REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT 2010

Germany

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State of affairs up to 1st January 2011

This report has been drafted for the **European Network of Legal Experts in the Non-discrimination Field** (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation), established and managed by:

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0 INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.

The Constitution, or Basic Law (*Grundgesetz*), is of central importance for understanding the German legal framework on discrimination. The German Constitution 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.[1] Fundamental rights are part of this directly effective constitutional order. They are binding on the legislature, executive, and judiciary as directly valid law.[2] 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*).[3] 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[4], but permeate other legal spheres as well, such as criminal and private law.[5]

There are several constitutional provisions that protect human equality. Most important is the guarantee of human dignity.[6] The core of this guarantee is the respect of any human being as an end in itself, simply by virtue of his or her humanity, irrespective of other characteristics. In accordance with this view, case law of the Federal German Constitutional Court (*Bundesverfassungsgericht*) consistently states that each person should be treated not only as an object of state action, but as an end in itself.[7] He or she is, in addition, protected against degrading or humiliating treatment.[8] The guarantee of human dignity is the central decision about values of German law, 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.

[1] Article 20.3 Basic Law (*Grundgesetz*).
[2] Article 1.3 Basic Law (*Grundgesetz*).
[3] Article 93.1 Nr. 4a Basic Law (*Grundgesetz*).
[4] Here understood in the narrow sense excluding criminal law.
[5] On some examples of such effects see below.
[6] Article 1.1 Basic Law (*Grundgesetz*): Human dignity is inviolable. To respect and protect it is the duty of all state authority.
[7] Settled case law, see e.g. BVerfGE 115, 118.
[8] Ibid.

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, be it presumed race, ethnic origin, religion or belief, disability, age, or sexual orientation, to name just the socially and historically pertinent grounds of discrimination under consideration in this report. The only question that arises is therefore by which concrete legal means the overarching value of human dignity can be adequately protected in various spheres of life.[9]

Other important constitutional guarantees are the guarantee of equality[10] and special constitutional equality rights concerning children out of wedlock,[11] equality of status and office,[12] and equality of electoral rights.[13]

There is in Germany specialised anti-discrimination legislation. Most importantly, since 18 August, 2006 the General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, in the following abbreviated as *AGG*)[14] is in force after many years of intense debate. This law covers labour law, general contract law, and public law. It created a new framework for anti-discrimination law in Germany. The act is part of a legal package that amends other existing legal regulations and contains in addition an act against discrimination in the army, the Law on the Equal treatment of Soldiers (*Gesetz über die Gleichbehandlung von Soldatinnen und Soldaten*, in the following abbreviated as *SoldGG*).[15]

[9] On the background cf. M. Mahlmann, Elemente einer ethischen Grundrechtstheorie, 2008, p. 97 et seq., p. 412 et seq.
[10] Article 3 Basic Law (*Grundgesetz*).
[11] Article 6.5 Basic Law (*Grundgesetz*): Children born out of wedlock by law have to be provided with the same conditions for physical and mental development and accorded the same place in society as legitimate children.
[12] Article 33.1 Basic Law (*Grundgesetz*): Every German in every State (*Land*) has the same political rights and duties.
Article 33.2 Basic Law (*Grundgesetz*): Every German is equally eligible for any public office according to his aptitude, qualifications, and professional achievements.
Article 33.3 Basic Law (*Grundgesetz*): Enjoyment of civil and political rights, eligibility for public office, and rights acquired by public service are independent of religious denomination. No one may suffer disadvantage by reason of his adherence or non-adherence to a denomination or philosophical persuasion.
Article 140 Basic Law (*Grundgesetz*) in conjunction with Article 136.1 and 136.2 Weimar Constitution reiterates the equality of status and office independent of religious denomination.
[13] Article 38.1 sentence 1 and Article 38.2 Basic Law (*Grundgesetz*).
[14] For an English translation of the AGG, see the website of the German Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*): http://www.antidiskriminierungsstelle.de/ADS-en/Service/downloads.html.
[15] Act Implementing European Directives Putting into Effect the Principle of Equal Treatment, (*Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlinien*, 14.8.2006 (BGBl. I, 1897). The AGG and the SoldGG have been amended, 2.12.2006 (BGBl. I, 2742). A second amendment was made to the AGG on 12.12.2007 (BGBl. I, 2840) and to the SoldGG on 9.8.2008 (BGBl I 2008, 1629). A third (though only technical) and so far last amendment to AGG was made on 5.2.2009 (BGBl I 2009, 160).

