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.¹⁰³ 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*).¹⁰⁴ 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.¹⁰⁵

The Federal Labour Court regarded the objective qualification of a job candidate as a condition for possible discrimination,¹⁰⁶ 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.¹⁰⁷ The Federal Labour Court underlined that filing suit for discrimination may form abuse of rights, ruling out a violation of the prohibition of discrimination.¹⁰⁸

Section 164(2) SGB IX prohibits discrimination on the ground of disability in work relations for persons with severe disabilities and people of equivalent status,¹⁰⁹ referring to the AGG, including its regime of justifications.¹¹⁰

Section 7(1) (second sentence) of the BGG defines discrimination as follows: 'Discrimination shall be deemed to occur if persons with and without disabilities are treated differently without a compulsory reason and the equal participation of persons with disabilities in society is in consequence directly or indirectly impaired'.¹¹¹

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,¹¹² may

¹⁰³ BVerfGE 75, 40 (70).

¹⁰⁴ BVerfGE 89, 276 (289).

¹⁰⁵ Federal Labour Court, 8 AZR 470/14, 19 May 2016, ECLI:DE:BAG:2016:190516.U.8AZR470.14.0, para. 53.

¹⁰⁶ Federal Labour Court, 8 AZR 370/09, 19 August 2010.

¹⁰⁷ Federal Labour Court, 8 AZR 470/14, 19 May 2016, ECLI:DE:BAG:2016:190516.U.8AZR470.14.0, para. 24ff.

¹⁰⁸ Federal Labour Court, 8 AZR 470/14, 19 May 2016, ECLI:DE:BAG:2016:190516.U.8AZR470.14.0. This is in line with Court of Justice of the European Union (CJEU): Judgment of 28 July 2016 *Kratzer*, C-423/15, EU:C:2016:604, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=182298&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4038683>.

¹⁰⁹ 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. Federal Labour Court, 9 AZR 823/06, 4 April 2007.

¹¹⁰ 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.

¹¹¹ This definition therefore only covers discrimination against persons 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 (2022), in: Dau/Düwell/Joussen/Luik (eds.), 6th ed., SGB IX, § 7 BGG para 4. Considerations of reasonable accommodation would need to be taken into account, however.

¹¹² See for example: Schleswig/Holstein Higher Labour Court (*Landesarbeitsgericht Schleswig/Holstein*) (LAG Schleswig/Holstein), Schleswig/Holstein/5 Sa 286/08, 9 December 2008.

constitute direct discrimination.¹¹³ 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 direct 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));¹¹⁴
 - 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)).

The regulations in this area are not within the scope of application of the directives and raise thus no questions about transposition.

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.¹¹⁵ Given that there is no explicit exception or possibility of justification of such unequal treatment under the Racial Equality Directive (2000/43/EC), the reconcilability of the clause with the European law depends on the question whether the interpretation of the clause is limited to very specific cases, e.g. of preventing ghettoization.¹¹⁶

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

¹¹³ See Schrader, P. and Schubert, J. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th ed.), Baden-Baden, Nomos Verlag, § 3 para. 22.

¹¹⁴ 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.

¹¹⁵ According to a legal opinion published by the Federal Anti-Discrimination Agency, due to the requirements of the Racial Equality Directive (2000/43/EC), Section 19(3) AGG should be amended so that it is explicitly stated that the relevant permissibility of unequal treatment will not apply in cases on the grounds of race and ethnic origin. Thüsing, G. and Vianden (2019), *Rechtsfreie Räume? Die Umsetzung der EU-Antirassismusrichtlinie im Wohnungsbereich: Zum verbleibenden Umsetzungsbedarf der Richtlinie 2000/43/EG im Allgemeinen Gleichbehandlungsgesetz*, Anti-Diskriminierungsstelle des Bundes, Berlin, p. 38, available in German at: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Rechtsgutachten/rechtsgutachten_rechtsfreie_raeume_umsetz_eu_rl_im_wohnungsbereich.html?nn=6580778.

¹¹⁶ 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 Rudolph, B. Mahlmann, M. (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. (2022), in: Däubler, W. and Beck, T., (5th ed.), *Allgemeines Gleichbehandlungsrecht: Handkommentar*, Baden-Baden, Nomos Verlag, § 19 para. 54ff.

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.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ 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.¹²⁰ As a result, direct discrimination under the guarantee of equality is possible, but only within the limit of differentiated standards of justification. These standards range from a test of arbitrariness to strict scrutiny of proportionality.

2.5 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.¹²¹ The criterion must affect a group of people protected by the AGG significantly more than

¹¹⁷ BVerfGE 57, 335 (342); 85, 191 (207).

¹¹⁸ See Nußberger, A. (2021), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (9th ed.), München, Beck Verlag, Art. 3 para 239ff, 250-251 (justification possible).

¹¹⁹ BVerfGE 1, 14 (52); 25, 101 (105).

¹²⁰ BVerfGE 88, 87 (96).

¹²¹ 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.'

others.¹²² This can be determined by statistical comparison,¹²³ although recourse to statistics is not mandatory.¹²⁴ Instead it is sufficient if the criterion is typically likely to have such consequences.¹²⁵

The case law on predecessors of this norm gives some further indications of its possible interpretation.¹²⁶ 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.¹²⁷ 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.¹²⁸ In another decision, a ratio of about 80 % women to 20 % men was deemed sufficient to establish a significant difference.¹²⁹

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.¹³⁰ This case law is based on CJEU case law.¹³¹

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,¹³² has previously been interpreted by the Federal Labour Court in this manner, explicitly referring to Article 2(2)(b) of Directive 2000/78/EC.¹³³ 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.¹³⁴

¹²² Federal Labour Court, 1 ABR 47/08, 18 August 2009; Higher Labour Court of Saarland (*Landesarbeitsgericht des Saarlandes*) (LAG Saarland), Saarland/1 TaBV 73/08, 11 February 2009.

¹²³ Federal Labour Court, 10 AZR 639/07, 24 September 2008.

¹²⁴ Federal Labour Court, 1 ABR 47/08, 18 August 2009.

¹²⁵ Federal Labour Court, 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.

¹²⁶ 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.

¹²⁷ See Federal Labour Court, *Neue Juristische Wochenschrift* 1992, 1125; Federal Labour Court, *Neue Juristische Wochenschrift* 1993, 3091, 3093.

¹²⁸ Federal Labour Court, *Neue Juristische Wochenschrift* 1993, 3091, 3094.

¹²⁹ Federal Labour Court, *Neue Juristische Wochenschrift* 1992, 1125, 1126f.

¹³⁰ Federal Labour Court, *Neue Juristische Wochenschrift* 1993, 3091, 3094.

¹³¹ Judgment of 13 May 1986, *Bilka*, C-170/84, , EU:C:1986:204, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93347&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=4349913>.

¹³² Section 164(2) SGB IX.

¹³³ Federal Labour Court, *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.

¹³⁴ Federal Administrative Court, 2 C 21/04, 23 June 2005, ECLI:DE:BVerwG:2005:23060502C21.04.0.

Section 7(1) of the Equal Opportunities for Persons with Disabilities Act defines discrimination as follows: discrimination will be deemed to occur if persons with and without disabilities are treated differently without a compulsory reason and the equal participation of persons with disabilities in society is in consequence directly or indirectly impaired.¹³⁵

The meaning of an indirect impairment is not further specified. Most *Land* disability laws follow this definition closely.¹³⁶

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.¹³⁷ 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.¹³⁸

¹³⁵ 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 (2022), in: Dau/Düwell/Joussen/ Luik (eds.), 6th ed., SGB IX, § 7 BGG para 4.

¹³⁶ See Baden-Württemberg Act on Equal Opportunities for Persons with Disabilities (*Landes-Behindertengleichstellungsgesetz Baden-Württemberg*), (L-BGG Baden-Württemberg), 17 December 2014: Section 3.3; Bavaria Act On Equal Opportunities, Integration and Participation for Persons with Disabilities (*Bayerisches Behindertengleichstellungsgesetz*) (BayBGG), 9 July 2003: Section 5; Brandenburg Law on the Equal Opportunities for Persons with Disabilities (*Brandenburgisches Behindertengleichstellungsgesetz*) (Bbg BGG), 11 February 2013: Section 3.2; Bremen Law on the Equal Opportunities for Persons with Disabilities (*Bremisches Behindertengleichstellungsgesetz*) (BremBGG), 18 December 2013: Section 7.2; Hamburg Act on Equal Opportunities for Persons with Disabilities (*Hamburgisches Behindertengleichstellungsgesetz*) (HmbGGbM), 19 December 2019: Section 6.1; Hessen Act on Equal Opportunities for Persons with Disabilities (*Hessisches Behinderten-Gleichstellungsgesetz*) (HessBGG), 20 December 2004: Section 4.1; Mecklenburg - West Pomerania Act on Equal Opportunities, Equal Participation and Integration for Persons with Disabilities (*Landesbehindertengleichstellungsgesetz Mecklenburg Vorpommern*) (LBGG M-V), 10 July 2006: Section 5; North Rhine-Westphalia Law on the Equal Opportunities for Persons with Disabilities (*Behindertengleichstellungsgesetz Nordrhein-Westfalen*) (BGG NRW), 16 December 2003, Section 2.1; Rhineland-Palatinate Act on Equal Opportunities, Inclusion and Participation of Persons with Disabilities (*Rheinland-Pfalz Landesinklusionsgesetz*), 17 December 2020: Section 3.2; Saarland Act Nr. 1541 on Equal Opportunities for Persons with Disabilities (*Saarländisches Behindertengleichstellungsgesetz*) (SBGG), 26 November 2003: Section 7.2; Saxony Act on Strengthening Inclusion of Persons with Disabilities in Saxony (*Sächsisches Inklusionsgesetz*) (SächsInklusG), 2 July 2019: Section 4.2; Schleswig-Holstein Act on Equal Opportunities for Persons with Disabilities (*Schleswig - Holstein Landesbehindertengleichstellungsgesetz*) (LBGG S-H): Section 2.2. Section 6 of the new Berlin Act on Promoting Equality for Persons with and without Disabilities (*Berliner Landesgleichberechtigungsgesetz*) (LGBG Berlin), 27 September 2021, states that any unequal treatment, exclusion or restriction due to disability is considered to be discrimination if there exists no compelling reason for its occurrence. Unequal treatment is justified if the occurring disadvantages are to be prevented or compensated by suitable and appropriate measures to protect the legitimate interests of persons with disabilities. The similar Section 4 of the Saxony-Anhalt Act on Equal Opportunities for Persons with Disabilities (*Behindertengleichstellungsgesetz Sachsen-Anhalt*) (BGG LSA), 16 September 2010, includes cases where the development of persons with disabilities is limited due to a lack of positive accommodation of their needs. When defining indirect discrimination in Section 4.3, the 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), 30 July 2019, states that it exists when apparently neutral regulations, criteria or procedures can disadvantage a person in a particular way due to her disability.

¹³⁷ Decisions of the Federal Constitutional Court (BVerfGE) 97, 35 (43).

¹³⁸ BVerfGE 121, 241 (254ff).

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.¹³⁹

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.¹⁴⁰

In 2004, the Court stated that the strict test of proportionality developed for cases of direct discrimination also applies to cases where the unequal treatment of facts indirectly leads to disadvantage for certain people. The Federal Constitutional Court determines in each case whether there are reasons of sufficient weight to justify the unequal treatment.¹⁴¹

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.¹⁴² 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.¹⁴³

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

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.¹⁴⁴

¹³⁹ Nußberger, A. (2021), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (9th ed.), München, Beck Verlag, Article 3 para. 248f.

¹⁴⁰ Federal Constitutional Court, 2 BvR 1476/01, 19 November 2003, ECLI:DE:BVerfG:2003:rk20031119.2bvr147601.

¹⁴¹ Federal Constitutional Court, 1 BvR 1748/99, 20 April 2004, ECLI:DE:BVerfG:2004:rs20040420.1bvr174899.

¹⁴² Federal Labour Court, 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, Enterprise and Regularory Reform*, 5 March 2009, EU:C:2009:128, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=77505&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4038809>.

¹⁴³ Schlachter, M. (2021), in: Müller-Glöße, R., Preis, U. and Schmidt, I. (eds.), *Erfurter Kommentar zum Arbeitsrecht* (21st ed.), München, Beck Verlag, § 3 AGG, para. 9ff for an overview, para. 13 for the balance of interests reasoning.

¹⁴⁴ To take one example, where case law from the CJEU exists: one Chamber of the Federal German Constitutional Court, Federal Constitutional Court, 2 BvR 1830/06, 6 May 2008, ECLI:DE:BVerfG:2008:rk20080506.2bvr147601 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 judgment of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=70854&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4038889>. For critical comments on the German case law, see Mahlmann, M. *EuZW* 2008, 218f. A (more influential 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, Federal Constitutional Court, 1 BvR 1164/07, 7 July 2009, ECLI:DE:BVerfG:2009:rs20090707.1bvr116407. For the important matter of the justification of unequal treatment on the ground of religion or belief, see section 4.2 below.

2.5.1 Statistical evidence

Section 2.5.1 has not been updated for 2022. Regarding the legal framework and practice, please see Country report Non-discrimination Germany 2022, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, reporting period 1 January 2021 – 1 January 2022.

2.6 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.¹⁴⁵ 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,¹⁴⁶ of certain severity, beyond mere onerousness.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹

In Germany, harassment explicitly constitutes 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, as detailed below.

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

¹⁴⁵ Federal Labour Court, 8 AZR 74/18, 18 May 2017, ECLI:DE:BAG:2017:180517.U.8AZR74.16.0: conduct and environment cumulative conditions.

¹⁴⁶ Federal Labour Court, 8 AZR 347/07, 24 April 2008: unjustified dismissal as such not creating a hostile environment; Düsseldorf Higher Labour Court (*Landesarbeitsgericht Düsseldorf*) (LAG), Düsseldorf/7 Sa 383/08, 18 June 2008: graffiti in restroom not enough by itself to create a hostile environment. Berlin-Brandenburg Higher Labour Court (*Landesarbeitsgericht Berlin-Brandenburg*) (LAG), Berlin-Brandenburg/6 Sa 271/10, 18 June 2010: no harassment if considerable time period and no inherent connection between different incidents.

¹⁴⁷ Schleswig-Holstein Higher Labour Court, (*Landesarbeitsgericht Schleswig-Holstein*) (LAG Schleswig-Holstein), 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.

¹⁴⁸ 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.

¹⁴⁹ Sections 185, 186 and 187 StGB.

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

According to Section 15(1) AGG, employers are liable for material damages caused by violations of the prohibition of discrimination in case of fault. For non-material damages there is strict liability.¹⁵⁰ 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.¹⁵¹ There are no special rules for discrimination.¹⁵² 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.¹⁵³

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.¹⁵⁴

2.7 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.¹⁵⁵ Courts have had no occasion yet to clarify the matter.

In addition, such cases may be covered by general legal provisions.¹⁵⁶ Responsibility for

¹⁵⁰ Federal Labour Court, 8 AzR 906/07, 22 January 2009.

¹⁵¹ Most importantly, Sections 31, 278 and 831 BGB, see section 2.5 of this report.

¹⁵² 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.

¹⁵³ Federal Labour Court, 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.

¹⁵⁴ Leuschner, A. (2018), in: Säcker, F. J., Rixecker, R., Oetker, H. and Limpeg, B. (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th ed.) (2018), München, Beck Verlag, § 31, para. 20.

¹⁵⁵ Deinert, O. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th ed.), Baden - Baden, Nomos Verlag, AGG, § 3 para. 108.

¹⁵⁶ 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 Wuppertal Labour Court (*Arbeitsgericht, ArbG*) Wuppertal/3 Ca 4927/03, 10 December 2003.

agents in contractual relations and in tort law is relevant in this respect.¹⁵⁷ Another example from criminal law is incitement to discrimination that amounts to a criminal offence, e.g. criminal insult.¹⁵⁸

In Germany, instructions 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.¹⁵⁹ There are no special rules or case law for discrimination.¹⁶⁰

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

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

In Germany, the duty on employers to provide reasonable accommodation for persons with disabilities is included in the law and is defined. There is no general definition covering all fields of law, 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.¹⁶¹ 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 persons 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 Law¹⁶² 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 persons with disabilities into society through individual assistance and accommodation of their needs¹⁶³ and establishes entitlements to material means of integration.¹⁶⁴ The German welfare agencies provide support for participation in working life.¹⁶⁵ This encompasses the support of persons 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 creation of housing adequate for persons with disabilities, to name some examples.¹⁶⁶

¹⁵⁷ Sections 31, 278, 831 BGB.

¹⁵⁸ Sections 26, 185 StGB.

¹⁵⁹ Most importantly, Sections 31, 278 and 831 BGB, see section 2.5 of this report.

¹⁶⁰ 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.

¹⁶¹ Federal Labour Court, 6 AZR 190/12, 19 December 2013, para. 53. Similar reasoning could be extended to job applicants.

¹⁶² Article 3.3 (second sentence) GG.

¹⁶³ Social Code I (*Sozialgesetzbuch I*) (SGB I), 11 December 1975, Section 10.

¹⁶⁴ SGB IX, 23 December 2016, last amended on 27 September 2021, Section 4ff. Special regulations for blind people: SGB XII, Section 72.

¹⁶⁵ Social Code III (*Sozialgesetzbuch III*) (SGB III), 24 March 1997, Section 112ff; SGB IX, Section 49ff.

¹⁶⁶ See e.g. Section 49 SGB IX.

Section 164(4) Social Code IX (SGB IX) imposes various duties on public and private employers in providing reasonable accommodation for persons with severe disabilities.¹⁶⁷

For example, persons with severe disabilities 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 persons 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 person with a severe disability has no claim if these measures would be unreasonable (*unzumutbar*) for the employer or cause a disproportionate burden even factoring in possible state support or are contrary to other legal regulations.¹⁶⁸ The employers are under a duty to promote part-time work.¹⁶⁹ Under certain circumstances, the person with a severe disability is entitled to work part time.¹⁷⁰ They are also entitled to additional paid holidays.¹⁷¹

According to Section 106 (third sentence) of the Industrial Code (*Gewerbeordnung*) (GewO),¹⁷² 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 employees with disabilities for enterprises and authorities with regard to working conditions and other issues of integration of persons with severe disabilities.¹⁷³ There are special regulations in pension law, including a lower minimum age for persons with severe disabilities to collect a state pension.¹⁷⁴

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, in the view of the author of this report, the law as it stands does not seem to conform to EU law.

b) 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.¹⁷⁵ There is only limited case law clarifying precise standards.¹⁷⁶ The Federal Labour Court (6

¹⁶⁷ On the definition of this, see section 2.1.1 above.

¹⁶⁸ Section 164.4 SGB IX.

¹⁶⁹ Section 164.5 SGB IX.

¹⁷⁰ Section 164.5 sentence 3 SGB IX.

¹⁷¹ Section 208 SGB IX.

¹⁷² Industrial Code (*Gewerbeordnung*) (GewO), 22 February 1999, last amended on 10 August 2021.

¹⁷³ Section 166 SGB IX.

¹⁷⁴ Section 37 SGB VI.

¹⁷⁵ Sections 160.5, 185.3.2 SGB IX.

¹⁷⁶ Baden-Württemberg Higher Labour Court (*Landesarbeitsgericht Baden-Württemberg*) (LAG Baden-Württemberg), 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 person with a disability 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

AZR 190/12, 19 December 2013) outlined some criteria to specify the meaning of 'reasonable': According to this decision, 'reasonableness' depends on the financial situation of the employer, the possibility of compensation by public subsidies, and the length of employment of the employee. There is no duty of the employer to invest more in reasonable accommodation measures than the benefits that the employment will yield for the employer.

c) Definition of disability and non-discrimination protection

There is no difference between the definition of disability (Section 2(1) SGB IX and Section 3 BGG, see above, section 2.1.1.c) 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 persons with severe disabilities (including reasonable accommodation) whereas the definition of disability is the same for both spheres of law—reasonable accommodation for persons with disabilities or severe disabilities on the one hand and protection from discrimination on the other.