In addition, there are various legal provisions which partly reiterate the fundamental guarantee of equality for areas of public law, including the law of the civil service and other public employees.[16]

In labour law, there is a general anti-discrimination clause in the Work Constitution Act (*Betriebsverfassungsgesetz*)[17] and the fundamental principle of equal treatment of employees has been consistently established by case law.[18] In addition, as regards discrimination on the ground of sex (which is not covered by this report) and of disability, various legal instruments have been passed aiming to protect against discrimination and increase the social inclusion of women and disabled persons.[19]

In the area of sexual orientation, some legal regulations have been created that either directly aim at protection against discrimination or do so indirectly by creating options that were not previously open to people with certain sexual orientations, for example, by introducing a legally regulated form of same-sex partnership.[20] As to religion, special legal regulations and case law, in addition to the non-discrimination clauses of public law and labour law, deal with the reasonable accommodation of various religious beliefs, including exceptions from general laws.[21]

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 have to be interpreted in the light of the constitutional order (especially in the light of fundamental rights and most importantly of human dignity) that prohibits discrimination.[22] Through the enactment of the AGG, these general clauses play an even more limited role in practise in this respect.

Germany is a democratic and social federal state under the rule of law.[23] 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.[24]

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[16] See Section 9 Federal Law on the Civil Service (*Bundesbeamtengesetz*). This codification was amended, newly arranged and published on 5.2.2009 (BGBl. I S. 160), amended again on 18.11.2010 (BGBl I 2010 S. 1552).
[17] Section 75.1 Work Constitution Act (*Betriebsverfassungsgesetz*).
[18] Settled case law, see Federal Labour Court (*Bundesarbeitsgericht*), 12 October 2005, 10 AZR 640/04.
[19] Most importantly, the AGG covers disability for all work relations and other areas beyond the scope of Directive 2000/78/EC, Section 81.2 of the Social Code IX (*Sozialgesetzbuch* IX) now refers to the regulation of the AGG, the Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) creates special duties for public authorities and some for private parties. See for more and details on disability below.
[20] Law on Life Partnerships (*Lebenspartnerschaftsgesetz*).
[21] See below.
[22] Especially as to race and ethnic origin, see T. Bezzenberger, Ethnische Diskriminierung, Gleichheit und Sittenordnung im bürgerlichen Recht, *Archiv für die civilistische Praxis* 196 (1996), 395 et. seq.
[23] Article 20.1 and 20.3, Article 28.1 Basic Law (*Grundgesetz*).
[24] For some examples see below.

The federal character of Germany leads to different regulations in different *Länder* in some areas where the *Länder* have legislative competencies, most notably as to education and cultural matters or certain aspects of the law regulating civil servants they employ.

Despite recent reform of the Federal order of competencies, the most important matters in public (with the exceptions mentioned) and private law are, however, still in the competence of the Federation, either as exclusive legislative power, or concurrent legislative power.[25]

0.2

0.3 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.
This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

[25] Article 70 – 74 Basic Law (*Grundgesetz*).

Overview

The two attempts to transpose the Directives in Germany have met considerable resistance in the public and legal spheres, which in part was directed at details of this transposition and in part against the project as such.[26]

A special focus of contention was the attempt not only to implement the Directives but to create a consistent regime of anti-discrimination law beyond the demands of European Law, especially to include all grounds in the prohibition of discrimination in civil law, and not only race and ethnic origin. The tone of some participants in the debate was very harsh, though today – given the experience with the new law – this has widely changed.

The initial and still existing opposition is to a certain degree surprising. There is enough empirical evidence on discriminatory opinions and behaviour in Germany to be concerned about the problem, though methodologically sound studies on many grounds of discrimination are rare.[27] 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 is universally acknowledged and authoritatively stated by the German Constitutional Court. The core of this guarantee is to provide protection for the person and individuality of human beings as ends in themselves on no other grounds and bound to no other precondition than the humanity of the individual.