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

In Germany, failure to meet the duty of reasonable accommodation in employment for persons with disabilities is recognised as a form of discrimination.

The Federal Constitutional Court found that persons with disabilities 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 person with disabilities.¹⁷⁷ 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.¹⁷⁸ 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 persons 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.¹⁷⁹

work relationship will end soon because of a fixed-term contract or age limits. If the measure jeopardises employment or places an undue burden on other employees, the same holds true. It has been regarded as unreasonable to demand that an employer introduce a measure directed purely at the rehabilitation of an employee without a real possibility that this measure will lead in the foreseeable future to the reintegration of the person concerned, see Rhineland-Palatinate Higher Labour Court (*Landesarbeitsgericht Rhineland-Palatinate*) (LAG Rhineland-Palatinate), 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 Federal Labour Court, 9 AZR 481/01, 3 December 2002.

¹⁷⁷ BVerfGE 96, 288. This judgment is not limited to persons with severe disabilities.

¹⁷⁸ Federal Labour Court, 6 AZR 190/12, 19 December 2013, para. 50ff.

¹⁷⁹ There is specific case law easing the burden to provide evidence for a possible breach of the duty to provide reasonable accommodation of a person with a disability, see Hessen Higher Labour Court (*Landesarbeitsgericht*) (LAG), Hessen/Az. 5 Sa 842/11, 21 March 2013, para 49; BAG, 9 AZR 230/04, 10 May 2005, para 42.

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

In Germany, there is a legal duty to provide reasonable accommodation for persons 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 children with disabilities from their social background and to educate them with children without disabilities through integrated schooling.¹⁸⁰

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 persons with disabilities against the will of the parents constituted a breach of Article 3(3)(2) GG, if it was possible for the child to attend an ordinary school without special pedagogical help, if his or her special needs could be fulfilled using existing means and other interests worthy of protection, especially of third parties, did not weigh against integrated schooling. A general ban on integrated schooling was regarded to be unconstitutional.¹⁸¹ Higher education in universities should take account of the needs of persons with disabilities.¹⁸²

There are various provisions stipulating that reasonable accommodation should be made to allow persons with disabilities to communicate with public authorities and in court. Persons with severe disabilities 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),¹⁸³ and other aspects of mobility, to name just a few examples.¹⁸⁴ Such regulations create the general framework for claims for individual support measures to accommodate the needs of individuals in specific cases.

There are particular regulations for persons with disabilities in civil law relating to their special needs.¹⁸⁵

A special regulation of general contract law allows for valid contracts with persons with intellectual disabilities.¹⁸⁶

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. However, under this Act, the parties should not only regulate

¹⁸⁰ Section 4.3 SGB IX. The school laws of the *Länder* contain detailed regulations on the matter.

¹⁸¹ See BVerfGE 96, 288.

¹⁸² Framework Act for Higher Education (*Hochschulrahmengesetz*) (HRG), 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).

¹⁸³ Sections 228-230 SGB IX.

¹⁸⁴ See Sections 7-11 BGG and the corresponding regulations in *Land* laws on disability, on a special regulation on mobility, e.g. Section 12 of the new Berlin Act on Promoting Equality for Persons with and without Disabilities (*Berliner Landesgleichberechtigungsgesetz*) (LGBG Berlin), 27 September 2021; 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; Section 483 ZPO; 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.

¹⁸⁵ Section 305(2)(2) BGB establishes, for example, the duty to pay due regard to the needs of persons with disabilities when general terms and conditions are included in a contract; on other matters see Section 138(6) SGB IX.

¹⁸⁶ See Section 105a BGB, applying automatically to all persons having such disabilities.

general questions of accessibility, but they should also include solutions for individual needs. This regulation is not limited to persons with severe disabilities.¹⁸⁷

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

Section 2.8.f has not been updated for 2022. Please see Country report Non-discrimination Germany 2022, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, Reporting period 1 January 2021 – 1 January 2022.

¹⁸⁷ Section 5 BGG. This may concern a variety of accessibility issues – from buses to buildings.

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 persons with severe disabilities apply to people who are legally resident or employed in Germany.¹⁸⁸ Other special legislation only applies to German citizens and those of other qualified countries, especially EU countries.¹⁸⁹

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 persons with disabilities in employment applies only to natural persons.¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

¹⁸⁸ Section 2(2) (second sentence) SGB IX.

¹⁸⁹ For example, under the terms of Section 7.1 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.

¹⁹⁰ For example, Section 164(2) SGB IX, referring to the AGG.

¹⁹¹ 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.

¹⁹² For example, the anti-discrimination clauses in the laws on the civil service or the Federal Personnel Representation Act: BPersVG, 9 June 2021.

b) Liability for discrimination

In Germany, the personal scope of anti-discrimination law covers natural and 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 persons with disabilities in employment (with reference to the AGG).¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶

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.¹⁹⁷ 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.¹⁹⁸

¹⁹³ See Section 164(2) SGB IX.

¹⁹⁴ See Mahlmann, M. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz* (5th ed.), Baden-Baden, Nomos Verlag, § 24 para. 64ff; Federal Administrative Court, 2 C 3/13, 30 October 2014, ECLI:DE:BVerwG:2014:301014U2C3.13.0, Federal Administrative Court, 2 C 11/13, 30 October 2014, ECLI:DE:BVerwG:2014:301014U2C11.13.0 et al.

¹⁹⁵ Consistent case law since BVerfG 7, 198.

¹⁹⁶ See Mahlmann, M. (2022), in: Däubler, W. and Beck, T., (eds.), *Allgemeines Gleichbehandlungsgesetz* (5th ed.), Baden-Baden, Nomos Verlag, § 24 para 21f.

¹⁹⁷ Consistent case law since BVerfG 7, 198.

¹⁹⁸ See Mahlmann, M. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz* (5th ed.), Baden-Baden, Nomos Verlag, § 24 para 64ff.

3.2 Material scope

3.2.1 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 relation to conditions for access to employment, self-employment or 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 and 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 prohibits discriminatory job advertisements.¹⁹⁹ Section 24 AGG provides for an application of the regulations of the 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.

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,²⁰⁰ for all grounds (race, ethnic origin, sex, religion or belief, disability, age or sexual identity; as mentioned above, '*Geschlecht*', translated as sex, covers gender identity/expression and sex characteristics, sexual identity and any form of sexual orientation). 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,²⁰¹ the guarantee of equal access,²⁰² civil service laws (which exclusively concern civil servants),²⁰³ prohibitions of discrimination in the law on the representation of public employees²⁰⁴ and – with regard to disability – a special regulation prohibiting discrimination that applies to private employers, too.²⁰⁵ Equal access to any kind of (self-)employment is guaranteed by freedom of profession, Article 12 GG.²⁰⁶ For the public sector, there are additional duties, such as the early registration of vacancies to facilitate the employment of persons with disabilities.²⁰⁷ 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*).²⁰⁸ 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)

¹⁹⁹ See, for example, Hessen Higher Labour Court (*Landesarbeitsgericht*) (LAG), Hessen/7 Sa 851/7, 18 June 2018.

²⁰⁰ In 2019, the Federal Court of Justice ruled that the AGG also applies in the event of termination of the employment of an executive of a company with limited liability. Federal Court of Justice, II ZR 244/17, 26 March 2019, ECLI:DE:BGH:2019:260319UIZR244.17.0.

²⁰¹ Article 3 GG.

²⁰² Article 33(2) and 33(3) GG.

²⁰³ On additional sexual orientation law on the *Land* level, see e.g. Article 10(2) of the Constitution of Berlin (*Verfassung von Berlin, VvB*). For the changing legal basis in this area see Annex 1 of this report.

²⁰⁴ See Section 2(4) BPersVG and the respective *Land*-level regulations.

²⁰⁵ Section 164(2) SGB IX, now referring to the AGG.

²⁰⁶ BVerfGE 7, 377: no differentiation between employed and self-employed.

²⁰⁷ Section 165 SGB IX.

²⁰⁸ Works councils are formed in all enterprises with more than five employees, excluding enterprises based on an ethos, see Section 118 BetrVG.

applies in all matters of labour law, including collective agreements, although contentiously not to recruitment.²⁰⁹

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

3.2.2 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 explicitly refers to discrimination on the ground of sex ('*Geschlecht*', including gender identity/expression and sex characteristics) and sexual identity.²¹⁰

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.²¹¹ 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.²¹² 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.²¹³ 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.²¹⁴

Since 1 January 2018, following amendments to Social Code IX, the representatives of persons with disabilities (*Schwerbehindertenvertretungen*) must be included in the process before the dismissal of a person with severe disabilities.²¹⁵

3.2.3 Access to all types and 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 on all grounds in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.

²⁰⁹ 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.

²¹⁰ Section 1 AGG: 'The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, sex (gender), religion or belief, disability, age or sexual orientation'.

²¹¹ Protection against Dismissal Act (KSchG), 25 August 1969.

²¹² 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, F.-J. (2006) 'Das AGG – ein neuer Versuch zur Umsetzung der Antidiskriminierungsrichtlinien in das Arbeitsrecht', *jurisPR-ArbR* 28/2006 para. 7; Thüsing/Bauer/Schunder (Thüsing) NZA 2006, 777; Däubler, W. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsrecht: Handkommentar* (5th ed.), Baden-Baden, Nomos Verlag, § 2, para. 292ff.

²¹³ Federal Labour Court, 2 AZR 523/07, 6 November 2008; Federal Labour Court, 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.

²¹⁴ Federal Labour Court, 6 AZR 190/12, 19 December 2013, para. 22.

²¹⁵ Section 178(2) (third sentence) SGB IX.

The AGG explicitly covers, among other grounds, sex (*'Geschlecht'*), including gender identity/expression and sex characteristics and sexual identity.²¹⁶

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)²¹⁷ contains a prohibition on all grounds for benefits concerning access to all forms and levels of vocational guidance, vocational training, advanced vocational training and vocational retraining including practical work experience. In addition, Section 36(2) Social Code III (SGB III)²¹⁸ 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.

3.2.4 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 relation to 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. The AGG explicitly covers, among other grounds, sex (*'Geschlecht'*), including gender identity/expression and sex characteristics and sexual identity.

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.

3.2.5 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, including the ground of sex (*'Geschlecht'*), including gender identity/expression and sex characteristics and sexual identity. 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 in this area of the law. 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, these areas are – for all grounds covered – within the scope of application of the AGG. According to Section 2(2) (first sentence) of the AGG, Section 33c of Social Code I (SGB I)²¹⁹ and Section 19a of Social Code IV (SGB IV) are

²¹⁶ Section 1 AGG: 'The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, sex (gender), religion or belief, disability, age or sexual orientation'.

²¹⁷ Social Code IV (*Sozialgesetzbuch IV*) (SGB IV), 12 November 2009.

²¹⁸ Social Code III (*Sozialgesetzbuch III*) (SGB III), 24 March 1997.

²¹⁹ Social Code I (*Sozialgesetzbuch I*) (SGB I), 11 December 1975.

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 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 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 persons with disabilities. The norm intends to implement Directive 2000/43/EC and adds the ground of disability. Section 19a SGB IV concerns vocational training, including vocational training in the framework of social protection. It covers all grounds of the directives.

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.

3.2.6 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.

According to Section 2(1)(6) AGG, social advantages are within the scope of application of the AGG.²²⁰

The AGG explicitly covers, among other grounds, sex ('*Geschlecht*'), including gender identity/expression and sex characteristics and sexual identity.²²¹

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.²²² 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 SGB I prohibits discrimination on the grounds of race, ethnic origin and disability in relation to claiming social rights.

The provision of Section 33c 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 persons with disabilities. The norm intends to implement Directive 2000/43/EC and adds the ground of disability. Section 19a Social Code IV concerns vocational training and covers all grounds of the directives. The constitutional guarantee of equality is also applicable including for social housing issues.

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.²²³ There are no

²²⁰ Cf. Eichenhofer, E. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz* (5th ed.), Baden-Baden, Nomos Verlag, § 2 para. 66.

²²¹ Section 1 AGG: 'The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, sex (gender), religion or belief, disability, age or sexual orientation.'

²²² Cf. Eichenhofer, E. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz* (5th ed.), Baden-Baden, Nomos Verlag, § 2 para. 83.

²²³ 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

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,²²⁴ 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.²²⁵ Such jurisdiction is contrary to the provision in the AGG.²²⁶ 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.²²⁷

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 the contradicting case law of lower courts on this matter.²²⁸ The German courts have followed this line of argument, as the decisions of the Federal Constitutional Court are binding.²²⁹ Section 46(4) SGB VI extends the entitlement to state pensions to registered partners. Married same-sex partners are entitled such pensions because of their marriage.

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

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

According to Section 2(1)(7) AGG, education is within the scope of application of the AGG in relation to all grounds. The AGG explicitly covers, among other grounds, sex ('*Geschlecht*', including gender identity/expression and sexual characteristics) and sexual identity.²³⁰ 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

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/document/document.jsf?text=&docid=70854&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4039687>.

²²⁴ Federal Administrative Court 2 C 43.04, 26 January 2006, ECLI:DE:BVerwG:2006:260106U2C43.04.0, NJW 2006, 1828.

²²⁵ Article 6 GG.

²²⁶ Mahlmann, M. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz* (5th ed.), Baden-Baden, Nomos Verlag, § 24 para. 50.

²²⁷ Judgment of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=70854&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4039687>.

²²⁸ Federal Constitutional Court, 1 BvR 1164/07, 7 July 2009, ECLI:DE:BVerfG:2009:rs2009070.1bvr116407 and Federal Constitutional Court, 1 BvR 3087/14, 11 December 2019, ECLI:DE:BVerfG:2019:rk20191211.1bvr308714.

²²⁹ See, for example, Saxony Higher Administrative Court (*Oberverwaltungsgericht*) (OVG), Saxony/2A665/10, 4 March 2011.

²³⁰ Section 1 AGG: 'The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.'

prohibitions of discrimination (Article 3(3) GG), is thus central,²³¹ 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.²³² Private schools, possibly with a religious or philosophical ethos, have a right to equal treatment as regards state support.²³³ 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.²³⁴ 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.²³⁵ There are rules on reasonable accommodation for children with disabilities. 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.²³⁶ Whether or not such patterns of underrepresentation are 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.²³⁷ However, a narrower definition guides ECRI.²³⁸

Article 1(c) of the Convention against Discrimination in Education 1960,²³⁹ 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).

²³¹ Cf. Rudolf, B. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 6 para. 154.

²³² 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.

²³³ BVerfGE 75, 40.

²³⁴ Article 7(4) (third sentence) GG.

²³⁵ 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.

²³⁶ Cf. Bildungsbericht (2020) *Bildung in Deutschland*, pp. 87-88, <https://www.bildungsbericht.de/de/bildungsberichte-seit-2006/bildungsbericht-2020/pdf-dateien-2020/bildungsbericht-2020-barrierefrei.pdf>, 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. 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> (most recent available data).

²³⁷ 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 of discrimination in which racial grounds are mixed with other grounds.'

²³⁸ 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.'

²³⁹ Convention against Discrimination in Education 1960, Paris, 14 December 1960.

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.²⁴⁰

There are special regulations for indigenous minorities in Germany,²⁴¹ which provide special protection of cultural identity, including the use of language in schools.

In Germany, the general approach to education for pupils with disabilities does not give rise to 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 children with disabilities from their social background (e.g. friends and peers) and to educate them with children without disabilities through integrated schooling.²⁴²

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 persons 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.²⁴³ Higher education in universities should take account of the needs of persons with disabilities.²⁴⁴

a) Trends and patterns regarding Roma pupils

In Germany, there are no specific trends and/or patterns (whether legal or societal) 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.²⁴⁵

²⁴⁰ See European Court of Human Rights (ECtHR), *D.H. and others v. the Czech Republic*, Application no. 57325/00, 13 November 2007, para. 175ff, 198.

²⁴¹ As already mentioned, 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_en_Vigueur=false&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=GER&coeconventions_WAR_coeconventionsportlet_codeNature=10.

²⁴² Section 4(3) SGB IX. The school laws of the *Länder* contain detailed regulations on the matter.

²⁴³ See BVerfGE 96, 288.

²⁴⁴ Framework Act of Higher Education, 19 January 1999: Section 2(4) (second sentence).

²⁴⁵ 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*

3.2.8 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 the 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. As throughout the AGG, sex ('*Geschlecht*') includes gender identity/expression and sexual characteristics and sexual identity as well as any sexual orientation. 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 than 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 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)²⁴⁶ 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.²⁴⁷ Telecommunications and postal service regulations require companies with a dominant market position to offer their services to everyone on the same conditions.²⁴⁸ The Licensing Act (*Gaststättengesetz*) (GastG)²⁴⁹ makes authorisation for the establishment of a restaurant dependent on the

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: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/expertise_bevölkerungseinstellungen_gegenueber_sinti_und_roma_20140829.pdf?__blob=publicationFile&v=4. 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).

²⁴⁶ Passenger Transport Act (*Personenbeförderungsgesetz*) (PBefG), 8 August 1990.

²⁴⁷ PBefG, 8 August 1990, Section 22. Persons with disabilities are consequently included.

²⁴⁸ Section 24 Telecommunications Act (*Telekommunikationsgesetz*) (TKG), 23 June 2021; 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.

²⁴⁹ Eating and Drinking Establishments Act (*Gaststättengesetz*), (GastG), 20 November 1998.

provision of rooms that reasonably accommodate the needs of persons with disabilities.²⁵⁰ The licence itself can be denied in cases of discriminatory behaviour.²⁵¹ There is some case law in this area.²⁵²

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.²⁵³

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 and banks) and those that are only available privately (e.g. those restricted 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,²⁵⁴ is one that regards any good or service that is offered (including an *invitatio ad offerendum*) to

²⁵⁰ 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 (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').

²⁵¹ Cf. Klose, A. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 6 para. 177ff.

²⁵² 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.

²⁵³ 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 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.

²⁵⁴ Cf. Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 3 para. 89.

an unlimited group of people by any means as 'available to the public'.²⁵⁵

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).²⁵⁶ 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) even if the goods and services are made available to the public. 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.²⁵⁷ The regulation of the AGG is thus, in the view of the author of this report, contrary to EU law.

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

In Germany, national legislation prohibits discrimination in the area of housing,²⁵⁸ as formulated in the Racial Equality Directive.

The AGG explicitly covers, among other grounds, sex ('*Geschlecht*'), including gender identity/expression and sexual characteristics and sexual identity.²⁵⁹

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.²⁶⁰ 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

²⁵⁵ 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.

²⁵⁶ Cf. Federal Court of Justice, V ZR 115/11, 9 March 2012, doubting applicability to hotels, and Federal Court of Justice, I ZR 272/15, 25 April 2019, ECLI:DE:BGH:2019:250419UIZR272.15.0.

²⁵⁷ 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.

²⁵⁸ Cf. background information: Müller, A. (2015), *Expertise "Diskriminierung auf dem Wohnungsmarkt"*. *Strategien zum Nachweis rassistischer Benachteiligungen*, Antidiskriminierungsstelle des Bundes, https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/expertise_diskriminierung_auf_dem_wohnungsmarkt.pdf?__blob=publicationFile&v=5 on cases of discrimination based on race and ethnic origin in the area of housing and footnotes 116 and 261.

²⁵⁹ Section 1 AGG: 'The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, sex (gender), religion or belief, disability, age or sexual orientation.'

²⁶⁰ Bundestag, *Bundestagsdrucksache* 16/1780 p. 42.

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.²⁶¹ A 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.²⁶²

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 3.2.8 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 3.2.8 above).²⁶³ 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).