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[26] On the debate see e.g. the overview in Bauer/Göpfert/Krieger, AGG, 2nd ed., para 32b; J. Braun, Forum: Übrigens – Deutschland wird wieder totalitär, *Juristische Schulung* 2002, p. 424 et seq. F.-J. Säcker, „Vernunft statt Freiheit" – Die Tugendrepublik der neuen Jakobiner, *Zeitschrift für Rechtspolitik* 2002, p. 286. See S. Baer, „Ende der Privatautonomie" oder grundrechtlich fundierte Rechtsetzung? – Die deutsche Debatte um das Antidiskriminierungsrecht, *Zeitschrift für Rechtspolitik* 2002, p. 290 et seq.; E. Eichenhofer, Diskriminierungsschutz und Privatautonomie, *Deutsches Verwaltungsblatt* 2004, p. 1078 et seq.; K. Hailbronner, Die Antidiskriminierungsrichtlinien der EU, *Zeitschrift für Ausländerrecht*, p. 254 et seq.; J. Neuner, Diskriminierungschutz durch Privatrecht, *Juristen Zeitung* 2003, p. 57 et seq.; U. Mager, Möglichkeiten und Grenzen rechtlicher Maßnahmen gegen die Diskriminierung von Ausländern, *Zeitschrift für Ausländerrecht* 1992, p. 170 et seq.; R. Nickel Handlungsaufträge zur Bekämpfung von ethnischen Diskriminierungen in der neuen Gleichbehandlungsrichtline 2000/43/EG, *Neue Juristische Wochenschrift* 2001, p. 2668 et seq.; E. Picker, Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie? *Juristen Zeitung* 2002, p. 880 et seq.; E. Picker, Antidiskriminierung als Zivilrechtsprogramm? *Juristen Zeitung* 2003, p. 540 et seq.; D. Schiek, Diskriminierung wegen „Rasse" oder „ethnischer Herkunft" – Probleme der Umsetzung der RL 2000/43/EG im Arbeitsrecht, *Arbeit und Recht* 2003, p. 44 et seq.; D. Schiek, *Differenzierte Gerechtigkeit: Diskriminierungsschutz und Vertragsrecht* (Baden-Baden: Nomos, 2000); H. Wiedemann/G. Thüsing, Zum Entwurf eines zivilrechtlichen Antidiskriminierungsgesetzes, *Der Betrieb* 2002, p. 463 et seq.; M. Mahlmann, Gleichheitsschutz und Privatautonomie, *Zeitschrift für europarechtliche Studien* 2002, p. 407 et seq.; M. Mahlmann, Gerechtigkeitsfragen im Gemeinschaftsrecht, in: *Loccumer Protokolle* 40/03, p. 47 et. seq.

[27] Cf. Klose in Rudolf/Mahlmann, GleichbehandlungsR, § 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. For the executive summary (in German) cf.: http://ec.europa.eu/ewsi/UDRW/images/items/docl_16487_986472583.pdf. The Anti-Discrimination Agency has commissioned such work as well, cf.: http://www.antidiskriminierungsstelle.de/ADS/downloads,page=0.html.

This makes impermissible on the most fundamental level discrimination against human beings because of any characteristics such as race, ethnic origin, religion, belief, disability, age or sexual orientation, among others.

The Directives aim to provide legal tools protecting individuals against such discrimination in the public and in the private sphere.[28] The values the Directives aim to protect are therefore part of the core of the German legal system.

The regime of legal regulations envisaged by the Directives already has, in addition, been partly a reality of Germany's legal system as regards discrimination based on sex (which is not covered by this report) and disability. These regulations and their interpretation by federal courts include the definition of discrimination, the shift of the burden of proof, legal standing and a regime of sanctions.