There is a special clause enabling registered partners (*Lebenspartner*) to succeed in rental contracts after their partner's death.²⁶⁴

If a public body provides housing, it is bound by the guarantee of equality. Support for persons 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,

²⁶¹ 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. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th ed.), Baden-Baden, Nomos Verlag, § 19 para. 54ff. The recent legal opinion commissioned by the Federal Anti-Discrimination Agency recommends the amendment of Section 19(3) AGG so that in the future formulation it is explicitly stated that the relevant permissibility of unequal treatment will not apply in cases of the grounds of race and ethnic origin. Thüsing, G. and Vianden (2019), *Rechtsfreie Räume? Die Umsetzung der EU-Antirassismusrichtlinie im Wohnungsbereich: Zum verbleibenden Umsetzungsbedarf der Richtlinie 2000/ 43/EG im Allgemeinen Gleichbehandlungsgesetz, (A legal vacuum? The transposition of the EU Anti-Racism Directive in the area of housing)* Anti-Diskriminierungsstelle des Bundes, Berlin, p. 38, available in German at: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Rechtsgutachten/rechtsgutachten_rechtsfreie_raeume_umsetzq_eu_rl_im_wohnungsbereich.html?nn=6580778.

²⁶² Hamburg-Barmbek Labour Court (*Amtssgericht*) (AG), Hamburg-Barmbek/811b C 273/15, 3 February 2017: The landlord had disregarded applicants with 'foreign sounding' names.

²⁶³ The authors of the legal opinion commissioned by the Federal Anti-Discrimination Agency, *A legal vacuum? The transposition of the EU Anti-Racism Directive in the area of housing*, recommend the following amendment of Section 19 para. 5 AGG: The provisions of this Section shall not apply to civil-law obligations where the parties or their relatives are closely related or a relationship of trust exists of such significance that under consideration the protection of privacy must take precedence over the protection against discrimination. As regards tenancy, this may in particular be the case where the parties or the relatives use housing situated on the same plot of land. Thüsing, G. and Vianden (2019), *Rechtsfreie Räume? Die Umsetzung der EU-Antirassismusrichtlinie im Wohnungsbereich: Zum verbleibenden Umsetzungsbedarf der Richtlinie 2000/ 43/EG im Allgemeinen Gleichbehandlungsgesetz*, Anti-Diskriminierungsstelle des Bundes, Berlin, p. 39, available in German at: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Rechtsgutachten/rechtsgutachten_rechtsfreie_raeume_umsetzq_eu_rl_im_wohnungsbereich.html?nn=6580778.

²⁶⁴ Section 563(1)(2) BGB, mirroring the same right of married couples, Section 563(1) BGB.

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 trends or patterns of housing segregation and discrimination against the Roma.

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

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4 Directive 2000/43, Article 4(1) Directive 2000/78)

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. The Islamic headscarf has given rise to substantial, differentiated and controversial case law in this context.²⁶⁵

²⁶⁵ The headscarf issue is at its core not conceptualized 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, 2 BvR 1436/02, 24 September 2003, ECLI:DE:BVerfG:2003:rs20030924.2bvr143602, 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, Federal Constitutional Court, 2 BvR 1436/02, 24 September 2003, ECLI:DE:BVerfG:2003:rs20030924.2bvr143602, para. 39. However, the Court emphasises that any prohibition of religious symbols must respect the strictly interpreted equality of religions, Federal Constitutional Court, 2 BvR 1436/02, 24 September 2003, ECLI:DE:BVerfG:2003:rs20030924.2bvr143602, para. 43, 71. The Federal Administrative Court confirmed this principle of equal treatment in its second headscarf decision, Federal Administrative Court, 2 C 45.03, 24 June 2004, ECLI:DE:BVerwG:2004:240604U2C45.03.0, 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, the former Section 45 (in force until 23 November 2021) prohibited 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 new Section 45 refers only to the possibility of eventual restrictions or prohibitions regarding the appearance of civil servants while performing their duties or at an activity closely related to their duties as prescribed by the relevant supervising authority; HBG, 15 November 2021, entry into force on 24 November 2021. The amending provision of the BGG referring to the appearance of Federal Civil Servants, refers explicitly to the possibility of restriction or prohibition of appearance with religious or ideological (*Weltanschauung*) connotations, in case they objectively impair trust in the neutral performance of the duties of the civil servants. See Section 61(2) BBG, last amended on 28 June 2021, entry into force on 7 July 2021. The consequences of the provision are to be closely observed. 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, 1 BvR 471/10, 27 January 2015, ECLI:DE:BVerfG:2015:rs20150127.1bvr047110. Cf. Mahlmann, M. (2015), 'Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Headscarf 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, 1 BvR 354/11, 18 October 2016, ECLI:DE:BVerfG:2016:rk20161018.1bvr035411. 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 Constitutional Court, 1 BvR 3237/13, 8 November 2016, ECLI:DE:BVerfG:2016:rk20161108.1bvr323713. 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 High Administrative Court of Bavaria (*Bayerischer Verwaltungsgerichtshof*) (BayVVGH), 7 March 2018, 3 BV 16.2040. Cf. Constitutional Court of Bavaria (*Bayerischer Verfassungsgerichtshof*) (BayVerfGH), Vf. 3-VII-18, 14 March 2019. On the question whether an employer can legitimately demand that an employee does not wear a headscarf at work due to the employer's neutrality policy, cf., after a preliminary reference by German courts, Opinion of GA Rantos of 25 February 2021, ECLI:EU:C:2021:144, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CC0341>.

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, employing about 1.2 million people.²⁶⁶ The question of the conformity of the exception in discrimination law cannot be answered without a view on this legal framework. The legal basis for it is the constitutional provisions on the status of religious communities: the Constitution separates religion and state and establishes the principle of the neutrality of the state. This principle 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,²⁶⁷ 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.²⁶⁸ 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.

See also the Judgment of 15 July 2021, C-804/18, *Wabe* and C-341/19 *Müller Handels GMBH*, ECLI:EU:C:2021:594, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0804>, formulating conditions for the permissibility of such a neutrality policy of an enterprise, in particular 'that that policy meets a genuine need on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out; secondly, that that difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner; and, thirdly, that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition' (para 92).

²⁶⁶ Religious communities are understood as associations of at least two people based on a consensus of faith aiming at least partly to manifest this faith.

²⁶⁷ The Constitution of the German Reich (*Die Verfassung des Deutschen Reichs*), 11 August 1919, usually known as the Weimar Constitution (*Weimarer Verfassung*).

²⁶⁸ 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, 2 BvR 661/12, 22 October 2014, ECLI:DE:BVerfG:2014:rs20141022.2bvr066112.

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 (BetrVG) is not applicable to hospitals as employers if their operation is part of the religious mission of a religious community.²⁶⁹ 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.²⁷⁰ Another provision in the law directly exempts religious communities.²⁷¹

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 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.²⁷² If, however, they exercise their private autonomy, they are in principle regulated by general labour law.²⁷³

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.

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.²⁷⁴

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

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

²⁶⁹ Federal Labour Court, 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.

²⁷⁰ Section 118(1) BetrVG, 25 September 2001. This provision applies if the character of the organisations justifies the exemption.

²⁷¹ Section 118(2) BetrVG, 25 September 2001.

²⁷² BVerfGE 70, 138, 164.

²⁷³ BVerfGE 70, 138, 164.

²⁷⁴ BVerfGE 70, 138, 168.

Church.²⁷⁵ 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, including 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.²⁷⁶

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,²⁷⁷ 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.²⁷⁸

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. In addition, the High Administrative Court of Bavaria (*Bayerischer Verwaltungsgerichtshof*) (BayVGh) stated 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.²⁷⁹ 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.²⁸⁰

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

²⁷⁵ Cf. Tagesspiegel, 15 May 2012.

²⁷⁶ Constitutional Court of Bavaria (*Bayerischer Verfassungsgerichtshof*) (BayVerfGH), BayVerfGHE 33, p. 65 et seq.

²⁷⁷ 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. (2021), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (9th ed.), München, Beck Verlag, Art. 140; 136 WRV, para. 3, both with further references to the extensive discussion.

²⁷⁸ Jeand'Heur, B. and Koriath, 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.

²⁷⁹ Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*) (BayVerwGH), Bavaria/7 CE 09.661 and Bavaria/7 CE 09.662, 30 April 2009.

²⁸⁰ 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.

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.²⁸¹ 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 in Article 4(2) Directive 2000/78/EC with regard to both the self-understanding and the kind of work concerned.²⁸²

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*.²⁸³ 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.²⁸⁴ 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.²⁸⁵ The case concerns an employer (defendant) who is affiliated with the

²⁸¹ 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.

²⁸² Federal Labour Court, 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.

²⁸³ Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257.

²⁸⁴ 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*) (ArbG), 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.

²⁸⁵ See Federal Labour Court, 8 AZR 501/14 (A), 17 March 2016, ECLI:DE:BAG:2016:170316.B.8AZR501.14A.0, 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), Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=201148&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4351529>, para 69: 'Article 4(2) of Directive 2000/78 must be

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 objective, legitimate and justified professional requirement in the light of the ethos of the religious community or institution.²⁸⁶ The Protestant Church has filed a constitutional complaint against this decision of the Federal Labour Court, arguing that the CJEU acted *ultra vires* in handing down the *Egenberger* decision and that the *Egenberger* decision should therefore not be applied.

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.²⁸⁷ 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. Given the on-going constitutional litigation against the *Egenberger* decision in particular, the outcome is open.²⁸⁸

In 2022 the Niedersachsen Regional Labour Court (Landesarbeitsgericht Niedersachsen) (LAG Niedersachsen) in its ruling of 12 January 2022,²⁸⁹ decided that the rejection of an

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), Judgment of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=205521&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4351760>. Cf. Federal Labour Court, 2 AZR 746/14, 20 February 2019, ECLI:DE:BAG:2019:200219.U.2AZR746.14.0.

²⁸⁶ Federal Labour Court, 8 AZR 501/14, 25 October 2018. This decision overturned previous case law. It has to be seen how the Federal German Constitutional Court reacts to these developments.

²⁸⁷ Judgment of 11 September 2018, *IR*, CJEU C-68/17, 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'. Judgment of 11 September 2018, *IR* C-68/17, EU:C:2018:696, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=205521&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4351760>.

²⁸⁸ For some recent case law on this matter from lower instance courts, see section 12.2 below: Regional Labour Court Baden-Württemberg (*Landesarbeitsgericht Baden-Württemberg*, LAG Baden-Württemberg), 10 February 2021, 4 SA 27/20; Regional Labour Court Hamm (*Landesarbeitsgericht Hamm*, LAG Hamm), 25 March 2021, 18 SA 1197/20, ECLI:DE:LAGHAM:2021:0325.18SA1197.20.00.

²⁸⁹ Niedersachsen Regional Labour Court (*Landesarbeitsgericht Niedersachsen*, LAG Niedersachsen), 8 Sa 599/19, 12 January 2022. For more details, see section 12.2 on case law below.

application for employment at the Protestant Church in Germany as the head of the department of human and fundamental rights and European law was justified according to Section 9 AGG, since the applicant was not a member of the Protestant Church. In light of the jurisprudence of the CJEU, *Egenberger*, and given that the employment concerned not only technical legal matters but demanded specific tasks including the drafting of documents of strategic importance for the Protestant Church, the court came to the conclusion that not only legal expertise was required but also an active identification with the theological beliefs of the Protestant Church. Therefore, the court argued that, given the particular kind of work concerned, the demand to be a member of the Protestant Church was proportionate.

In another decision of the same year, the Hess Regional Labour Court (*Hessisches Landesarbeitsgericht*) in its ruling of 1 March 2022²⁹⁰ considered a comparable situation. The case concerns a complaint against the dismissal of an employee working in an organisation providing advice for pregnant women. The association is affiliated with the Catholic Church. The complainant left the Catholic Church while she was on maternal leave. Before her return there were discussions and attempts on the side of the organisation to convince her to re-join the Catholic Church. When these efforts were unsuccessful the complainant was dismissed. The court confirmed the decision of the lower instance that this dismissal could not stand. It argued that the dismissal formed direct discrimination on the ground of religion. It argued in accordance with recent case law of the Federal Labour Court in Germany and the decision of CJEU in *Egenberger* that the proportionality of duties of loyalty of religious communities is to be assessed according to the specific kind of work performed. The court argued that there is no specific need for an organisation providing advice for pregnant women to require that the employees providing this advice are members of the Catholic Church. The specific organisation does not provide certificates necessary for a legal abortion in Germany. The defendant in the case identifies with the specific evaluation of abortion underlying this practice, which is according to the court sufficient for the task she performs. There is no additional need to be a member of the Catholic Church. Accordingly, there was discrimination on the ground of religion under Section 7.1 AGG that was not justified by Section 9 AGG. The relevant regulation in the labour contract was therefore null and void and the complainant was reinstated. In addition, she was awarded compensation for immaterial damages of EUR 2 314.22. The court argued that this compensation is sufficient because the continuation of the employment already compensated the material damages of the complainant and also implied symbolic affirmation of her justified claims. The decision is not final.

These two decisions show how a differentiation of admissible duties of loyalty according to the kind of work concerned may play out in practice.

There are various unresolved problems in this area. For example, courts previously 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.²⁹¹ The cases cited seem to indicate the basically fluid case law of lower instance courts. There will be only a final clarification if/when the constitutional complaint against the CJEU judgment in *Egenberger* is decided.

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

²⁹⁰ Hess Regional Labour Court (*Hessisches Landesarbeitsgericht*), 8 Sa 1092/20, 1 March 2022. For more details, see section 12.2 on case law below.

²⁹¹ 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, Federal Labour Court, 2 AZR 516/09, 21 December 2010); Federal Labour Court, 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.

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 are specific provisions and/or case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in the context of employment (e.g. the rights of organisations with an ethos based on religion as opposed to protection against discrimination on the basis of sexual orientation or another ground).

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.²⁹² Given what has been said above, a practice that does not differentiate between spheres of work, raises issues of proper implementation.

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19 Directive 2000/78)

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

In Germany, the scope of the exception is limited to safeguarding the combat effectiveness of the armed forces.

In Germany, the scope of the exception does not extend to other non-combat staff (e.g. civilians employed in administrative positions in the army).²⁹³

The Equal Treatment of Soldiers Act (*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 soldiers with severe disabilities 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.²⁹⁴ 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*),²⁹⁵ 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

²⁹² On this matter, with reference to some case law, see Wedde, P. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th ed.), Baden-Baden, Nomos Verlag, § 9 para 66. 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 admit applicant for education as carer for persons with disabilities); Stuttgart Labour Court (*Arbeitsgericht*) (*ArbG*) Stuttgart/14 Ca 1585/09, 28 April 2010, NJOZ 2011, 1309 (registered partnership justified reason not to employ applicant as head of Catholic kindergarten).

²⁹³ The specific age restrictions for professional soldiers are to be found in Section 45(1) and (3) Legal Status of Military Personnel Act (*Soldatengesetz*) (*SG*), 30 May 2005, last amended on 20 August 2021.

²⁹⁴ It should be noted that compulsory military service was suspended in 2011.

²⁹⁵ Legal Status of Military Personnel Act (*Soldatengesetz*) (*SG*), 30 May 2005, last amended on 20 August 2021.

others.²⁹⁶ It should be noted, that the constitutional equality clause, Article 3(3) GG applies as well.

According to social law, the legal status of soldiers with severe disabilities is, with regard to certain legal provisions (e.g. on special advantages, such as additional holidays), the same as for other persons with severe disabilities. The provisions for persons with severe disabilities are applied insofar as they are compatible with the special requirements of military service.²⁹⁷

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

In German law, as in other legal systems, there is a differentiated system for the treatment of non-German nationals. On the most fundamental level, the status of non-nationals is protected by fundamental rights in the German constitution, which are human rights and therefore applicable to every human being in their relations with the German state authorities. The most important of such rights is the guarantee of human dignity.²⁹⁸ 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.²⁹⁹

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.³⁰⁰

Some professions are open only to German nationals and specified groups of non-Germans, such as EU citizens and stateless people.³⁰¹ 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.³⁰²

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

²⁹⁶ 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. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th ed.), Baden-Baden, Nomos Verlag, § 24 para. 92ff.

²⁹⁷ Section 211(3) SGB IX.

²⁹⁸ Article 1 GG.

²⁹⁹ As, for example, in the case of freedom of assembly, see Section 1 Assembly Act (*Versammlungsgesetz, VersammIG*), 15 November 1978.

³⁰⁰ 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.

³⁰¹ See Section 9(1) German Judiciary Act (*Deutsches Richtergesetz*) (DRiG), 19 April 1972; Section 37.1(1) 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.

³⁰² For a recent decision, see: Frankfurt am Main Regional Court (*Landesgericht*) (LAG), Frankfurt am Main/2-24 O 37/17, 16 November 2017.

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.³⁰³

4.5 Health and safety at work (Article 7(2) Directive 2000/78)

In Germany, there are exceptions in relation to disability and health and safety at work 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).³⁰⁴

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

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

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.

b) 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

³⁰³ Cf. Federal Labour Court, 8 AZR 364/11, 21 June 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.

³⁰⁴ Federal Labour Court, 6 AZR 190/12, 19 December 2013, para. 53.

- 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)³⁰⁵ (Section 10 No 5);
- differentiation of benefits in compensation plans in the sense of the Works Constitution Act (*Betriebsverfassungsgesetz*) (BetrVG),³⁰⁶ 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 jurisprudence on age discrimination.³⁰⁷

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 social security appear to be acceptable grounds for justification. It follows existing legal practice.³⁰⁸ On Section 10 No. 5 on retirement ages, see section 4.6.4 below. Before the CJEU *Age Concern* decision,³⁰⁹ and later clarifications by the CJEU on aims of social policy as a precondition for the application of Article 6 of the directive,³¹⁰ 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.³¹¹ It has to be seen how this jurisprudence is adapted given the CJEU case law just mentioned. The various

³⁰⁵ Social Code VI (*Sozialgesetzbuch VI*) (SGB VI), 19 February 2002.

³⁰⁶ BetrVG, 25 September 2001.

³⁰⁷ Cf. Court of Justice of the European Union (CJEU), Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56134&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4352257>; Judgment of 3 June 2021, *Ministerio della Giustizia*, C-914/19, ECLI:EU:C:2021:430, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242025&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1936303>, on the proportionality test when aims such as ensuring that that a profession is practised in a stable manner for a significant period before retirement, safeguarding the proper functioning of a profession and facilitating the natural turnover and rejuvenation of that profession are pursued by a regulation.

³⁰⁸ The issue is contentious in legal theory, for discussion cf. Boors, C. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th 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).

³⁰⁹ Judgment of 5 March 2009, *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07, EU:C:2009:128, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=77505&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4352518>.

³¹⁰ Cf. e.g. Judgment of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=109381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4352850>.

³¹¹ Federal Labour Court, 8 AzR 906/07, 22 January 2009.

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,³¹² which is a test of proportionality, and other existing case law.

c) 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.

d) Fixing of ages for admission to occupational pension schemes

In Germany, national law (Section 10(4), AGG) allows occupational pension schemes to fix ages for admission to the scheme taking up the possibility provided for by Article 6(2) of the Employment Equality Directive.

4.6.2 Special conditions for younger or older workers

In Germany, there are special conditions set by law for older and younger workers in order to promote their vocational integration.

There are various measures that aim to integrate older and younger workers.³¹³

4.6.3 Minimum and maximum age requirements

In Germany, there are exceptions permitting minimum and maximum age requirements in relation to access to employment 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;³¹⁴ judges, maximum - varying *Land* laws exist, e.g. in Bayern it is 44 years;³¹⁵ federal judges, minimum – 35;³¹⁶ Federal constitutional judges, minimum – 40.^{317 318} Section 5 of the

³¹² Court of Justice of the European Union (CJEU), Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, <http://curia.europa.eu/juris/showPdf.jsf?docid=56134&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs&part=1&cid=4353056>. Cf. Federal Labour Court, 7 AZR 237/17, 20 March 2019, ECLI:DE:BAG:2019:200319.U.7AZR237.17.0.

³¹³ The provisions under scrutiny in the *Mangold* case (Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56134&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4353345>), 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.

³¹⁴ Article 54(1) GG.

³¹⁵ Bavaria, Civil Service Act (*Beamtengesetz Bayern*) (BayBG), 29 July 2008, Section 23.

³¹⁶ Courts Constitution Act (*Gerichtsverfassungsgesetz*) (GVG), 9 May 1975, Section 125(2).

³¹⁷ Federal Constitutional Court Law (*Bundesverfassungsgerichtsgesetz*) (BVerfGG), 11 August 1993, Section 3(1).

³¹⁸ Federal civil servants: age requirement can be waived for official purposes, application for service training (*Vorbereitungsdienst*) in criminal investigation department, maximum: 42 years (Section 5(2) Regulation on service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung*) (KrimLV), 18 September 2009, last relevant amendment on 4 September 2020). 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 (KrimLV)). Executive police service (*Polizeivollzug*),

Federal Police Career Structures Regulation³¹⁹ 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).³²⁰

Exempted from this regulation are holders of certificates of inclusion and acceptance, in accordance with Section 9 of the Military Pensions Act (*Soldatenversorgungsgesetz*) (SVG),³²¹ 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.

maximum: 62 years (Section 5(1) Federal Executive Police Service Act (*Bundespolizeibeamten-gesetz*) (*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 (*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). 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 was initially increased to 67 years to be finally removed from the law. Section 12(1)(3) *SchfHwG* sees now only objective physical and mental weakness as a reason for termination of duty. 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: 4 with the possibility of exceptions (Section 23 Bavaria Civil Service Act (*Beamten-gesetz 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. Cf. Federal Court of Justice, NotZ (Brfg) 7/18, 27 May 2019, ECLI:DE:BGH:2019:270519UNOTZ.BRFG.7.18.0, High Administrative Court of the Land Baden-Württemberg (*Verwaltungsgerichtshof Baden-Württemberg*) (VGH Baden-Württemberg), 9 S 2567/17, 26 February 2019, ECLI:DE:VGHBW:2019:0226.9S2567.17.00 and Higher Administrative Court of the Land North Rhine-Westphalia (*Oberverwaltungsgericht für das Land Nordrhein-Westfalen*) (OVG Nordrhein-Westfalen), 13 B 1352/19, 13 November 2019, ECLI:DE:OVGNRW:2019:1119.13B1352.19.00.

³¹⁹ Federal Police Career Structures Regulation (*Bundespolizei-Laufbahnverordnung*, (*BpolLV*), 2 December 2011.

³²⁰ Such a provision seems to be in line with the case law of the CJEU on this matter, cf. e.g. Judgment of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=72660&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4353587>; Judgment of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160977&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4353850>; Judgment of 15 November 2016, *Salaberria Sorondo*, C-258/15, EU:C:2016:873, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185361&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4354110>.

³²¹ Military Pensions Act (*Soldatenversorgungsgesetz*, *SVG*), 16 September 2009, last amended on 22 November 2021.

4.6.4 Retirement

a) State pension age

In Germany, there is no state pension age at which individuals must begin to collect their state pensions. There is, however, a general pension age at which an individual is entitled to collect a pension and at which the collection of state pension usually begins.

If an individual wishes to work beyond the state pension age, the pension can be deferred – in 2017, the ‘flexi-pension’ (*Flexi-Rente*) was implemented.³²² 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.³²³

After a reform in 2008, the normal state pension age for both women and men is 67 (instead of 65).³²⁴ However, the threshold applies fully only to those who were born in 1964 or later. The state pension age for age cohorts from 1947 to 1963 are being 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.³²⁵

An individual can collect a pension and still work.

b) Occupational pension schemes

In Germany, there is a standard age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.³²⁶

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

An individual can collect a pension and still work.

c) State-imposed mandatory retirement ages

In Germany, there is no *general* state-imposed mandatory retirement age but there are various special regulations for particular professions that fix a retirement age.³²⁷ 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.

³²² Cf. 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.

³²³ SGB VI, Section 77(3) (third sentence) (subparagraph 3).

³²⁴ SGB VI, Section 35(2).

³²⁵ SGB VI, Section 34(2).

³²⁶ The legal entitlement of employees to an occupational pension by converting an amount of their salary is compatible with the Constitution, Federal Labour Court, 3 AZR 14/06, 13 June 2007.

³²⁷ See section 4.6.3 of this report.

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 52.³²⁸

Such objective reasons are widely held to exist for ending an employment contract at the age of 65, subject to reconsideration, given the later pension age.³²⁹

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.

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 4.6.3 above). The courts also follow the standards set out by the CJEU.

4.6.5 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.³³⁰ 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.³³¹ 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.³³²

³²⁸ 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.

³²⁹ 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. (2021), in: Müller-Glöge, R., Preis, U. and Schmidt, I. (eds.), *Erfurter Kommentar zum Arbeitsrecht* (21st ed.), München, Beck Verlag, § 14 TzBfG para. 56ff; Federal Labour Court, Az.: 7 AZR 135/93, 20 October 1993; Federal Labour Court, 7 AZR 428/93, 1 December 1993; Federal Labour Court, 7 AZR 296/03, 19 November 2003; before that age, special requirements can justify early retirement.

³³⁰ SGB VI, Section 41.

³³¹ KSchG, Section 1(3) (first sentence), 25 August 1969. 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.

³³² 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, Federal Labour Court, 6 AZR 457/14, 23 July 2015, ECLI:DE:BAG:2015:230715.U.6AZR457.14.0.

The interest of the employer in maintaining an age balance among employees was also held to be reasonable in this context.³³³ 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.³³⁴

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.

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.³³⁵

4.7 Further exceptions necessary in a democratic society: Public security, public order, criminal offences, protection of health and 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 in relation to public security, public order, criminal offences, protection of health and protection of the rights and freedoms of others, although such considerations would enter into the existing regime of exceptions.

4.8 Any other exceptions

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

³³³ Federal Labour Court, 2 AZR 533/99, 23 November 2000: employee working in a kindergarten.

³³⁴ Cf. Brors, C. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th ed.), Baden-Baden, Nomos Verlag, § 10 para. 13.

³³⁵ Cf. for an example Federal Labour Court, 9 AZR 20/18, 18 September 2018, ECLI:DE:BAG:2018:180918.U.9ZR2018.0.

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.³³⁶ Explicit regulations make permissible positive action promoting the equality of men and women and persons with disabilities.³³⁷ 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).³³⁸ 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,³³⁹ which permits such treatment in principle, as long as the schemes allow for individual cases to be assessed.³⁴⁰

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 grounds other than gender, albeit such measures are also a matter of discussion regarding these grounds.

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

³³⁶ Article 3, 33(2) and 33(3) GG.

³³⁷ 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.

³³⁸ See for an overview of the debate: Nußberger, A. (2021), in: Sachs, M. (ed.), *Grundgesetz: Kommentar* (9th ed.), München, Beck Verlag, Art. 3 para. 256ff.

³³⁹ See Judgment of 17 October 1995, *Kalanke*, C-450/93, EU:C:1995:322, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993CJ0450&from=DE>; Judgment of 11 November 1997, *Marschall*, C-409/95, EU:C:1997:533, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0409&from=GA>; Judgment of 6 July 2000, *Abrahamsson and Anderson*, C-407/98, 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.

³⁴⁰ Compare for such legislation e.g. Federal Civil Service Act (BBG), 5 February 2009, Section 9 (second sentence).

preferential rules for political representation and so on,³⁴¹ constitutionally buttressed by basic policy clauses of the *Länder* constitutions.³⁴²

Work councils and the staff councils of public authorities have the competence to promote the integration of persons with disabilities, older and foreign workers and to initiate measures against racism and xenophobia.³⁴³

Social security law grants state funding to help persons with disabilities participate in working life in areas such as training and education, equipment and transport,³⁴⁴ and also gives financial assistance to the employer for costs such as training and education, equipment and costs relating to integration.³⁴⁵ A person with a severe disability can claim preferential treatment regarding promotion and training. The employer is under a duty to check whether qualified persons with disabilities are available for vacant posts.³⁴⁶ Employers are under a duty to communicate and cooperate with public authorities. Persons with severe disabilities have the right to part-time work if it is necessary for reasons related to their disability.³⁴⁷ Furthermore there is a duty to conclude integration agreements,³⁴⁸ which are particular, binding legal provisions, with open-ended content, including structural measures and regulations enabling measures directed at individuals. 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.³⁴⁹ There is an obligation to create a representative body for persons with severe disabilities if there are at least five workers with severe disabilities.³⁵⁰ Severe disability must be taken into account within social choice

³⁴¹ 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*, 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.

³⁴² 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*).

³⁴³ Section 80.1 BetrVG: Nr. 4 integration of persons with severe disabilities; Nr. 6: integration of older employees; Nr. 7: integration of foreign workers, initiating measures against racism and xenophobia. See also Section 62 Nrs. 4, 5, 7 BPersVG.

³⁴⁴ Section 49 SGB IX.

³⁴⁵ Section 50 SGB IX.

³⁴⁶ Section 164.1 SGB IX.

³⁴⁷ Section 164.5 sentence 3 SGB IX.

³⁴⁸ Section 166 SGB IX.

³⁴⁹ On all this, see section 2.6 above.

³⁵⁰ 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 persons with severe disabilities 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.

(*Sozialauswahl*) in relation to dismissals (*betriebsbedingte Kündigungen*).³⁵¹ There is a special procedure involving the public authorities in the case of an ordinary dismissal of a person with a disability.³⁵² The employer is under an obligation to cooperate with the representative body for persons with disabilities and the integration authority to avoid dismissal.³⁵³

According to the Equal Opportunities for Persons with Disabilities Act, organisations and social partners should conclude agreements (*Zielvereinbarungen*, see also section 2.8.e above) which can encompass positive action measures concerning accessibility.

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.³⁵⁴

b) Quotas in employment for persons with disabilities

In Germany, national law provides for a quota for the employment of persons with disabilities.

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 % persons with severe disabilities. 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.³⁵⁵ If the quota is not met, there are obligatory penalties/payments, ranging from EUR 125 up to EUR 320 for every person with a disability who should have been employed, Section 160, SGB IX.³⁵⁶ 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.

³⁵¹ KSchG, Section 1(3) (first sentence). Cf. section 3.2.2 above.

³⁵² 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.

³⁵³ Section 167 SGB IX, last amended on 2 June 2021.

³⁵⁴ 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 (ERAC), 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>.

³⁵⁵ There are modifications for smaller companies. According to the most recent data (reporting year 2019) published by the Federal Agency of Labour, 1 146 459 persons with severe disabilities were employed. That is a quota of 4.6 %. See (in German) https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche_Formular.html?nn=1523092&opic_f=bsbm-bsbm.

³⁵⁶ The payments have to be paid by 31 March of the following year and are calculated on a monthly basis. According to relevant and most recent data, 104 492 employers had to make such payments in 2019. See <https://www.rehadat-ausgleichsabgabe.de/hintergrund/statistik/>.

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.³⁵⁷

A claim can be brought after employment has ended, within the limits of general law, especially the statute of limitations.³⁵⁸

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

³⁵⁷ 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. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th 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*) (LAG Hamburg), Hamburg/5 Sa 3/09, 3 June 2009: Court of Justice of the European Union (CJEU), Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83132&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4156771>. 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. On the demand of the principle of effectiveness, that the time period is sufficient to determine whether persons have been discriminated against, see Court of Justice of the European Union, Judgment of 27 February 2020, TK, C-773/18 to C-C775/18, ECLI:EU:C:2020:125.

³⁵⁸ A dismissal protection case must be brought within three weeks, Section 4 KSchG; partly specific regulations for persons with disabilities, Sections 4 (fourth sentence) KSchG in conjunction with Section 168 SGB IX.

litigation and problems of proof, e.g. as to the causality of ground protected for a disadvantageous decision.³⁵⁹

c) Number of discrimination cases brought to justice

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

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.³⁶⁰ This is a rather small number. There is no more recent data that would indicate that a different situation has developed.

d) Registration of national court decisions on discrimination cases

In Germany, court decisions on discrimination 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 in proceedings 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 proceedings 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.³⁶¹ Trade unions as such are not associations in this sense.

³⁵⁹ 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.

³⁶⁰ The empirical study by the author and Prof Dr Hubert Rottleuthner mentioned above, commissioned by the EU and the German Government, includes data collected in this respect. See the executive summary (in German): <https://ec.europa.eu/migrant-integration/librarydoc/diskriminierung-in-deutschland---vermutungen-und-fakten-executive-summary>. 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. Interestingly, this remains the largest study to systematically investigate the cases in courts. Therefore, it continues to be a reference point.

³⁶¹ 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.

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 case.³⁶² 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) of the Civil Procedure Code provides that the actions of the counsel are taken as actions of the party, if the latter does not contradict them.³⁶³ 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.³⁶⁴

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.³⁶⁵ 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.³⁶⁶

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 persons with disabilities.³⁶⁷

³⁶² Cf. the explanatory report to the AGG, *Bundestagsdrucksache* 16/1780, 48.

³⁶³ These actions encompass both factual declarations as to the matter of the case and procedural actions (recognition of a claim etc.).

³⁶⁴ 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).

³⁶⁵ Schlachter, M. (2021), in: Müller-Glöge, R., Preis, U. and Schmidt, I. (eds.), *Erfurter Kommentar zum Arbeitsrecht* (21st ed.), München, Beck Verlag § 23 AGG, para. 1.

³⁶⁶ Cf. *Bundestagsdrucksache* 16/1780, 26, 48.

³⁶⁷ Equal Opportunities for Persons with Disabilities Act, 27 April 2002, Section 14 (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 person with a disability 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.³⁶⁸ Similar possibilities exist with regard to consumer protection.³⁶⁹ 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 Act to introduce civil model declaratory proceedings³⁷⁰ amending the Civil Procedure Code (*Zivilprozessordnung*) (ZPO).³⁷¹ 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 Act³⁷² 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. So far this remains uncharted legal territory.

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 regulates³⁷³ the burden of proof. 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

³⁶⁸ Cf. for details: Prohibitory Action Act (*Unterlassungsklagengesetz*) (UKlaG), 27 August 2002.

³⁶⁹ Cf. for details: Act against unfair competition (*Gesetz gegen den unlauteren Wettbewerb*) (UWG), 3 March 2010.

³⁷⁰ Act to introduce civil model declaratory proceedings (*Gesetz zur Einführung einer Musterfeststellungsklage*), 12 July 2018, with effect from 1 November 2018.

³⁷¹ ZPO, 5 December 2005.

³⁷² UKlaG, 27 August 2002.

³⁷³ For case law on Section 22 AGG, see the ruling of the Federal Labour Court, Federal Labour Court, 8 AZR 736/15, 26 January 2017, ECLI:DE:BAG:2017:260117.U.8AZR736.15.0 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.³⁷⁴

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.³⁷⁵ 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 regulation is relevant in *non liquet* situations, cases in which the applicable law is unclear.³⁷⁶

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.³⁷⁷ There is no special prohibition in civil law as set out in Article 9 Directive 2000/43/EC, which constitutes a deficit in implementation.³⁷⁸ Apart from civil service law (through Section 24 AGG) and public employees directly covered by the AGG, there is no regulation of victimisation in

³⁷⁴ Cf. e.g. Germany, Federal Labour Court, 9 AZR 791/07, 16 September 2008; Beck, T. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th 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.

³⁷⁵ Some state disability laws contain such regulations for public law, see Section 6.3 Berlin Act on Promoting Equality between People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung (Berliner Landesgleichberechtigungsgesetz)*) (LGBG Berlin), 27 September 2021; Section 8(3) Law of Saxony-Anhalt on Promoting the Equality of Persons 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 Persons with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderung*) (ThürGIG), 16 December 2005.

³⁷⁶ Cf. Mahlmann, M. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th ed.), Baden-Baden, Nomos Verlag, § 24 para. 79ff.

³⁷⁷ 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 employees with disabilities) are specially protected in disability law so that they are not discriminated against because of their function, Section 179 SGB IX.

³⁷⁸ Cf. Armbrüster, C. (2007), in Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 9 para. 6.

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 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) AGG). 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).³⁷⁹

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,³⁸⁰ demanding strict liability in the case of damages awarded in civil law for discrimination, in view of the author, the regulations in Section 15(1) (second sentence) and Section 21(2) (second sentence) AGG are in breach of European law.³⁸¹

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.³⁸²

Other violations of public law norms can give rise to state liability.

b) Compensation – maximum and average amounts

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

³⁷⁹ For details, cf. Mahlmann, M. (2022), in: Däubler, W. and Beck, T. (eds.), *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (5th ed.), Baden-Baden, Nomos Verlag, § 24 para. 66ff.

³⁸⁰ Cf. Judgment of 22 April 1997, *Draehmpaehl*, C-180/95, EU:C:1997:208, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=100350&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3968846>, para. 37.

³⁸¹ It may be argued that the same extends to Section 15(3) AGG in relation to collective agreements.

³⁸² 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.

employment and the lower, current salary until retirement.³⁸³

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.³⁸⁴ In another case, the Federal Labour Court awarded two months' salary because of discrimination on the ground of religion.³⁸⁵ However, it is difficult to extrapolate any average patterns from the case law. In general, compensation in particular for immaterial damages is usually limited and not comparable, for instance, to the punitive damages of US law. The compensation awarded in standard discrimination cases is no exception to this rule.

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.

³⁸³ Cf. Wiesbaden Labour Court (*Arbeitsgericht*) (ArbG), Wiesbaden/5 Ca 46/08, 18 December 2008, (the parties settled in the next instance: Hessen Higher Labour Court (*Landesarbeitsgericht*) (LAG), Hessen/12 SA 68/09 and Hessen/12 Sa 94/09).

³⁸⁴ Berlin Labour Court (*Arbeitsgericht*) (ArbG), Berlin/Az.: 91 Ca 17871/03, 10 October 2003, held that a general minimum for cases in which an applicant with a disability 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 an applicant with a disability, cf. Düwell, *jurisPR-ArbR* (*juris Praxis Arbeitsrecht*) 1/2004 Anm. 6.

³⁸⁵ Federal Labour Court, 8 AZR 501/14, 25 October 2018, ECLI:DE:BAG:2018:251018.U.8AZR501.14.0. For further examples see section 12.2 on case law, below.

7 BODY FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

7.1 Body 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)³⁸⁶ 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. The services of the ADS are accessible on an equal basis for all, without costs, throughout Germany. A programme to create an improved network of offices for advice on discrimination (respect*land) was launched in 2022, with funds of EUR 5 million provided by the German Bundestag. Reasonable accommodation is provided, e.g. by presenting information in simple language and producing relevant informative videos in sign language. The website of the ADS also provides a link for reporting any accessibility barriers.

7.2 Political, economic and social context of the designated body

Since its creation, the ADS has gained widespread acceptance and has become a well-respected voice in debates on discrimination issues. Its mandate, however, is restricted to what can be regarded as the minimum required by Article 13 of the Directive which, in turn, formulates narrowly tailored demands on the competences of equality bodies.

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, to which the ADS contributed, 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 same-sex 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.

7.3 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.

³⁸⁶ Website: http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html. In English: http://www.antidiskriminierungsstelle.de/EN/Home/home_node.html.

7.4 Status of the designated body – general independence and resources

a) Status of the body

- Separate or other legal status or personality

The Federal Anti-Discrimination Agency (ADS) is organisationally associated with the Ministry of Family Affairs, Senior Citizens, Women and Youth (Section 26 AGG).

- Selection of governing body

According to the latest relevant amendment of the General Act on Equal Treatment (AGG), the Federal Commissioner for Anti-Discrimination becomes the head of the agency³⁸⁷ and is elected by the Bundestag with a majority (more than half) of its members (Section 26.3 AGG) after nomination by the Federal Government (Section 26.1 AGG). The commissioner will serve for five years (Section 26b.1 AGG) with, in theory, the possibility of one re-election (Section 26b.2 AGG).