The final implementation of the Directives through the AGG and accompanying legislation is therefore not a radical new start for German law but the further development of relevant parts of the existing law. To take notice of these fundamental normative parameters in German law may be helpful to focus on an effective, sober and pragmatic development of anti-discrimination law.[29] This is necessary to foster the liberal aims of anti-discrimination law: to provide freedom to act and private autonomy for all members of society and to protect the equality of human worth.

[28] On the background: C. McCrudden (ed.), *Anti-Discrimination Law*, 2nd ed., Ashgate, Aldershot, 2004; C. McCrudden, "*The New Concept of Equality*" talk delivered at the European Acadamy of Law, Tries 2 – 3 2003; S. Fredman, *Discrimination Law*, Oxford, Oxford University Press, 2002. S. Fredman, Equality: A New Generation?, *Industrial Law Journal*, 2001, p. 145, 154 et seq; S. Baer, *Würde oder Gleichheit*, (Baden-Baden: Nomos, 1995; D. Schiek, *Differenzierte Gerechtigkeit* (Baden-Baden, Nomos, 2000), M. Bell, *Anti-Discrimination Law and the European Union* (Oxford: Oxford University Press, 2002) p. 52; P. Skidmore, EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?, *Industrial Law Journal*, 2001, 126 et seq.; L. Waddington, *The Expanding Role of the Equality Principle in European Union Law*, (San Domenico di Fiesole: European University Institute, Robert Schuman Centre of Advanced Studies, 2003); G. More, *The Principle of Equal Treatment: From Market Unifier to Fundamental Right*, in: P. Craig/G. de Búrca (ed.), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), p. 517 et seq. For some more technical remarks on the German situation, see M. Mahlmann, Prospects of German Anti-Discrimination Law, in: *Transnational Law & Contemporary Problems*, 2005, p. 1045; for a general attack from the point of view of the economic analysis of law: R. A. Epstein, *Forbidden Grounds: The Case against Anti-Discrimination Law*, Harvard University Press, Cambridge, Ma, 1992.

[29] Cf. on the legal ethics of anti-discrimination law, Mahlmann in Rudolf/Mahlmann, GleichbehandlungsR, § 1.

State of implementation

Through the AGG and the accompanying legislation, a full transposition of the directives is intended. There are, however, some shortcomings.[30] The main points are (other problematic issues will be identified later in this report):[31]

- an exception of dismissal from the application of the prohibition of discrimination, Sec. 2.4 AGG, though mitigated by case-law (cf. 3.2.3);
- the possible non-application of the AGG to occupational pension schemes, Sec. 2.2 Sentence 2 AGG, depending, however, on the judicial interpretation of the respective norm (cf. 3.2.3);
- an exception from the material scope of the provision of goods and services for all transactions concerning a special relation of trust and proximity between the parties or their family, including the letting of flats on the premise of the landlord for all grounds including race and ethnic origin, Sec. 19.5 AGG, which raises problems under the race directive, depending, however, on its contentious interpretation in this respect, (cf. 3.2.9; 3.2.10);
- an exception for housing including unequal treatment on the ground of race and ethnic origin to provide for socially and culturally balanced settlements, Sec. 19.3 AGG, depending on judicial interpretation (cf. 3.2.10);
- the formulation of the justification of unequal treatment for religion and belief, depending on judicial interpretation, Sec. 9.1 AGG, (cf. 4.2);

[30] Assuming that European law demands a differentiated transposition, see ECJ C-49/00, ECR 2001 I-8575 Commission vs. Italy, para 21 et seq.; ECJ C- 236/95 ECR 1996 I-445 Commission vs. Greece, para 13; ECJ C-38/99, ECR 2000 I-10941 Commission vs. France para 53; ECJ C-144/99 Commission vs. Kingdom of the Netherlands, www.curia.eu.int, para 17: "It should be borne in mind, in that connection that according to settled case-law, whilst legislative action on the part of each Member State is not necessarily required in order to implement a directive, it is essential for national law to guarantee that the national authorities will effectively apply the directive in full that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before national courts". As 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.