In 2022, Ferda Ataman, former head of the press office of the designated body, was elected by the Bundestag and officially appointed by the Federal President as the new Independent Commissioner for Anti-Discrimination and the new head of the Federal Anti-Discrimination Agency,³⁸⁸ succeeding Bernhard Franke who had served as acting head since 2018. The post of the head of the Federal Anti-Discrimination Agency had not been properly occupied since the retirement of the previous head, Christine Lüders, in 2018. As a temporary solution, Bernhard Franke had been serving as the acting head, a fact that had prompted severe criticism of the Federal Government. The appointment of a new head of the agency was delayed due to the fact that the initially proposed appointment of the new head was challenged before Berlin's Administrative Court by another competing applicant for the position. The Federal Government was thus waiting for the final judicial clarification of the legality of the appointment that had already been proposed. In the end, the Berlin Administrative Court criticised the selection decision of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth ruling that it was not compatible with the 'best selection principle' enshrined in the Basic Law (Article 33, paragraph 2).³⁸⁹ Ferda Ataman was elected according to the recently amended provisions of the AGG and will serve for five years (Section 26b.1 AGG) with the possibility of re-election once only (Section 26b.2 AGG).

- Sources of funding

Funding for the ADS is provided through the Ministry of Family Affairs.

- Powers to recruit and manage staff

The body has the power to recruit and manage its staff.

- Accountability

The head of the ADS is independent and only subject to the law. It is legally accountable to the ministry, although the ministry cannot give political directives concerning the operations of the ADS.

³⁸⁷ Before the amendment the head of the Federal Anti-Discrimination Agency was appointed by the Minister of Family Affairs, Senior Citizens, Women and Youth after a proposal by the Government.

³⁸⁸ Bundestag (2022) 'Ferda Ataman is the new Commissioner for Anti-Discrimination', press release, 7 July 2022, <https://www.bundesregierung.de/breg-en/news/anti-discrimination-commissioner-2060474>. Ferda Ataman was elected by the Bundestag with a tight majority: she was elected with 376 out of total of 736 votes.

³⁸⁹ Berlin Administrative Court (VG Berlin) 7 L 218.18, 8 February 2019, ECLI:DE:VGBE:2019:0208.VG7L218.18.00.

b) Independence of the body

The independence of the ADS is in particular secured because the head of the ADS is independent and subject only to the law. The tenure of the head of the agency is five years. Previous concerns with regard to the independence of the head of the body because the head was appointed by the Minister of Family Affairs, Senior Citizens, Women and Youth after a proposal by the Government have been assuaged by the new appointment procedure. 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 be regarded as independent in the terms of the directives irrespective of the procedure for the appointment of its head.

c) Resources

– The annual budget of the body/bodies

Funding for the ADS is provided through the Ministry of Family Affairs, but the financial resources (about EUR 5 094 000 in 2021)³⁹⁰ are administered independently by the ADS.

– The share of the annual budget dedicated to the equality body mandate (if applicable)

N/A

– The total number of staff of the body/bodies

There are 46 people working for the agency. The advice department is staffed by nine people, who deal with all discrimination grounds.

– The number of staff dedicated to the equality body mandate (if applicable)

N/A

7.5 Grounds covered by the designated body

The role of the agency is to support people to protect their rights against discrimination on all grounds regulated by the AGG,³⁹¹ (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. In recent years there was no such thematic focus and diverse research studies were carried out.³⁹² Any special activities of the ADS (e.g. commissioned studies) were devoted to the characteristic that were that year's theme as long as this practice continued. However, the ADS had no policy of concentrating its overall activities on any of these grounds specifically even during this period. 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.

³⁹⁰ See in German, <https://dserver.bundestag.de/btd/20/019/2001995.pdf>. According to the ADS press agency, not changes in budget are expected for 2022.

³⁹¹ Sec. 25.1, Sec. 1 AGG.

³⁹² For more information, see section 10 below.

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.

7.6 Competences of the designated body – and their independent exercise

a) Independent assistance to victims

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.

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.

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, a central precondition for effective work of the body. There are no indications, however, that there are deficiencies in this respect that would impair the operation of the body within the limits of its powers and the narrowly tailored legal demands of Article 13 of the Directive.

b) Independent surveys and reports

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.

The agency exercises this duty effectively. This is confirmed by the fact that, over the years, the ADS has commissioned many substantial studies and continues to do so.

There are no publicly available data to assess whether the resources – within the constraints of the overall budget – are sufficient for efficient work. Given the amount of substantial studies, there are no indications that the resources are not sufficient for meaningful work in this area,³⁹³ taking into account the limits of the agency's powers and the narrowly tailored legal demands of Article 13 of the Directive.

c) Recommendations

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).

³⁹³ For detailed information about surveys financed by the agency, see section 10 of the present report.

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.

The ADS has worked effectively in this context, given that it has no ability to force public authorities to follow its recommendations.

There are no publicly available data to assess whether the resources – within the constraints of the overall budget – are sufficient for efficiently formulating recommendations. There is no indication, however, that the ADS does not devote enough resources to this task, taking into account the limits of the agency's powers and the narrowly tailored legal demands of Article 13 of the Directive.

d) Prevention, promotion and awareness-raising

The Federal Anti-Discrimination Agency has a duty to engage in the prevention of discrimination and in the promotion of equal treatment, and to adopt a strategy defining how it will engage in public dialogue, communicate with individuals and groups at risk of discrimination, provide training and guidance, and promote equality duties, equality mainstreaming and positive action among public and private entities. The agency uses up-to-date methods to achieve such goals, uploading for example useful videos on its YouTube channel.³⁹⁴

Furthermore, the agency regularly funds anti-discrimination projects dedicated to the promotion of a discrimination-free society, e.g. by commissioning scientific studies, organising workshops, maintaining a public presence at events such as pride parades or awarding prizes for inclusive civil society work.

In the author's opinion the duties of the agency are exercised effectively and in an independent manner in practice, taking into account the limits of the agency's powers and the narrowly tailored legal demands of Article 13 of the Directive. Equally, the agency has been successfully cooperating with civil society organisations.

e) 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).

In Germany, the designated body engages with stakeholders in 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

³⁹⁴ See: <https://www.youtube.com/@antidiskriminierungsstelle4715/videos>.

applications in collaboration with employers; setting up a 'coalition against discrimination'; and engaging with *Länder* and local government.

7.7 Legal standing of the designated body

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, for example as an *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.

7.8 Dispute resolution

a) Quasi-judicial functions

In Germany, the designated body is not a quasi-judicial institution.

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.

The body cannot issue binding enforceable decisions. It can issue non-binding opinions.

i) Power to impose sanctions

In Germany, the body has no power to impose sanctions.

ii) Nature and level of sanctions that can be imposed

N/A

iii) Possibility to appeal (to the body itself or to courts)

N/A

iv) Enforcement of binding decisions

N/A

v) Implementation of non-binding opinions

There is no systematic documentation concerning the status of implementation of the non-binding opinions of the Federal Anti-Discrimination Agency.

b) Amicable settlements

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.

However, there is no legal duty for the submission of such statements. 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. As the agency cannot issue binding decisions and does not possess the power to impose any sanctions against the parties, it cannot be regarded as a quasi-judicial institution.

There have been several conflicts settled in advance by the intervention of the agency. The agency engages in informal conflict resolution processes between parties, which appears to be done on a case-by-case basis. There is no larger scale conflict resolution practice in place.

7.9 Procedural safeguards

In Germany there are no procedural safeguards to ensure separation between the different functions of the designated equality body. It has no judicial or quasi-judicial powers.

7.10 Data collection by the designated body

a) Registration of complaints and decisions

In Germany, the designated 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.³⁹⁵ In 2019, 4 247 inquiries reached the agency, which is 792 more than in 2018.³⁹⁶ In 2020 and most probably due to the pandemic, there was a remarkable rise in the number of inquiries, which reached a total of 6 383. Of those inquiries, 41 % concerned disability, 33 % ethnic origin, 9 % age, 5 % religion, 4 % sexual identity and 2 % philosophical belief.³⁹⁷ In 2021, the agency dealt with 5 617 inquiries: 37 % concerned race and ethnic origin, 32 % disability, 10 % age, 6 % religion, 4 % sexual identity, and 3 % philosophical belief.³⁹⁸ In 2022, there were 8 827 inquiries – a record number since the establishment of the agency – 6 600 out of which referred to a ground covered by the AGG: 43 % concerned race or ethnic origin, 27 % disability, 21 % gender, 10 % age, 5 % religion, 4 % sexual identity, and 1 % belief.³⁹⁹

³⁹⁵ See the report to the German Bundestag, *Bundestagsdrucksache* 18/1360, p. 41.

³⁹⁶ See Federal Anti-Discrimination Agency (2020), *Annual Report 2019*: 33 % of these inquiries concerned race and ethnic origin; 29 % sex/gender; 26 % disability; 12 % age; 7 % religion; 4 % sexual identity (understood as sexual orientation); and 2 % philosophical belief. Less frequently than in 2018, about 10 % of the cases concerned multiple discrimination. Available at: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Jahresberichte/2019_englisch.html.

³⁹⁷ Federal Anti-Discrimination Agency (2021), *Annual Report 2020*. Available in German at: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Jahresberichte/2020.pdf;jsessionid=527C02096FC39171FA2CE730B3EC8A75.2_cid360?blob=publicationFile&v=2. Most recent available data.

³⁹⁸ Federal Anti-Discrimination Agency (2022), *Annual Report 2021*. Available in German at: <https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Jahresberichte/2021.html>.

³⁹⁹ Federal Anti-Discrimination Agency (2023), *Annual Report 2022*. Available in German at: <https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Jahresberichte/2022.html?nn=305458>.

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.⁴⁰⁰

b) Equality data collection

In Germany, the designated body collects general equality data.

It provides the public with information concerning the discrimination ground of the inquiries and relevant case law in various publications.⁴⁰¹

The Federal Anti-Discrimination Agency has access to data collected by other bodies such as various anti-discrimination advice agencies.

The Federal Anti-Discrimination Agency also funded the #Afrozensus online survey which collected for the first-time data on the realities of life for Black and African people and the African diaspora in Germany and which was eventually published in 2021.⁴⁰²

7.11 Roma and Travellers

The body has not yet developed any special programme with regard to Sinti and Roma in Germany.⁴⁰³ 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 Alliance for Solidarity with Sinti and Roma of 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 Alliance carried out many activities, including public discussions, art campaigns etc.⁴⁰⁴ On International Roma Day 2017, the head of the ADS⁴⁰⁵ warned against the dangers of stereotyping.⁴⁰⁶ In 2017, the agency organised a public discussion on the police and anti-Gypsyism.⁴⁰⁷ International Roma Day 2018 was celebrated in Berlin with a parade (as part of the first Roma Biennale), starting from the Memorial to the Sinti and Roma of Europe

⁴⁰⁰ See, for example, the relevant publications that present anti-discrimination cases, available at: http://www.antidiskriminierungsstelle.de/DE/Publikationen/publikationen_node.html.

⁴⁰¹ Nevertheless, the documentation procedures of different anti-discrimination advice agencies need to be optimised. See the publication results of the relevant research project commissioned by the Federal Anti-Discrimination Agency, German Centre for Integration and Migration Research (*Deutsches Zentrum für Integrations- und Migrationsforschung, DeZIM*) (2022), *Mindeststandards zur Dokumentation von Antidiskriminierungsberatung* (Minimum standards for the documentation of anti-discrimination advice), available in German at: https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Expertisen/mindeststandards_antidiskriminierungsberatung.html?nn=304966.

⁴⁰² Aikins, M., Bremberger, T., Aikins, J., Gyamerah, D., Yildirim-Caliman, D. (2021) *Afrozensus 2020: Perspektiven, Anti-Schwarze Rassismuserfahrungen und Engagement Schwarzer, afrikanischer und afrodiasporischer Menschen in Deutschland* (Afrozensus 2020: Perspectives, anti-black experiences of racism and engagement of black people, African people and people from the African diaspora in Germany): <https://afrozensus.de/reports/2020/>.

⁴⁰³ The relevant 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: https://ec.europa.eu/info/sites/info/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: https://ec.europa.eu/info/sites/info/files/assessment_of_german_national_roma_strategy_2012_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).

⁴⁰⁴ See <https://romaday.org/Alliance>.

⁴⁰⁵ The Federal Anti-Discrimination Agency is a member of the Alliance for Solidarity with the Sinti and Roma of Europe.

⁴⁰⁶ Federal Anti-Discrimination Agency (2017), 'Discrimination against Sinti and Roma' (7 April, 2017), https://www.antidiskriminierungsstelle.de/SharedDocs/Pressearchiv/DE/2017/20170407_PM_Romaday.html?jsessionid=AA56E6953ACF6F50609FB177556D8752.1_cid341.

⁴⁰⁷ See: www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2017/20171017_Veransaltung_Polizei_und_Antiziganismus.html.

murdered under National Socialism. Since then the International Roma Day has been marked by different political and cultural events (see previous annual country reports on non-discrimination).

Roma Day 2022, which was celebrated from 7 April – 1 May 2022, focused on the following questions: 'Still hope in paradise?'; 'Is there still hope?'; 'In paradise?'; 'Where is this paradise, for whom?'; 'And for how long?' For the 51st World Roma Day, a series of events took place in Berlin dealing primarily with future pessimism and utopias. The events included performances, panel discussions, workshops, a street parade and a concert by the Serbian feminist rap band, Pretty Loud.⁴⁰⁸

In 2014, the ADS published a study regarding the opinions and attitudes of the German people towards Sinti and Roma.⁴⁰⁹ The study concluded that various forms of distancing from and rejection of Sinti and Roma exist in Germany.

In March 2020 the Federal Government set up a Cabinet Committee for the fight against racism and right-wing extremism, which announced a list of 89 specific measures.⁴¹⁰ Regarding the protection of Sinti and Roma in particular, among the measures decided by the Federal Government was the establishment of a national contact point in the context of the EU Roma Strategy 2030, adhering to the European Commission's recommendation to strengthen the role of the national contact points.⁴¹¹ On 31 March 2021, the Federal Government adopted the International Holocaust Remembrance Alliance's (IHRA) non-binding working definition of 'antigypsyism/anti-Roma discrimination' at national level as a valuable tool to identify and assess anti-Gypsy stereotypes.⁴¹²

⁴⁰⁸ See: <https://romatrial.org/veranstaltung/romaday-2022-still-hope-in-paradise-ausstellung-parade-performance-diskurs/>.

⁴⁰⁹ 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 in German at: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/expertise_bevolkerungseinstellungen_gegenueber_sinti_und_roma_20140829.pdf?__blob=publicationFile&v=4.

⁴¹⁰ See the relevant announcement with the detailed list of suggested measures to combat right-wing extremism, racism, antisemitism, anti-Gypsyism, Islamophobia, anti-Black racism and all other forms of group-focused enmity, available in German at: <https://www.bundesregierung.de/breg-de/suche/kabinett-rechtsextremismus-1819828>.

⁴¹¹ See the relevant announcement with the detailed list of suggested measures to combat right-wing extremism, racism, antisemitism, antiziganism, Islamophobia, anti-Black racism and all other forms of group-focused enmity, p. 3. Available in German at: <https://www.bundesregierung.de/breg-de/suche/kabinett-rechtsextremismus-1819828>.

⁴¹² See: <https://www.auswaertiges-amt.de/de/newsroom/maas-ihra-antiziganismus/2451624>.

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.⁴¹³

The German Institute for Human Rights (Deutsches Institut für Menschenrechte), which had previously launched a special website for an online manual, *Active against Discrimination*, published a handbook for everyone interested in educational work on human rights, flight, asylum and/or racial discrimination, entitled *Scale of Human Rights - Educational Practice on the Topics of Flight, Asylum and Racial Discrimination*.⁴¹⁴

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.⁴¹⁵

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.⁴¹⁶

- 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.⁴¹⁷ Legislative consultation processes on matters relating to discrimination 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 and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

There are various activities to stimulate a dialogue between social partners. 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 and programmes, including and underlining the role of social partners.⁴¹⁸ This is part of a policy (also pursued by the EU) to underline that measures

⁴¹³ On the activities of the agency, see www.antidiskriminierungsstelle.de/DE/Home/home_node.html.

⁴¹⁴ Deutsches Institut für Menschenrechte (2019), *Massstab Menschenrechte: Bildungspraxis zu den Themen Flucht, Asyl und rassistische Diskriminierung*, Berlin, available in German at: <https://www.institut-fuer-menschenrechte.de/publikationen/detail/massstab-menschenrechte>.

⁴¹⁵ For more information see <https://www.bpb.de/die-bpb/138852/federal-agency-for-civic-education>.

⁴¹⁶ See www.gesetze-im-internet.de.

⁴¹⁷ 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 <https://www.demokratie-leben.de/en/programme>.

⁴¹⁸ The Federal Anti-Discrimination Agency, for instance, has launched a funding programme for the period 2019-2020, supporting partner projects to combat discrimination in the labour market. Under the motto *Strengthening partnerships for a non-discriminatory labour market - Bundling forces* (Partnerschaften für einen diskriminierungsfreien Arbeitsmarkt stärken - Kräfte bündeln), civil society organisations, together with partners from business, trade unions and interest groups will be subsidised to develop effective instruments to prevent or eliminate discrimination in the workplace. See: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/Dokumente_ohne_anzeige_in_Publikationen/Foerderung.html.

against discrimination are not detrimental to economic success.⁴¹⁹ Legislative consultation processes on matters relating to discrimination routinely include also social partners.

d) Addressing the situation of Roma and Travellers

As already mentioned, the ADS 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 supported by the Federal Government Commissioner for Matters Related to Ethnic German Resettlers and National Minorities (*Beauftragter für Aussiedlerfragen und nationale Minderheiten*).⁴²⁰

On 27 March 2019, the Federal Government announced 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).⁴²¹ The Independent Commission on Antigypsyism published its report on the situation of Sinti and Roma in Germany in June 2021.⁴²² Its specific recommendations to the Federal State and the *Länder* include the appointment of a Government commissioner to fight anti-Gypsyism, an independent circle of advisors, the creation of a standing committee of the German Federal Government and the German states, and the full recognition of the Nazi genocide of the Sinti and Roma. In their 2021 coalition agreement, the elected partners have committed to meeting the recommendations of the Commission.⁴²³

In February 2022, the Federal Government adopted the national Roma strategy 'Tackling Antigypsyism, Ensuring Participation', implementing the EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020-2030 at national level. The national strategy builds on previous systematic efforts to promote the integration of Sinti and Roma people in Germany. Equal access to education, employment, health and housing, combating anti-Gypsyism and promoting equal participation remain key issues of the strategy.⁴²⁴

Within the context of strategy, the Federal Government Commissioner for Antigypsyism is responsible not only for the coordination of various activities concerning the fight against anti-Gypsyism but also for the implementation and further development of the strategy on the basis of proposals by the Independent Commission on Antigypsyism, established by the Government to advise it.

Additionally, two points are of interest. First, the current Roma strategy does not mention positive action but it does refer to measures such as the Berlin action plan on incorporating foreign Roma, which consolidates positive measures providing Roma migrants in uncertain living conditions access to governmental services. Secondly, it highlights the importance of promoting and ensuring Sinti and Roma social participation as a political priority for the Government, with reference to the European Social Fund Plus (ESF+) for Skills 2021-2027. According to the national strategy, combating discrimination by means of a cross-sectoral

⁴¹⁹ Cf. for example the link between the protection of diversity and economic strength in: European Commission, [LGBTIQ Equality Strategy 2020-2025](#).

⁴²⁰ See www.sintiundroma.de/start.html.

⁴²¹ <https://www.bmi.bund.de/DE/themen/heimat-integration/gesellschaftlicher-zusammenhalt/unabhaengige-kommission-antiziganismus/unabhaengige-kommission-antiziganismus-artikel.html>.

⁴²² Independent Commission on Antigypsyism (2021) *Perspektivwechsel: Nachholende Gerechtigkeit. Partizipation. Bericht der Unabhängigen Kommission Antiziganismus*.

⁴²³ Coalition Agreement 2021-2025, p. 120, available in German at: https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf.

⁴²⁴ Federal Ministry of the Interior (2022) *Tackling Antigypsyism, Ensuring Participation - National Strategic Framework to Implement the EU Roma Strategic Framework in Germany*, <https://www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2022/2022-eu-roma-strategic-framework.html>.

approach will be a key concern throughout the whole process of designing, implementing, monitoring and evaluating the ESF+ Federal funding programmes.

The National Roma Strategy coordinates existing activities against anti-Gypsism and develops new perspectives. The fight against discrimination is highlighted as a special concern. The measures to collect more empirical data on discrimination are crucial to obtaining a better understanding of the many facets of discrimination in social reality.

Following the adoption of the National Roma Strategy (see above), the Federal Government appointed the first Federal Commissioner on Antigypsyism in March 2022.⁴²⁵ The office of the new Commissioner is based in the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, and his role is to coordinate the measures of the Federal Government to combat anti-Gypsyism. In addition to implementing the strategy, one of the Commissioner's tasks is to set up a national coordination office to implement the EU Roma Strategy 2030 and a civil society monitoring and information office for the investigation and documentation of anti-Gypsy attacks. The Commissioner will act as the Federal Government's central contact with the communities of Sinti and Roma. Furthermore, the Commissioner has announced his plan to establish a federal commission to investigate the injustices that the Sinti and Roma communities suffered in post-war Germany. Within the context of the strategy and since the fight against discrimination constitutes a significant concern, the measures for the collection of additional empirical data on discrimination are of particular importance as a credible means to achieve a more thorough understanding of the various aspects of discrimination as mirrored in social reality.⁴²⁶

The appointment of the Federal Commissioner on Antigypsyism was one of the specific recommendations of the Independent Commission on Antigypsyism in its report published in June 2021. In their Coalition Agreement, the parties forming the Government elected in 2021 committed to meeting the recommendations of the Commission.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

According to Articles 14(a) and 16(a), Member States must take the necessary measures to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished. As explained, in the view of the author, certain laws may be considered to be in breach of the directives and no steps have been taken to derogate these norms. Moreover, there has been no systematic survey by the public authorities as to whether or not norms exist that are contrary to the directives. Therefore, arguably, Germany has not taken all the necessary measures required by the directives.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

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

⁴²⁵ See: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (2022) 'Federal Government appoints first Commissioner on Antigypsyism, press release, 9 March 2022, <https://www.bmfsfj.de/bmfsfj/aktuelles/presse/pressemitteilungen/bundesregierung-beruft-erstmal-antiziganismus-beauftragten-193920>.

⁴²⁶ For more information in English, Federal Ministry of the Interior (2022) *Tackling Antigypsyism, Ensuring Participation - National Strategic Framework to Implement the EU Roma Strategic Framework in Germany* <https://www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2022/2022-eu-roma-strategic-framework.html>.

only for unilateral legal acts and agreements with discriminatory effects on third parties.⁴²⁷
The common rules to solve clashes of legal rules apply.⁴²⁸

⁴²⁷ 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.

⁴²⁸ 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.

As already mentioned, the national Roma strategy 'Tackling Antigypsyism, Ensuring Participation', was adopted in February 2022 by the Federal Government, implementing the EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020-2030 at national level.⁴²⁹ In March 2022, Mehmet Daimagüler was appointed by the Federal Government as the first Federal Commissioner on Antigypsyism.

The Federal Commissioner on Antigypsyism has the significant role to act as the central contact of the Federal Government with the communities of Sinti and Roma. Furthermore, the establishment of a federal commission to investigate the injustices of Sinti and Roma suffered in post-war Germany is among the plans announced by the Federal Commissioner on Antigypsyism.

Reem Alabali-Radovan, Federal Commissioner for Migration, Refugees and Integration (*Staatsministerin beim Bundeskanzler und Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration*) became in 2022 the first Federal Commissioner for Anti-Racism (*Beauftragte der Bundesregierung für Antirassismus*).⁴³⁰

In 2017, the Federal Government adopted a national action plan against racism, *National Action Plan Against Racism - Positions and Measures to Address Ideologies of Inequality and Related Discrimination*, which also covers homophobia and transphobia.⁴³¹ 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.

⁴²⁹ Germany, Federal Ministry of Interior (2022) *National Strategy 'Fight antigypsyism, ensure participation!'*, published on 23 February 2022, available in German at: <https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/heimat-integration/minderheiten/eu-roma-strategie-2030.html>.

⁴³⁰ Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (2022) 'Federal Government appoints first Commissioner on Antigypsyism, press release, 9 March 2022, <https://www.bmfsfj.de/bmfsfj/aktuelles/presse/pressemitteilungen/bundesregierung-beruft-erstmalig-antiziganismus-beauftragten-193920>.

⁴³¹ See BT Drs. 18/7936. See the 2017 Action Plan (*Nationaler Aktionsplan gegen Rassismus – Positionen und Massnahmen zum Umgang mit Ideologien der Ungleichwertigkeit und den darauf bezogenen Diskriminierungen*): <https://www.bmfsfj.de/resource/blob/116798/5fc38044a1dd8edec34de568ad59e2b9/nationaler-aktionsplan-rassismus-data.pdf>. In English, available at: https://www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2018/nap-en.pdf?__blob=publicationFile&v=4. The Government included homophobia and transphobia in the action plan because it regarded racism and homophobia and transphobia (as other discriminatory beliefs and practices) as manifestations of underlying 'ideologies of unequal worth' of human beings (*Ideologien der Ungleichwertigkeit*) that should be combated in all its forms. Moreover, it was motivated by considering intersectional and multiple forms of discrimination. This action plan is still valid. The activities are ongoing (and will continue if the next German Government decides that they should). There has been no assessment of the measures.

However, the initial plan has been criticised for mainly containing descriptions of already existing political and legal measures to combat racism, xenophobia and antisemitism. The fact that both plans are non-binding when it comes to homophobia and transphobia has been condemned by the LGBTIQ⁴³²community, which has criticised the absence of a concrete LGBTIQ national action plan to actually protect their community.⁴³³

Due to the refugee crisis faced by Europe and Germany in particular, the Federal Government adopted a national integration action plan (*Integrationsplan Deutschland*) in 2015.⁴³⁴

In 2022, the Federal Government adopted the 'Queer Living' action plan, a national strategy for the protection of sexual and gender diversity. Sven Lehmann was appointed by the Federal Government as the first Federal Commissioner for the Acceptance of Sexual and Gender Diversity (*Queer-Beauftragter der Bundesregierung*).⁴³⁵

⁴³² In Germany the terms LGBTIQ* and LGBTQIA* are now commonly used.

⁴³³ In December 2019, the Greens submitted a proposal to the *Bundestag* concerning a national action plan for sexual and gender diversity (*Vielfalt leben – Bundesweiten Aktionsplan für sexuelle Vielfalt auflegen*). See: https://www.bundestag.de/resource/blob/672608/5c590376abe67e654882a235a366d9f6/19-13-67c_angef-SN_Petra-Follmar-Otto-data.pdf. In 2022, the national action plan, as mentioned below, was finally adopted.

⁴³⁴ See www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/neustart-in-deutschland--integrationsplan-vorgestellt/90032. A summary in English is available at: <https://www.bundesregierung.de/resource/blob/975226/476922/783102dcc20e64cece8ced4686026306/2009-04-22-kurzfassung-nip-fortschrittsbericht-engl-data.pdf?download=1>. Cf. for the current projects within this framework, <https://www.nationaler-aktionsplan-integration.de/napi-de>.

⁴³⁵ For more information in German, <https://www.bmfsfj.de/bmfsfj/ministerium/behoerden-beauftragte-beiraete-gremien/queer-beauftragter-der-bundesregierung>.

10 CURRENT BEST PRACTISES

Relevant best practices include the following:

- To successfully pursue the aims of the list of 89 specific measures presented by the appointed Cabinet Committee for the fight against racism and right-wing extremism in March 2020,⁴³⁶ the Federal Government has committed to financially supporting the realisation of the relevant projects with EUR 1 billion for 2021 – 2024.⁴³⁷ A central project of the measures that the Federal Government adopted in May 2021 is a broad study by the Research Institute for Social Cohesion (*Forschungsinstitut Gesellschaftlicher Zusammenhalt*, FGZ) on 'Racism as a threat to social cohesion in the context of selected social and institutional areas', commissioned by the Federal Ministry of the Interior and Community (BMI).⁴³⁸ The appointed experts will analyse racism and its potential threat to social cohesion in authorities at federal, state and local level in 23 separate projects at 9 locations in Germany; the study will run to 2024.
- 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 and non-discrimination in society – from after-school tuition to sport.⁴³⁹ It is notable that in March 2020, employment agencies or job centres provided guidance to 210 000 refugees, while a total of about 360 000 refugees were registered in December 2019 as underemployed.⁴⁴⁰ Furthermore, in December 2019, 95 000 refugees were supported by labour market policy measures, which is 7 000 more than in 2018.⁴⁴¹ 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. 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.⁴⁴²
- *fair@school* initiative of the Anti-Discrimination Agency

A significant joint initiative between the Anti-Discrimination Agency and the publishing house Cornelsen in 2022 has been the *fair@school* (Schools against Discrimination) competition,⁴⁴³ which was successfully launched in 2017. The aim is

⁴³⁶ See the relevant announcement with the detailed list of suggested measures to combat right-wing extremism, racism, antisemitism, antiziganism, Islamophobia, anti-Black racism and all other forms of group-focused enmity, available in German at: <https://www.bundesregierung.de/breg-de/suche/kabinetts-rechtsextremismus-1819828>.

⁴³⁷ See in German, <https://www.bundesregierung.de/resource/blob/974430/1819984/4f1f9683cf3faddf90e27f09c692abed/2020-11-25-massnahmen-rechtsextremi-data.pdf?download=1>.

⁴³⁸ See in German, <https://www.fgz-risc.de/forschung/inra-studie>.

⁴³⁹ Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*) (BAMF), <https://www.bamf.de/DE/Themen/Integration/Akteure/Ehrenamtliche/Interessierte/EhrenamtlichesEngagement/Integrationsprojekte/integrationsprojekte-node.html>.

⁴⁴⁰ Federal Employment Agency (*Bundesagentur für Arbeit: Statistik/Arbeitsmarktberichterstattung*) (2020), Berichte: Arbeitsmarkt kompakt – Fluchtmigration Nürnberg, available in German at: <https://statistik.arbeitsagentur.de/Statistikdaten/Detail/202003/fluchtmigration/fluchtmigration/fluchtmigration-d-0-202003-pdf.pdf?blob=publicationFile&v=1>. Latest available data.

⁴⁴¹ Federal Employment Agency (*Bundesagentur für Arbeit: Statistik/Arbeitsmarktberichterstattung*) (2020), Berichte: Arbeitsmarkt kompakt – Fluchtmigration Nürnberg, available in German at: <https://statistik.arbeitsagentur.de/Statistikdaten/Detail/202003/fluchtmigration/fluchtmigration/fluchtmigration-d-0-202003-pdf.pdf?blob=publicationFile&v=1>. Latest available data.

⁴⁴² See in German, <https://www.bmwi.de/Redaktion/DE/Artikel/Wirtschaft/fluechtlingspolitik.html>.

⁴⁴³ For more information, see in German: www.fair-at-school.de.

to support and promote engagement at school and the award-winning projects are intended to provide examples of how schools can work for diversity. The competition is open to everyone working at a general or vocational school in Germany, including school administrators, teachers, and (school) social pedagogues, who are publicly campaigning against discrimination at their school and initiating relevant projects. In 2022, the Kurt-Schumacher-Grundschule in Berlin was awarded the first prize of EUR 3 000 for the 'Like a Forest' (*Wie ein Wald*) project. Some of the school children who had experienced racism at school, including from teachers, worked on a script and a film which was then shown to the entire school.⁴⁴⁴ The project initiated an intense and fruitful exchange among pupils and teachers.

– Grants for project funding for measures to combat discrimination

On 8 January 2019, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth issued the guidelines according to which the Federal Office of Administration (*Bundesverwaltungsamt*) (BVA) will distribute project funding for measures to combat discrimination (with effect from January 2019 until December 2022).⁴⁴⁵

– Publications and Legal Expertise

In accordance with Section 27(4) of the General Act on Equal Treatment (AGG), every four years the Federal Anti-Discrimination Agency submits, jointly with the relevant Federal Government and Bundestag Commissioners, reports to the German Bundestag on the status of discrimination in Germany and issues recommendations on the elimination and prevention of discrimination. The report includes recommendations for legislators, state and local government authorities, administration, employers, civil society and anti-discrimination counselling centres. The Fourth Joint Report of the Federal Anti-discrimination Agency, the Federal Government Commissioner for Matters relating to Persons with Disabilities and the Federal Commissioner for Migration, Refugees and Integration, *Discrimination in Germany – experiences, risks and various constellations of circumstances*, was published in September 2021 and included the following joint recommendations: the nationwide expansion of public and private anti-discrimination bodies with long-term financial sustainability; the establishment of *Land* anti-discrimination agencies in all federal *Länder*; alternative dispute settlement procedures for discrimination cases, such as arbitration boards in specific key areas like the housing market; and greater visibility of discrimination topics in large-scale surveys.⁴⁴⁶

The Federal Anti-Discrimination Agency also commissioned a study on the potential risks of discrimination due to algorithm and data-based decision making, which was published in 2020.⁴⁴⁷ The study recommends:

- the definition of socially acceptable differentiations;

⁴⁴⁴ For more information, see a short film explaining the project (in German): <https://www.youtube.com/watch?v=tB5Nc8QILP4>.

⁴⁴⁵ See, in German: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/Dokumente_ohne_anzeige_in_Publikationen/Foerderaufruf.pdf?__blob=publicationFile&v=2.

⁴⁴⁶ Federal Anti-Discrimination Agency (2021), *Diskriminierung in Deutschland - Erfahrungen, Risiken und Fallkonstellationen, Vierter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages*, Berlin. A short overview in English is available at: https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/EN/publikationen/Kurzueberblick_en_Vierter_Bericht_an_den_BT_2021.pdf?__blob=publicationFile&v=4.

⁴⁴⁷ Orwat, C. (2020), *Risks of discrimination through the use of algorithms*, Berlin, Federal Anti-Discrimination Agency, available at: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/Studie_en_Diskriminierungsrisiken_durch_Verwendung_von_Algorithmen.pdf?__blob=publicationFile&v=2.

- clarification of current data protection law that would also serve anti-discrimination purposes, particularly in relation to so-called informed consent;
- more detailed regulation of algorithmic and data-based decision making in addition to the current regulatory focus on data processing;
- that, given the difficulty in detecting and proving algorithm-based discrimination by those it affects, and according to the principle of subsidiarity, representative bodies should act on behalf of the persons concerned, making use of collective redress.

A series of publications called 'Positions' (*Standpunkte*) was launched in 2020 by the Federal Anti-Discrimination Agency to communicate its views on current legal issues regarding discrimination. The second publication in July 2021 dealt with the applicability of the AGG to child daycare civil law contracts,⁴⁴⁸ while the third one, published in December 2021, addressed the legitimacy of terminating contracts due to breach of civil law anti-discrimination provisions.⁴⁴⁹

In 2022, the Federal Anti-Discrimination Agency published the results of a survey, 'Ageism – Images of Ageing and Age Discrimination', with the aim of establishing a reliable database on ideas, attitudes and assessments of the German population focusing on older people and old age. For the purpose of the survey, which was conducted by the polling institute Kantar Public, 2 000 persons, age 16 and older, were interviewed nationwide by phone.⁴⁵⁰

Since 2013, several *Länder* have signed a state treaty with the Sinti and Roma association: Baden-Württemberg (2013), Bavaria (2018), Hessen (2018), Bremen (2012), Thuringia (2015), Brandenburg (2018), Rhineland-Palatinate (2015) and Saarland (2022). Within the terms of these treaties, the various *Länder* commit, among other things, to working 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. The implementation of the treaties has not been assessed.

⁴⁴⁸ Federal Anti-Discrimination Agency (2021), *Ist das Allgemeine Gleichbehandlungsgesetz auf zivilrechtliche Betreuungsverträge in der Kindertagesbetreuung anwendbar?* Standpunkte 2, Berlin, available in German at: https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Standpunkte/02_Kindertagesbetreuung.pdf?__blob=publicationFile&v=2.

⁴⁴⁹ Federal Anti-Discrimination Agency (2021), *Besteht bei Verletzung des des zivilrechtlichen Benachteiligungsverbots ein Anspruch auf Vertragsschluss?* Standpunkte 3, Berlin, available in German at: https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Standpunkte/03_benachteiligungsverbot.pdf?__blob=publicationFile&v=3.

⁴⁵⁰ Kessler, E.-M. and Warner, L. M. (2022), *Ageismus – Altersbilder und Altersdiskriminierung in Deutschland*, Berlin, Federal Anti-Discrimination Agency, available in German at: https://www.antidiskriminierungsstelle.de/SharedDocs/forschungsprojekte/DE/Studie_Ageismus_Altersdiskr_Dtl.html.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

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.⁴⁵¹ Several problematic issues have been identified in this report:⁴⁵²

- 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 ruled⁴⁵³ – not reconcilable with Article 6 of Directive 2000/78/EC (see section 4.7.5.a) and is no longer applied by German courts;
- 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, is contrary to CJEU jurisprudence in this respect but continues to be valid law (see section 6.5);

⁴⁵¹ 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/showPdf.jsf?text=&docid=46846&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3967761>; 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/showPdf.jsf?text=&docid=45861&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3967912>; 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/showPdf.jsf?text=&docid=46355&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3968067>: '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.

⁴⁵² 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.

⁴⁵³ Judgment of 19 January 2010, *Küçükdeveci*, C-555/07, EU:C:2010:21, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=72658&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3967565>.

- 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 2.8.a).

11.2 Other issues of concern

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.⁴⁵⁴ There are some empirical studies about the particular experiences of discrimination of migrants and refugees confirming the existence of discrimination on a significant scale.⁴⁵⁵ It is important to emphasise that there are very substantial patterns of migration to Germany, which form a crucial demographic background to the worrying patterns of discrimination, xenophobia and racism, and underline how important it is to be aware of this problem. By the end of 2022, Germany had registered in its Central Register of Foreigners (*Ausländerzentralregister*) (AZR) about 3.08 million asylum seekers, including 1.01 million Ukrainians, which all together amounts to 1.14 million more asylum seekers than in 2021.⁴⁵⁶ Due to Germany's efforts in the refugee crisis, the number of foreigners in Germany has risen by 2.7 million since 2015; as of 31 December 2022, there were about 13 383 910 foreigners in Germany, out of a total population of around 84.3 million inhabitants, marking the highest proportion of the population ever recorded at the end of the year.⁴⁵⁷ At the end of 2022, the Central Register of Foreigners registered 29 455 persons as stateless, an all-time record number. By the end of 2022, among the foreigners living in Germany, there were 1 164 200 people from Ukraine, 923 805 people from Syria and 377 240 people from Afghanistan.

In recent years, right-wing extremists and parties with xenophobic agendas have had some political success, albeit often short-lived. In 2022, on New Year's Eve, youth riots took place in Berlin when young men started fires in the streets, injuring pedestrians, police officers, firefighters and journalists. The incidents stirred a national debate concerning the quality of integration of foreigners in Germany given that the majority of the incidents took place in neighbourhoods with high immigrant population, and two-thirds of the persons

⁴⁵⁴ 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/doc1_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.

⁴⁵⁵ For example, Antidiskriminierungsstelle des Bundes (2016), *Diskriminierungsrisiken für Geflüchtete in Deutschland: Eine Bestandsaufnahme der Antidiskriminierungsstelle des Bundes*, 2016, https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Diskriminierungsrisiken_fuer_Gefuechtete_in_Deutschland.html. The Federal Agency has published a guide to inform refugees and immigrants about their rights under anti-discrimination law: Antidiskriminierungsstelle des Bundes (2016) 'Protection against Discrimination in Germany. A Guide for Refugees and New Immigrants', www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Refugees/Fluechtlingsbroschue_re_englisch.pdf?__blob=publicationFile&v=7.