[31] For the following list in the main text it is assumed that Article 3 of the Basic Law (*Grundgesetz*) 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 Basic Law (*Grundgesetz*) paragraph one 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 jurisdiction of the BVerfG (cf. below 1). For some other legally problematic aspects of the implementation see below. The Commission has identified the following points to be in breach of the directives in question (on these points in detail see below in the report and the Country report 2006 for the European network of legal experts in the non-discrimination field by this author): Restrictions on benefits for same sex partners, Sec. 2.4. AGG (dismissal), Sec. 622.2 Sentence 2 Civil Code (*BürgerlichesGesetzbuch*), Sec. 9.1. AGG, no full implementation of reasonable accommodation, time limit for claims based on AGG, not sufficient possibilities for engagement of association in procedures, no strict liability for discrimination. On these matters see in detail below.

- Sec. 622.2 sentence 2 Civil Code (*BürgerlichesGesetzbuch*) provides that employment periods under the age of 25 are not taken into account when determining notice periods. This regulation is – as meanwhile ruled by the CJUE[32] – not reconcilable with Art. 6 Directive 2000/78/EC (cf. 4.7.5. a) and is not applied by German courts anymore (cf. 0.3);
- there is no special prohibition of victimisation in civil law, as foreseen in Art. 9 Directive 2000/43/EC (cf. 6.4.);
- the dependence of compensation for material damage on fault (wilful or negligent wrongdoing) or gross negligence respectively, Secs. 15.1; 15.3; 21.2 AGG, contrary to CJUE jurisprudence in this respect (cf. 6.5);
- 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 to harassment and the instruction to discriminate, depending on judicial interpretation (cf. 3.2.4; 3.2.6 – 3.2.9.).

Germany had chosen to defer implementation as to age. Age is, however, now included in the AGG.

0.4 Case-law

Provide a list of any <u>important</u> case law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

Name of the court
Date of decision
Name of the parties
Reference number (or place where the case is reported).
Address of the webpage (if the decision is available electronically)
Brief summary of the key points of <u>law</u> and of the actual facts (no more than several sentences)
➔Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives (also beyond employment on the grounds of Directive 2000/78/EC), even if it does not relate to the legislation transposing them - e.g. if it concerns previous legislation unrelated to the transposition of the Directives.

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

Numerous decisions by German courts in 2010 referred to the Directives as well as to German law on the same equality grounds. Important ones include:[33]

[32] ECJ, C-555/07 (*Kücükdeveci*), 19 January 2010.
[33] For previous case-law, see chapter 0.3 in Country report for the European network of legal experts in the non-discrimination field by this author of 2006, 2007, 2008 and 2009.

- In a case concerning the *Mangold* decision by the CJUE (22 November 2005, C-144/06), the Federal Constitutional Court (*Bundesverfassungsgericht*) clarified its jurisdiction on the possible control over CJUE decisions. While it left the question open whether or not the *Mangold* decision of the CJUE was *ultra vires*, it argued that it could only set aside a decision rendered by the CJUE if it was *evidently ultra vires* and had the consequences of structurally reshaping the competencies within the Union to the disadvantage of the Member states. Concerning the *Mangold decision*, the court ruled, this was not the case.[34]
- The Federal Constitutional Court (*Bundesverfassungsgericht*) decided that the unequal treatment between survivors who had lived in a registered same sex partnership (*eingetragene Lebenspartnerschaft*) and survivors who had lived in a marriage concerning the amount and exemptions of inheritance tax and gift tax violated Art. 3.1 Basic Law (*Grundgesetz*), guaranteeing general equality. As there was no justification discernable for the unequal treatment, the provisions were held to be unconstitutional.[35]
- In a number of cases, the Federal Administrative Court (*Bundesverwaltungsgericht*) decided that civil servants living in a registered same sex partnership (*eingetragene Lebenspartnerschaft*) are to be granted the same benefits as married civil servants if their respective situations are comparable, following the CJUE decision *Maruko* (1 April 2008, C-267/06). Consequently, it decided that civil servants living in a registered same sex partnership can claim allowance for service in foreign countries (*Auslandszuschlag*),[36] compensation for certain expenses due to dual residence following a relocation in a foreign country[37] and that their partners can claim surviving dependants' pension.[38] They are equally entitled to family allowance (*Familienzuschlag*), however, according to the Federal Administrative Court, only as of 7 July 2009, as this is the date of a decision by the Federal Constitutional Court (*Bundesverfassungsgericht*), stating the normative comparability of both situations.[39]

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[34] Federal Constitutional Court (*Bundesverfassungsgericht*), 6 July 2010, 2 BvR 2661/06; Mahlmann, The Politics of Constitutional Identity and its Legal Frame—the Ultra Vires Decision of the German Federal Constitutional Court, *German Law Journal* 12/2010, 1407-1420.

[35] Federal Constitutional Court (*Bundesverfassungsgericht*), 21 July 2010, 1 BvR 611/07, 1 BvR 2464/07..

[36] Federal Administrative Court (*Bundesverwaltungsgericht*), 28 October 2010, 2 C 52/09. With the same result, but only assuming an *indirect* discrimination: Federal Labour Court (*Bundesarbeitsgericht*), 18 March 2010, 6 AZR 434/07.

[37] Federal Administrative Court (*Bundesverwaltungsgericht*), 28 October 2010, 2 C 56/09.

[38] Federal Administrative Court (*Bundesverwaltungsgericht*), 28 October 2010, 2 C 47/09. Concerning occupational pensions, Lower Saxony *Land* Labour Court (*Landesarbeitsgericht Niedersachsen*), 28 September 2010, 3 Sa 540/10 B (not final) confirmed the previous jurisdiction by the Federal Labour Court (*Bundesarbeitsgericht*), 14 January 2009, 3 AZR 20/07, applying the same standards surviving partners who lived in a registered same sex partnership as to surviving spouses.

[39] Federal Administrative Court (*Bundesverwaltungsgericht*), 28 October 2010, 2 C 21/09. However, a court of first instance, Münster Administrative Court (*Verwaltungsgericht Münster*), 14 June 2010, 4 K 901/09, argued that the family allowance is to be granted as of the registration of the partnership. On the decision by the Federal Constitutional Court (*Bundesverfassungsgericht*), 7 July 2009, 1 BvR 1164/07, and the previously conflicting case law on the matter see the Country report 2009 for the European network of legal experts in the non-discrimination field by this author, p. 15, fn. 43.

- A reference to the Federal Constitutional Court (*Bundesverfassungsgericht*) concerns the question whether a provision which does not permit a partner living in a registered same sex partnership (*eingetragene Lebenspartnerschaft*) to adopt his/her partner's child if this child was originally adopted by the latter (so-called "successive adoption") – while such successive adoptions are possible for married couples – is constitutional or not.[40]
- A court held that the authority of a public school can forbid a Muslim pupil to pray (aloud) on the school premises, inter alia in order to prevent conflict with other pupils. The absence of pray rooms was equally held to be legitimate. The court argued that although praying in public schools falls within the scope of freedom of religion, this right is limited by other constitutional values, particularly the neutrality of the state which requires equal treatment of all religions. In that respect, to provide a space for all prayers of all religions would not be possible due to organisational constraints.[41]
- The Federal Administrative Court (*Bundesverwaltungsgericht*) decided that not granting a civil servant the right to special (and paid) leave for a regional convention of Jehovah's Witnesses does not constitute a direct discrimination based on religion. It left open whether a provision which granted this privilege particularly to civil servants who take part in the German Catholic Convention (*Deutscher Katholikentag)* or the German Protestant Convention (*Deutscher Evangelischer Kirchentag*) was constitutional or not but argued that a regional convention of Jehovah's Witnesses is not comparable to the Catholic or Protestant Conventions because of different social impact.[42]
- The Federal Labour Court (*Bundesarbeitsgericht*) upheld a dismissal based on the lack of an employee's language skills. The ability to read work instructions in German was held to be a legitimate demand of the employer, not constituting an indirect discrimination on the ground of ethnic origin. According to the court, several unsuccessful attempts of the employer to improve the language skills of the worker justified the dismissal.[43]
- In a case widely discussed in German public, a court of first instance decided that the rejection (noted on the applicant's CV) of a job application based on the fact that the applicant was born in the former GDR does not constitute a discrimination on the ground of ethnic origin since people from Eastern Germany were not ethnically different from other Germans; other grounds were not considered.[44]