⁴⁵⁶ See in German, Federal Statistical Office (*Statistisches Bundesamt, Destatis*) at: https://www.destatis.de/DE/Presse/Pressemitteilungen/2023/03/PD23_125_125.html. All data in this report are the most recent relevant data available.

⁴⁵⁷ See: Destatis (2023) 'Population increased to 84.3 million in 2022', press release, 19 January 2023, https://www.destatis.de/EN/Press/2023/01/PE23_026_124.html.

detained had migration background.⁴⁵⁸ A xenophobic party achieved strong election results in 2017 and was validated again by the results in 2021, and is now represented in the German Parliament (*Alternative für Deutschland*).

Unfortunately, there has been a significant increase in politically motivated crimes: the Federal Ministry of Interior reported 9 167 right-wing motivated crimes during only the first half of 2022, among which 418 were acts of violence. The Federal Criminal Police Office (*Bundeskriminalamt*) (BKA) had recorded 965 antisemitic crimes by the second quarter of 2022. After the Russian invasion of Ukraine in February 2022, the Federal Criminal Police Office reported many politically motivated attacks against both the Russian and the Ukrainian communities. By March 2022 there had been 500 such attacks.⁴⁵⁹

The refugee crisis has spurred many violent acts, including numerous attacks on shelters for refugees, including arson. The Federal Criminal Police counted about 1 000 such attacks on refugee shelters in 2016, more than 300 in 2017,⁴⁶⁰ 161 in 2018,⁴⁶¹ 126 in 2019⁴⁶² and 82 in 2020,⁴⁶³ which is considerably less, but still a significant number. Between January and March 2021, 19 incidents were reported.⁴⁶⁴ As of July 2022, the Federal Government reported 181 politically motivated crimes directed against asylum seekers or refugees near their asylum accommodation and three criminal offences against aid organisations.⁴⁶⁵

Right-wing extremism within police forces and the German Army⁴⁶⁶ became the focus of systematic investigations that resulted in the suspensions of police officers and the dissolution of a company of an elite unit, the Commando Special Forces. In 2020, the Federal Government responded by reinforcing its efforts to address right-wing extremism and racism and committing more than EUR 1 billion to this cause in 2021-2024. The aims of the measures to be funded include: protection of and support for victims of racist discrimination; sustainable structures for the fight against racism; improved cooperation between the police, the judicial system and civil society; prevention; political education; and more empirical research on racism in society.⁴⁶⁷ While such initiatives have been

⁴⁵⁸ See: Reuters (2023) 'Berlin New Year's Eve Riots rekindle immigration debate', 17 January 2023

<https://www.reuters.com/world/europe/berlin-new-years-eve-riots-rekindle-immigration-debate-2023-01-17/>.

⁴⁵⁹ Federal Criminal Police (2020), *Kriminalität im Kontext von Zuwanderung*, Bundeslagebild 2019, Wiesbaden, p. 57, available in German at:

https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2019.html?nn=62336.

⁴⁶⁰ Federal Criminal Police (Bundeskriminalamt) (BKA) (2018), *Kriminalität im Kontext von Zuwanderung*, Bundeslagebild 2017, Wiesbaden, p. 56, available in German at:

www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2017.html.

⁴⁶¹ Federal Criminal Police (2019), *Kriminalität im Kontext von Zuwanderung*, Bundeslagebild 2018, Wiesbaden, p. 56, available in German at:

https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2018.html.

⁴⁶² Federal Criminal Police (2020), *Kriminalität im Kontext von Zuwanderung*, Bundeslagebild 2019, Wiesbaden, p. 57, available in German at:

https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2019.html?nn=62336.

⁴⁶³ Federal Criminal Police (2021), *Kriminalität im Kontext von Zuwanderung*, Bundeslagebild 2020, Wiesbaden, p. 51, available in German at:

https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2020.html?nn=62336.

⁴⁶⁴ Federal Criminal Police (2021), *Kernaussagen 'Kriminalität im Kontext von Zuwanderung'*,

Betrachtungsraum: 01.01-31.03.2021, Wiesbaden, p. 7, available in German at:

https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/Lagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_node.html.

⁴⁶⁵ See in German, <https://dserver.bundestag.de/btd/20/030/2003007.pdf>.

⁴⁶⁶ In 2019, the Federal Ministry of Defence (Bundesministerium der Verteidigung, BMVg) established a central coordinating agency to inform the German Parliament and the public about the efforts and outcomes of the fight against extremism in the German Army. Further information and the first relevant report for 2019 are available in German at: <https://www.bmvg.de/de/aktuelles/null-toleranz-extremisten-bundeswehr-201168>.

⁴⁶⁷ See the relevant announcement with the detailed list of suggested measures to combat right-wing extremism, racism, antisemitism, antiziganism, Islamophobia, anti-Black racism and all other forms of

greeted as promising efforts in combating racism and right-wing extremism, there have been explicit calls to address several remaining issues, such as the replacement of the term 'race' in the German Constitution with the term 'racial discrimination'.⁴⁶⁸

In addition, there has been increasing awareness about the risks of algorithm and data-based decision making, which may lead to discrimination.⁴⁶⁹ The fact that the effects of algorithms are almost impossible to trace suggests that it is highly unlikely that the persons concerned will be able to demonstrate discrimination due to algorithms. The difficulty of detecting potential discrimination cannot be effectively met even by the option of collective redress in the form of a class action suit.

Other issues of concern are the discriminatory effects of the closure of educational institutions for refugees and persons with a migrant background and the adverse effects in healthcare for these groups because of the pandemic. As yet, no reliable studies on these effects are available in Germany.

The mandate and the powers of the Federal Anti-Discrimination Agency have also been issues of concern and were addressed by the European Commission against Racism and Intolerance (ECRI) in the relevant report on Germany, which was presented on 17 March 2020. ECRI underlines the importance of strengthening the Federal Anti-Discrimination Agency as a national equality body and recommends that the 'provisions on the competences, powers, independence and effectiveness of the agency are brought in line with ECRI's General Policy Recommendation No.2 on Equality Bodies'.⁴⁷⁰ ECRI's specific proposals regarding the Federal Anti-Discrimination Agency include suggesting that the German authorities:

- extend its mandate to cover hate speech, the grounds of skin colour, language, citizenship and gender identity, and intersectional discrimination;
- ensure that its mandate covers all areas of the public and private sector under the competence of the Federation;
- provide it with the competence to intervene in the legislative procedure, provide people exposed to racism and discrimination with legal assistance, represent them before institutions, adjudicatory bodies and the courts, bring cases in its own name and intervene in legal proceedings as amicus curiae, third party or expert;
- provide it with the power to hear witnesses;
- reform the appointment procedure for its head;
- stipulate that it drafts annual reports for discussion by Parliament and Government;
- provide it with sufficient human and financial resources for these tasks.⁴⁷¹

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 origin, religion, belief, disability, age or sexual orientation, impermissible on the most fundamental level. The directives aim to provide legal tools protecting individuals against

group-focused enmity, available in German at: <https://www.bundesregierung.de/breg-de/suche/kabinettt-rechtsextremismus-1819828>.

⁴⁶⁸ See Deutsches Institut für Menschenrechte (2021), *Entwicklung der Menschenrechtssituation in Deutschland Juli 2020 - Juni 2021. Bericht an den Deutschen Bundestag gemäss § 2 Absatz 5 DIMRG*, Berlin, p. 13.

Available in German at: https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Menschenrechtsbericht/Menschenrechtsbericht_2021.pdf.

⁴⁶⁹ See the relevant study commissioned by the Federal Anti-Discrimination Agency: Orwat, C. (2020), *Risks of discrimination through the use of algorithms*, Berlin, Federal Anti-Discrimination Agency, available at: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/Studie_en_Diskriminierungsrisiken_durch_Verwendung_von_Algorithmen.pdf?__blob=publicationFile&v=2.

⁴⁷⁰ ECRI (2017), *General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level*, available at: <https://rm.coe.int/ecri-general-policy-/16808b5a23>.

⁴⁷¹ Council of Europe (2020), *ECRI Report on Germany (sixth monitoring cycle)*, available at: <https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle-/16809ce4be>.

such discrimination in the public and private spheres.⁴⁷² 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.⁴⁷³

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, the foremost of which is the protection of 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. Legal tools, such as *actio popularis* could also be improved. Another issue of concern is the need to prevent attitudes that give rise to discrimination. Recent events, including xenophobic demonstrations of a significant scale, the electoral success of xenophobic political parties despite the strong reaction by civil society, Government and political actors, and a wave of racist terrorist attacks in recent years give reason to believe that persistent efforts in this respect may be of great importance.

⁴⁷² See: McCrudden, C. (ed.) (2004), *Anti-discrimination law*, 2nd edition, Ashgate, Aldershot; Fredman, S. (2011), *Discrimination Law*, 2nd ed. Oxford, Oxford University Press.

⁴⁷³ On the legal ethics of anti-discrimination law, see Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch*, Baden-Baden, Nomos Verlag, § 1.

12 LATEST DEVELOPMENTS IN 2022

12.1 Legislative amendments

German Infection Protection Act (*Infektionsschutzgesetz, IfSG*)

On 10 November 2022, the Bundestag passed a law (known as the Triage Act) entailing amendments to the German Infection Protection Act (*Infektionsschutzgesetz, IfSG*) regulating the distribution of scarce intensive care resources during a pandemic.⁴⁷⁴ The amended IfSG is the legislature's response to the Federal Constitutional Court's ruling of 16 December 2021 (BVerfG 1 BvR 1541/20) according to which there had been no efficient measures to ensure that no one was placed at risk of a disadvantage in particular on the ground of disability in the allocation of life-sustaining treatment in the event of shortages in the available intensive care resources. The reasoning of the ruling emphasised the tragic choices often caused by triage situations such as those occurring during a pandemic.

The key point of the amendments constitutes the explicit prohibition of discrimination in the allocation of scarce but vital treatment resources on the ground of disability, degree of frailty, age, ethnic origin, religion or belief, gender or sexual orientation (Section 5c(1) IfSG). According to the amended law, the decisive criterion for available treatment in the event that the resources are, due to the situation, scarce is the 'current and short-term probability of survival'. Criteria not affecting such probability will not be considered. Other diseases (comorbidities) may only be taken under consideration 'if, due to their severity or combination, they significantly reduce the short-term probability of the current disease-related survival' (Section 5c(2) IfSG). Ex post triage (that is ending the treatment of a patient in favour of another due to the latter's higher chance of survival) is explicitly prohibited. The now amended Infection Protection Act imposes procedural requirements - such as requiring that allocation decisions are taken by two medical specialists (*Multiaugenprinzip*) with many years of experience in the field of intensive care medicine. In addition, the allocation decisions should be documented.

The new Triage Act has been criticised for not efficiently preventing discrimination against older persons and persons with disabilities in the allocation of scarce treatment resources since existing prejudices disadvantage per se these groups. According to the critics, any objective criteria to prevent such discrimination are still missing. Other voices suggested alternative solutions such as making decisions based on a lottery or the time of admission to the clinic. The fact that the law does not regulate other possible triage situations, such as natural disasters or terrorist attacks, was also highlighted as problematic. Some representatives of the medical professions have also been critical due to the fear regarding the lack of legal certainty occurring in such situations. The prohibition of ex post triage has also been criticised. Critics point to the accidental nature of the time of admission to hospitals and the consequence that patients with better chances of survival may die because the resources are allocated differently. Defenders of the regulation argue that it is ethically and legally not admissible to stop a life-saving treatment that has already been started. The characteristic 'race' is presumably not included because of the view that this term should no longer be used in legal language given that there are no different human races and that other terms cover such cases. The explanatory report does not explain the exact reasons, however.

German Catholic Church Reforms Ecclesiastical Law

The Catholic bishops in Germany decided on 22 November 2022 to amend the regulations for employees of the Catholic Church, exercising the Church's right to self-determination (Article 137.3 Basic Law).⁴⁷⁵ According to the amended Basic Regulations on Service in the Church 2022 (*Grundordnung des kirchlichen Dienstes 2022, GrO 2022*) all employees

⁴⁷⁴ Bundestag (2022) 'Bundestag approves Infection Protection Act', press release, 10 November 2022, <https://www.bundestag.de/dokumente/textarchiv/2022/kw45-de-infektionsschutzgesetz-917438>.

⁴⁷⁵ See in German, <https://www.dbk.de/presse/aktuelles/meldung/neufassung-des-kirchlichen-arbeitsrechts>.

regardless of their origin, religion, age, disability, sex, sexual identity and way of life can be representatives in the general sense of bearing witness of the faith of a church meant to serve people (Section 3.2 *GrO* 2022). By amending their Ecclesiastical Law, the Catholic Church in Germany has responded to recent developments and pressure from their base. In January 2022 Catholic Church employees, among them members of the clergy, launched the #OutInChurch campaign, sharing their various, including queer, bi and non-binary sexual orientations and risking their employment. The practical effect of the new recommendations remain to be seen since each individual bishop (27 in total in Germany) may decide for or against the implementation.⁴⁷⁶

Amendment of the General Act on Equal Treatment (AGG): Federal Commissioner for Anti-Discrimination becomes the head of the Anti-Discrimination Agency

According to the new amendment of the General Act on Equal Treatment (AGG) of 23 May 2022, the Federal Commissioner for Anti-Discrimination becomes the head of the Anti-Discrimination Agency⁴⁷⁷ (Section 25.3 AGG) who is elected by the Bundestag with a majority (more than half) of its members (Section 26.3 AGG) after nomination by the Federal Government (Section 26.1 AGG).

In the opinion of the author, the amendment of the AGG regarding the appointment of the Federal Commissioner for Anti-Discrimination who acts as head of the Federal Anti-Discrimination Agency aims to address efficiently the problem of the appointment of the head of the Agency, a task previously reserved to the Federal Minister for Family Affairs, Citizens, Women and Youth (formerly Section 26 AGG, now abrogated).

12.2 Case law

Discrimination on the ground of age

Relevant discrimination ground(s): age

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

Date of decision: 8 February 2022

Name of the parties: N/A⁴⁷⁸

Reference number: 1 AZR 252/21

ECLI reference: ECLI:DE:BAG:2022:080222.U.1AZR252.21.0

Link: <https://www.bundesarbeitsgericht.de/entscheidung/1-azr-252-21/>

Brief summary: The case concerns a regulation governing compensation for dismissal based on age or length of service. The complainant argued that setting a maximum compensation level creates indirect discrimination of older employees because they would regularly obtain a higher compensation than younger employees without this provision. The reason for this is that they have typically spent more years being employed in the relevant enterprise, which increases their compensation claims. The court argued, however, that such a regulation for a maximum can form an objective reason justifying

⁴⁷⁶ This is considered by many to be an important development in the history of the German Catholic Church, which in Germany, together with the Protestant Church, is the second largest employer after the public sector. The former practice of the Catholic Church in Germany included termination of employment in the cases of same-sex relationship and second marriage after divorce. In the author's opinion, the new Ecclesiastical Law displays the determination of the German Catholic Church to proceed to substantial reforms, a commitment that has already prompted serious criticism from the Vatican. The German Bishops Conference has reacted to the prior case law of the German courts, the sinking numbers of the congregation, the sexual abuse scandals and the unpopularity of the Church as an employer. How the recommendations are to be implemented remains to be examined. The development has to be considered in the context of the legal developments initiated by the CJEU in *Egenberger*. The Protestant Church launched a constitutional complaint against the implementation of this Federal Labour Court's decision. The decision of the Bishops Conference moves in the direction established by the CJEU in *Egenberger*.

⁴⁷⁷ As already mentioned above in the relevant section, Ferda Ataman became the new Independent Commissioner for Anti-Discrimination and the new head of the Federal Anti-Discrimination Agency succeeding Bernhard Franke who had served as acting head since 2018 (<https://www.bundesregierung.de/breg-en/news/anti-discrimination-commissioner-2060474>). For more details see section 7.4.a above.

⁴⁷⁸ In Germany, court decisions do not publish the names of the parties.

indirect discrimination if it is proportional. The point of a maximum level of compensation is to distribute fairly the available resources for the compensation scheme. It argued that the sum of EUR 200 000 as a maximum level of compensation is appropriate because it allows a substantial amelioration of the situation of a person who loses employment. The fact that older employees are proportionally more affected by the regulation is, the court argued, the flipside of the coin that they are in an advantageous position in the first place because their longer working years are factored into the compensation the scheme provided for them. Giving the necessity of a general regulation, the scheme was regarded as proportionate overall. The court dismissed the complaint.

Relevant discrimination ground(s): age / sex

Name of the court: Labour Court Koblenz (Arbeitsgericht Koblenz, AG Koblenz)

Date of decision: 9 February 2022

Name of the parties: N/A

Reference number: 7 Ca 2291/21

ECLI reference: ECLI:DE:ARBGKOB:2022:0209.7Ca2291.21.00

Link: <https://www.landesrecht.rlp.de/bsrp/document/JURE220027024>

Brief summary: The case concerns a complaint of an applicant for a job as a mechanic. The complainant reacted to an advertisement asking for 'cool blokes' ('*coole Typen*'). The case also included a complaint about discrimination on the ground of sex because of the applicant's transsexual identity. The court dismissed the complaint that the reference to 'cool blokes' implies discrimination on the ground of age. It argued that the adjective 'cool' is not limited to younger people but describes a certain attitude toward life. It therefore dismissed this part of the complaint. It granted, however, compensation for discrimination on the ground of sex.

Relevant discrimination ground(s): age

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

Date of decision: 24 February 2022

Name of the parties: N/A

Reference number: 8 AZR 208/21 (A)

ECLI reference: ECLI:DE:BAG:2022:240222.B.8AZR208.21A.0

Link: <https://www.bundesarbeitsgericht.de/entscheidung/8-azr-208-21-a/>

Brief summary: The case concerns a complaint of an applicant who applied for employment as a personal assistant to a person with severe disabilities. The advertisement referred to persons preferably between 18 and 30 years old. The complainant was born 1986 and was not offered the job. The Federal Labour Court referred the case to the Court of Justice of the European Union. The main issue is whether the direct discrimination on the ground of age can be justified according to Section 8 or Section 10 AGG because by reason of the nature of the particular occupational activities or the context in which they are carried out, the discrimination constitutes a genuine and determinant occupational requirement, provided that the objective is legitimate and the requirement is proportionate (Section 8) or because it is objectively and reasonably justified by a legitimate aim (Section 10) if the means of achieving the aim are appropriate and necessary. The court argues that the right not to be discriminated on the ground of age conflicts here with the right of the person with disabilities to have her personality rights protected. It argues that the personal assistant shares to a large degree private elements of the life of the person with disabilities. Therefore, these rights have to be protected. In the specific case, the assistant was supposed to help a student who was 28 years old. The question is then whether in this particular context it forms a justification according to Section 8 or Section 10 AGG to consider only applicants within more or less the same age group as the student.

Moreover, the court argued, that the personal wishes of the person with disabilities seeking assistance must have particular weight, in this case to have an assistant roughly of the same age group. The court therefore asked the Court of Justice of the European Union whether direct discrimination on the ground of age can be justified under the circumstances of the specific case.