[40] Hamburg Higher Regional Court (*Hanseatisches Oberlandesgericht*), 22 December 2010, 2 Wx 23/09.
[41] Berlin Administrative Appeals Tribunal (*Oberverwaltungsgericht Berlin*), 27 May 2010, OVG 3 B 29.09.
[42] Federal Administrative Court (*Bundesverwaltungsgericht*), 25 November 2010, 2 C 32/09.
[43] Federal Labour Court (*Bundesarbeitsgericht*), 28 January 2010, 2 AZR 764/08.
[44] Stuttgart Labour Court (*Arbeitsgericht Stuttgart*), 15 April 2010, 17 Ca 8907/09. The parties agreed on a settlement in the next instance.

- The Federal Labour Court (*Bundesarbeitsgericht*) decided that generally, a discrimination of a job applicant only comes into question when this person applied for the job before it was assigned to somebody else.[45] However, the job applicant can also be discriminated against by the form of the application procedure, e.g. when the employer assigns the position before the end of the closing date (set up by him-/herself).[46]
- Following a decision by the CJUE,[47] the Federal Labour Court (*Bundesarbeitsgericht*) confirmed that the provision of Sec. 622.2 sentence 2 Civil Code (*Bürgerliches Gesetzbuch*) which stated that employment periods under the age of 25 are not to be taken into account when determining notice periods, is in breach of European anti-discrimination law and is thus not to be applied; this holds for all dismissals from the end of the deadline for transposal of Directive 2000/78 on 2 December 2006.[48]
- According to the Federal Labour Court (*Bundesarbeitsgericht*), a job advertisement which states that "young" applicants are wanted, constitutes a discrimination on the ground of age.[49] This, another court specified, holds also for cases, in which the employer describes *him-/herself* in the job advertisement (under the headline "we offer") as "young team" since an average reader will understand this in a way that he or she would only fit into the team if he or she was young him-/ herself.[50]
- In a number of cases, provisions of the *Länder* which prescribe retirement age of 65 years (now mostly gradually elevated to 67) for civil servants were held to be justified. The courts argued, inter alia, that these regulations were required by the need to give younger generations a chance to employment.[51] However, one court submitted a preliminary reference to the CJUE, asking whether such a provision is in accordance with Directive 2000/78.[52]

[45] Federal Labour Court (*Bundesarbeitsgericht*), 19 August 2010, 8 AZR 370/09; similar: Cologne *Land* Labour Court, 1 October 2010, 4 Sa 796/10.
[46] Federal Labour Court (*Bundesarbeitsgericht*), 17 August 2010, 9 AZR 839/08.
[47] ECJ, C-555/07 (*Kücükdeveci*), 19 January 2010.
[48] Federal Labour Court (*Bundesarbeitsgericht*), 1 September 2010, 5 AZR 700/09. Cf. also: Düsseldorf *Land* Labour Court (Landesarbeitsgericht Düsseldorf), 17 February 2010, 12 Sa 1311/07; Hessian *Land* Labour Court (*Hessisches Landesarbeitgericht*), 23 March 2010, 19 Sa 1309/ 09; Düsseldorf *Land* Labour Court (Landesarbeitsgericht Düsseldorf), 30 March 2010, 9 Sa 354/09.
[49] Federal Labour Court (*Bundesarbeitsgericht*), 19 August 2010, 8 AZR 530/09.
[50] Hamburg *Land* Labour Court (*Landesarbeitsgericht Hamburg*), 23. June 2010, 5 Sa 14/10.
[51] Gelsenkirchen Administrative Court (*Verwaltungsgericht Gelsenkirchen*), 19 February 2010, 12 K 131/08; Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*), 9 August 2010, 3 CE 10.927; Schleswig-Holstein *Land* Administrative Appeals Court (*Oberverwaltungsgericht für das Land Schleswig-Holstein*), 23 August 2010, 3 MB 18/10; Saarland Administrative Court (*Verwaltungsgericht des Saarlandes*), 14 September 2010, 2 K 605/09; Neustadt Administrative Court (*Verwaltungsgericht Neustadt*), 16 November 2010, 6 K 753/10.NW.
[52] Frankfurt Administrative Court (*Verwaltungsgericht Frankfurt*), 29 March 2010, 9 K 3854/09.F (= ECJ C-159/10 and 160/10).