Relevant discrimination ground(s): age

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

Date of decision: 31 March 2022

Name of the parties: N/A

Reference number: 8 AZR 238/21

ECLI reference: ECLI:DE:BAG:2022:310322.U.8AZR238.21.0

Link: <https://www.bundesarbeitsgericht.de/entscheidung/8-azr-238-21/>

Brief summary: The case concerns an application for employment of a person who had already reached the regular pension age. He was 74 years old when he applied for a post in the public service. His application was rejected with reference to his age. The court clarified that in principle such direct discrimination on the ground of age can be justified according to Section 10 AGG, according to which difference on the ground of age does not constitute discrimination if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must appropriate and necessary. Such an objective reason can be derived from the intention of an employer to create a balanced age structure in the enterprise or part of public service including the increased possibility of younger persons to have access to employment. The court indicated that in addition, the proportionality of the direct discrimination in the specific case has to be assessed, in particular whether for the specific job such considerations were in fact relevant given the age structure of the enterprise. However, it left this question ultimately open because it argued that in the particular case there was an abuse of right on the side of the complainant. It argued that various elements of the application process and the documents filed show that the applicant was not seriously considering an employment but wanted to pursue a compensation claim from the beginning by provoking a rejection of his application. The court drew attention to the unspecified application without clear reference to the advertised job and the applicant's lack of interest in providing sufficient information. It therefore dismissed the complaint.

Relevant discrimination ground(s): age

Name of the court: Federal Criminal Court (Bundesgerichtshof (1. Strafsenat))

Date of decision: 4 May 2022

Name of the parties: N/A

Reference number: 1 StR 3/21

ECLI reference: ECLI:DE:BGH:2022:040522B1STR3.21.0

Link: <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=3&nr=131246&pos=95&anz=762>

Brief summary: The case concerns the question whether certain forms of claiming discrimination in court if there is no interest for a particular form of employment but only the aim to claim compensation for discrimination can constitute fraud under German Criminal Code (*StGB*), Section 263. According to this norm 'whoever, with the intention of obtaining an unlawful pecuniary benefit for themselves or a third party, damages the assets of another by causing or maintaining an error under false pretences or distorting or suppressing true facts incurs a penalty [...]'. The defendant in the case had applied in 12 cases for employment and afterwards, when his applications were rejected, had claimed discrimination on the ground of age. A lower instance had convicted him of fraud because it assumed that he had caused an error which led to pecuniary benefits, namely the wrongful belief of the employer that he really had intended to accept the offered employment. The Federal Criminal Court quashed this decision arguing that there is no general assumption in German practice that an application for a job is meant seriously and not just submitted due to other pecuniary reasons. It argued with the legal decision of the German legislature not to include specific rules in the German Criminal Law against discrimination but to regulate these questions by private law. Therefore, it argued, existing criminal law regulations should be interpreted restrictively. The court held, however, that it is imaginable that such claims for compensation because of discrimination directed only at obtaining pecuniary advantages could form fraud if the defendant asserted in the legal proceedings a sincere intention to accept the relevant employment if he had no such intention. In such cases, so-called 'AGG-hopping' could be a criminal offence. The court

handed the case back to the lower instance for reconsideration according to the previously mentioned standards.

Relevant discrimination ground(s): age/severe disability

Name of the court: Regional Labour Court Köln (Landesarbeitsgericht Köln, LAG Köln)

Date of decision: 6 May 2022

Name of the parties: N/A

Reference number: 10 Sa 560/21

ECLI reference: ECLI:DE:LAGK:2022:0506.10SA560.21.00

Link: <https://openjur.de/u/2462032.html>

Brief summary: The case concerns a case of ‘mobbing’. The complainant argued that she was a victim of harassment due to her age and her severe disability. She argued that various measures of her employer, including the conditions of inclusion into the workforce after a longer illness, were based on a hostile attitude towards her caused by her age and disability. The court argued that such a claim can be based on contractual law Section 280.1 Civil Code in conjunction with Section 241.2 Civil Code. This extends to representatives of the employer according to Section 278.1 Civil Code. A claim can also arise from delict, Section 823.1 Civil Code in conjunction with Section 831 Civil Code. It specified the preconditions of harassment drawing from Section 3.3 AGG. It argued, however, that the complainant had not shown any evidence that in fact a hostile environment in the sense of Section 3(3) existed. The specific cases that the complainant identified belonged, the court argues, to a different category, namely to unavoidable daily conflicts about the fulfilment of the specific duties stemming from the employment relationship. There were no indications of any particular hostile acts directed at the complainant due to her age or severe disability. The conflicts were rather of administrative nature. Some of them were caused by the wishes of the complainant herself, for example, to be employed close to her place of residence. The court, therefore, dismissed the complaint.

Relevant discrimination ground(s): age

Name of the court: Land Labour Court Düsseldorf / Landesarbeitsgericht Düsseldorf

Date of decision: 24 May 2022

Name of the parties: N/A

Reference number: 3 Sa 1100/21

ECLI reference: ECLI:DE:LAGD:2022:0524.3SA1100.21.00

Link:

http://www.justiz.nrw.de/nrwe/arbgs/duesseldorf/lag_duesseldorf/j2022/NRWE_LAG_D_sseeldorf_3_Sa_1100_21_Urteil_20220524.html

Brief summary: The case concerns a regulation concerning compensation for dismissal. The complainant argued that the specific regulation formed indirect discrimination on the ground of age because it disadvantaged older employees. The court argued that such a regulation governing compensation provides an objective reason for indirect discrimination if the scheme pursues the aim to create distributive justice among the recipients of the compensation scheme. This is in particular the case if it provides a lump sum independent from the salary that the employees were paid when employment ended but based on the years of employment. It argues that such a lump sum is particularly suitable to balance disadvantages because of the age of the employees and thus to contribute to the appropriateness of the compensation scheme. That is at least the case if the compensation is sufficiently substantial in monetary terms (in practice, EUR 27 000). Remaining cases of unequal treatment covered by this regulation concern in particular people with a particularly high income, as in the case of the complainant. These disadvantages have to be accepted in the view of the court for the sake of the overall justice of the compensation scheme. It therefore dismissed the complaint.

Relevant discrimination ground(s): age

Name of the court: Bavarian Higher Administrative Court / Bayerischer Verwaltungsgerichtshof

Date of decision: 28 June 2022

Name of the parties: N/A

Reference number: 14 BV 19.580

ECLI reference: ECLI:DE:BAYVGH:2022:0628.14BV19.580.00

Link: <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2022-N-16900?hl=true>

Brief summary: The complainant argued that the amount of his pension entitlements should be calculated so as to include the time worked for the Federal Custom Service before the age of 17, not only after the age of 17 as provided by the then relevant law on the calculation of pension entitlements in the public service. The court decided that this regulation is direct discrimination on the ground of age but justified. It derived the justification not from Section 10 AGG because in its view the respective federal norms on the calculation of pension entitlements enjoy the same normative rank as the Federal General Act on Equal Treatment, the AGG. It argues, therefore, that EU law is primarily relevant to assess the legality of the relevant regulation. The court held that Article 6(2) Directive 2000/78/EC justifies the regulation, which fixes a minimum age for the calculation of pension benefits. It argues that such a regulation is necessary to stabilise systems providing pensions for public employees. It draws attention to the decision of the CJEU in *Lesar* (judgment of 16 June 2016, C-159/15, ECLI:EU:C:2016:451), confirming this interpretation. The court also argues that even if Section 10 AGG was regarded as legally relevant the result would be same because Section 10 AGG also allows such a regulation securing the stability of the pension system of the public service. The court therefore dismissed the complaint.

Relevant discrimination ground(s): age

Name of the court: Labour Court Arnsberg (Arbeitsgericht Arnsberg, AG Arnsberg)

Date of decision: 8 August 2022

Name of the parties: N/A

Reference number: 2 Ca 29/22

ECLI reference: ECLI:DE:ARBGAR:2022:0808.2CA29.22.00

Link:

http://www.justiz.nrw.de/nrwe/arbgs/hamm/arb_g_arnsberg/j2022/2_Ca_29_22_Urteil_20220808.html

Brief summary: The case concerns a complaint based on alleged discrimination on the ground of age. The complainant applied for a post as headteacher and was accepted by the school. He had already passed the retirement age but was regularly employed for part-time substitution and limited fixed-term substitution at various schools. The local authority advised the school, however, not to employ the complainant but to employ instead a competitor who had not passed the retirement age. The court argued that not employing the complainant formed direct discrimination on the ground of age but was justified on the basis of Article 10 AGG. The aim of the measure was to guarantee a balanced relation of different age groups for teachers at public schools and to enable younger teachers to enter the school service. The court regarded this aim as proportionate and legitimate. It dismissed the complaint.

Relevant discrimination ground(s): age

Name of the court: Regional Labour Court Nürnberg (Landesarbeitsgericht Nürnberg, LAG Nürnberg)

Date of decision: 11 November 2022

Name of the parties: N/A

Reference number: 8 Sa 164/22

ECLI reference: -

Link:

https://www.lag.bayern.de/imperia/md/content/stmas/lag/nuernberg/entscheidungen/2022/8_sa_164_22.pdf

Brief summary: The case concerns a regulation governing compensation based on age that included the following provision: after the age of 62 and after 24 months of unemployment benefits, a person entitled to the provisions of the compensation scheme could only demand 25 % of the standard amount of compensation. This is, however, only

the case if the employee was entitled to an early retirement scheme or to regular retirement benefits. The court considered this regulation as direct discrimination on the ground of age, but justified according to Section 10 Number 6 AGG. This is because it provided for a proportional regulation as the reduction of the payment based on the compensation scheme was only relevant for employees who had other entitlements that guaranteed their financial security by either an entitlement to early pension or to regular pensions. The court therefore dismissed the complaint.

Relevant discrimination ground(s): age

Name of the court: Regional Labour Court Munich (Landesarbeitsgericht München, LAG München)

Date of decision: 22 December 2022

Name of the parties: N/A

Reference number: 2 Sa 564/21

ECLI reference: -

Link: -

Brief summary: The case concerns a pension scheme for surviving dependents. The scheme included a regulation that provided for a maximum age for marriage of 60 years as a condition for entitlements of the spouse from the pension scheme. Marriage concluded at a later age created no such entitlement. The regulation also demanded that the marriage had existed for at least one year before the death of the employee. The court argued that such a regulation violates Section 7 AGG and is null and void according to Section 3.2 AGG. The means to achieve the legitimate end of such a pension scheme, namely the prevention of marriages concluded only to provide monetary advantages for the surviving dependent, were not proportionate in the sense of Section 3.2 AGG. The court argued that the maximum age of 60 for marriage was arbitrary and not in accordance with structural decisions of German pension law, which includes a regular retirement age of 65 or in more recent cases, 67. The condition of a minimum duration of one year of the marriage was only proportionate, the court argued, if the claimant had the possibility to prove that at the time of the marriage no particular risk of death of the employee was foreseeable, as in the specific case where the deceased employee died because of an accident. The court decided, therefore, that the respective regulations are null and void according to Section 3.2 sentence 2 AGG. It awarded the surviving dependent the pension accordingly.

Discrimination on the ground of race or ethnic origin

Relevant discrimination ground(s): race/ethnic origin

Name of the court: Regional Labour Court Berlin-Brandenburg (Landesarbeitsgericht Berlin-Brandenburg, LAG Berlin-Brandenburg)

Date of decision: 14 October 2022

Name of the parties: N/A

Reference number: 12 Sa 51/22

ECLI reference: ECLI:DE:LAGBEBB:2022:1014.12SA51.22.00

Link: <https://gesetze.berlin.de/bsbe/document/JURE230039268>

Brief summary: The case concerns discrimination on the grounds of race and ethnic origin. The complainant was dismissed by the Federal Republic of Germany because of racist utterances against another employee. The other employee had dark skin. The complainant allegedly asked her about her true origin. She also allegedly said the appearance of the employee caused a 'sensation' in the complainant's team. The court considered such remarks, if proven, as possible discrimination in the form of harassment under Section 7 in conjunction with Section 3.3 AGG. It regarded questions about origin as legitimate, but not to insist and imply that there are no Germans with African origins. It also regarded the description of a person as a 'sensation' as evidently implying a discriminatory attitude towards that particular person. It argued, however, that this kind of behaviour was not of a severity to justify the dismissal. It argued that to reprimand the complainant was sufficient to prevent further utterances of the kind that had been reported. The court, therefore, dismissed the complaint of the Federal Republic of Germany and upheld the lower instance judgment declaring the dismissal unjustified.

Discrimination on the ground of religion

Relevant discrimination ground(s): religion

Name of the court: Regional Labour Court Niedersachsen (Landesarbeitsgericht Niedersachsen, LAG Niedersachsen)

Date of decision: 12 January 2022

Name of the parties: -

Reference number: 8 Sa 599/19

ECLI reference: -

Link: <https://voris.wolterskluwer-online.de/browse/document/4b291a95-1ec3-4f9a-b7f8-b2d1d3bae7a4>

Brief summary: The case concerns the rejection of an application for employment at the Protestant Church in Germany as the head of the department of human and fundamental rights and European law. The applicant was not considered because he is not a member of the Protestant Church in Germany. The court argued that not to consider the complainant's application forms direct discrimination on the grounds of religion. This direct discrimination is, however, the court argued, justified according to Section 9 AGG. The court held that in light of the jurisprudence of the CJEU in *Egenberger*, the specific kind of employment is decisive to ascertain whether a certain duty of loyalty is proportionate or not. In the specific case, the employment concerned not only technical legal matters, it demanded in contrast specific tasks including the drafting of documents of strategic importance for the Protestant Church, which implied the need not only of legal knowledge but for an active identification with the theological beliefs of the Protestant Church. The particular employment also presupposed the representation of the Protestant Church in various social contexts, where more than just technical legal knowledge was necessary, and where identification with the theological outlook of the Protestant Church was required. Therefore, the court argued that, given the particular kind of work concerned, the requirement to be a member of the Protestant Church was proportionate. It therefore dismissed the complaint.

Relevant discrimination ground(s): religion

Name of the court: Regional Labour Court Hess / Hessisches Landesarbeitsgericht

Date of decision: 1 March 2022

Name of the parties: N/A

Reference number: 8 Sa 1092/20

ECLI reference: ECLI:DE:LAGHE:2022:0301.8SA1092.20.00

Link: <https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220003143>

Brief summary: The case concerns a complaint against the dismissal of an employee working in an organisation providing advice for pregnant women. The association is affiliated with the Catholic Church. The complainant left the Catholic Church while she was on maternal leave. Before her return there were discussions and attempts on the side of the organisation to convince her to re-join the Catholic Church. When these efforts were unsuccessful the complainant was dismissed. The court confirmed the decision of the lower instance that the dismissal could not stand. It argued that the dismissal formed direct discrimination on the ground of religion. It argued in accordance with recent case law of the Federal Labour Court in Germany and the decision of CJEU in *Egenberger* that the proportionality of duties of loyalty of religious communities is to be assessed according to the specific kind of work performed. The court argued that there is no specific need for an organisation providing advice for pregnant women to require that the employees providing this advice are members of the Catholic Church. The specific organisation does not provide certificates necessary for a legal abortion in Germany. The defendant in the case identifies with the specific evaluation of abortion underlying this practice, which is according to the court sufficient for the task she performs. There is no additional need to be a member of the Catholic Church. Accordingly, there was discrimination on the ground of religion under Section 7.1 AGG that was not justified by Section 9 AGG. The relevant regulation in the labour contract was therefore null and void. The complainant was reinstated. In addition, she was awarded compensation for immaterial damages of EUR 2 314.22. The court argued that this compensation is sufficient because the continuation of the employment

already compensated the material damages of the complainant and also implied symbolic affirmation of her justified claims. The decision is not final.

Discrimination on the ground of disability

Relevant discrimination ground(s): disability

Name of the court: High Administrative Court of Bavaria (Bayerischer Verwaltungsgerichtshof, VGH Bayern)

Date of decision: 16 May 2022

Name of the parties: N/A

Reference number: 3 ZB 20.8

ECLI reference: ECLI:DE:BAYVGH:2022:0516.3ZB20.8.00

Link: <https://rewis.io/urteile/urteil/fgv-16-05-2022-3-zb-208/>

Brief summary: The court concerns a claim to compensation by a person alleging discrimination on the ground of disability because her employment was terminated, and she was obliged to take earlier retirement. The court argued that according to Section 22 AGG it is sufficient that one of the parties is able to establish facts from which it may be presumed that there has been discrimination on the ground referred to in the AGG. It is for the other party to show that there has been no breach of provisions prohibiting discrimination. In the specific case, the court argued that the complainant had not established any such facts. The complainant only drew the attention to the fact that she is in fact a person with disabilities. The mere fact that she is a person with disabilities, however, according to the court, is not sufficient to shift the burden of proof. Further facts need to be established that show that this specific ground was potentially relevant for the discriminatory act. As the complainant did not provide such facts the court dismissed the complaint.

Relevant discrimination ground(s): disability

Name of the court: Regional Labour Court Rhineland-Palatinate (Landesarbeitsgericht Rheinland-Pfalz, LAG Rheinland – Pfalz)

Date of decision: 08 September 2022

Name of the parties: -

Reference number: 2 Sa 490/21

ECLI reference: ECLI:DE:LAGRLP:2022:0908.2Sa490.21.00

Link: <https://www.landesrecht.rlp.de/bsrp/document/JURE230042983>

Brief summary: The case concerns the claim of an employee who wanted to bring a dog to her workplace for therapeutic reasons. The complainant suffers from a post-traumatic disorder. She brought for some time with the permission of the employer two successive dogs to her workplace. At some stage the employer prohibited this measure after the dog had behaved aggressively towards other employees. The court decided that in this case, there is no discrimination on the grounds of disability because the prohibition against the dog accompanying the complainant was not based on her disabilities but on the danger that the behaviour of the dog caused. It did not consider indirect discrimination. The argument of the decision suggested, however, that the behaviour of the dog would have been regarded as an objective reason justifying the prohibition. The court dismissed the complaint.

Relevant discrimination ground(s): disability

Name of the court: Regional Labour Court Munich (Landesarbeitsgericht München, LAG München)

Date of decision: 10 October 2022

Name of the parties: N/A

Reference number: 4 Sa 290/22

ECLI reference: -

Link:

https://www.lag.bayern.de/imperia/md/content/stmas/lag/muenchen/4_sa_290_22_urteil_anonym.pdf

Brief summary: The case concerns a claim for compensation on the grounds of discrimination based on disability. The court argued that Article 22 creates a burden of proof. This norm provides that, if, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds protected, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination. That provision, however, demands that at least certain facts are established to shift the burden of proof. The court underlined that the complainant needed to substantiate such facts. There is no general experience that the rejection of an application of a person with a disability is based on disability. There is also no general suspicion of discriminatory behaviour established by the AGG. The court, therefore, dismissed the complaint.

Relevant discrimination ground(s): disability

Name of the court: Regional Labour Court Saxony (Sächsisches Landesarbeitsgericht, LAG Sachsen)

Date of decision: 22 August 2022

Name of the parties: N/A

Reference number: 2 Sa 144/21

ECLI reference: -

Link: <https://www.iww.de/quellenmaterial/id/233721>

Brief summary: The case concerns the question whether the duty to invite an applicant with a severe disability to interview according to Section 165 Social Code IX (*SGB IX*) exists even if an advertised position in fact does not exist. The complainant applied to a job advertisement of a public body and was not invited to a job interview. This creates, according to the court, a shift of the burden of proof according to Section 22 AGG. Section 22 AGG provides that, if, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the protected grounds, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination. Not to invite the complainant creates, according to the court, facts that can shift the burden of proof. It is then up to the employer to prove that, in the particular case, there were reasons to assume that no discrimination had occurred. The court argued that this is the case if the employer shows that, in fact, there was no open position, but that the position was only advertised to 'test the market'. The court underlined that such behaviour by a public employer is not particularly 'friendly' towards possible applicants but does not in itself indicate that there was discrimination on the grounds of disability. As the employer was able to show that, in the particular case, the advertising of the position was motivated by the desire to test the market, no discrimination on the ground of disability could be assumed. The court dismissed the complaint.

ANNEX 1: INTERNATIONAL INSTRUMENTS

Country: Germany
Date: 1 January 2023

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	5/12/1952	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	29/03/2021	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
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

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 Rights of Persons with Disabilities	30/03/2007	24/02/2009	N/A	Yes	No

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