- Several other new preliminary references to the CJUE were submitted by German courts: Thus, it was asked whether the differentiation of salary based on the age of the employee in the (meanwhile replaced) federal labour agreement for public employees (*Bundesangestelltentarifvertrag*) constituted an unjustified discrimination on the ground of age or was justified as a generalised reward for professional experience.[53] If the mentioned provision should be considered as an unjustified discrimination, it was further asked, whether by a new collective agreement for public employees (namely the *Tarifvertrag für den öffentlichen Dienst*) that does not contain the differentiation by age itself but provides for the transfer from the former collective agreement's salary levels according to the status in the moment of transition, perpetuates such a discrimination.[54] Concerning a case about discrimination on the ground of sex (not covered by this report), the Federal Labour Court (*Bundesarbeitsgericht*) asks the – for other grounds of discrimination equally important – question, whether a rejected job candidate who was objectively qualified for a position has a right to be informed by the employer whether the latter has finally employed somebody else and, if so, on which set of criteria the choice was based.[55] Another preliminary reference was formulated on the question whether in case of termination for operational reasons, the creation of age groups in social choice (*Sozialauswahl*)[56] – with the consequence that the average age of the personnel will be approximately the same before and after restructuring – can be justified by the aim to preserve a balanced age structure in the company.[57]
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Other case law is reported in the relevant sections below.

Cases within the scope of the AGG or the Directives brought by Roma and Travellers are not reported for 2010.[58] The case law reported in this area over the last years is limited. Accordingly, there are no patterns of jurisprudence discernable.

Further decisions in 2010 include:

1) General

Lüneburg Administrative Appeals Court (*Oberverwaltungsgericht Lüneburg*), 11 January 2010, 5 LA 105/09: The anti-discrimination provisions of the AGG may apply

[53] Federal Labour Court (*Bundesarbeitsgericht*), 20 May 2010, 6 AZR 148/09 (A) (= ECJ C-298/10). Earlier in 2010, the Hessian *Land* Labour Court (*Hessisches Landesarbeitgericht*), 6 January 2010, 2 Sa 1121/09, decided that the very same provision constituted an unjustified discrimination on the ground of age. However, this decision was partly annulled by the next instance, Federal Labour Court (*Bundesarbeitsgericht*), 19 October 2010, 6 AZR 115/10.
[54] Federal Labour Court (*Bundesarbeitsgericht*), 20 May 2010, 6 AZR 319/09 (A) (= ECJ C-297/10).
[55] Federal Labour Court (*Bundesarbeitsgericht*), 20 May 2010, 8 AZR 287/08 (A) (= ECJ C-415/10).
[56] On this concept, see below, 4.7.4 e).
[57] Siegburg Labour Court (*Arbeitsgericht Siegburg*), 27 January 2010, 2 Ca 2144/09 (= ECJ, C-86/10).
[58] No such cases are known to the Central Council of Sinti and Roma in Germany, personal communication to this rapporteur for 2010.

to the procedure for the election of a municipal civil servant (*kommunaler Wahlbeamter*), e.g. the nomination of candidates by the mayor.
Federal Labour Court (*Bundesarbeitsgericht*), 18 March 2010, 8 AZR 1044/08: Compensation for material and immaterial damages (Se. 15.1 and 15.2 AGG) require that a job candidate was objectively qualified for the position; the question of objective qualification is not to be answered by formal profile of requirements by employer but by prevailing professional opinion, as specified by the Court.[59]

Hessian *Land* Labour Court (*Hessisches Landesarbeitsgericht*), 23 April 2010, 19/3 Sa 47/09: Public employer has an obligation to keep records of selection procedure; violation of this obligation may reverse onus of presentation (*Darlegungslast*) and lead to entitlement to employment by the rejected candidate.

Bremen *Land* Labour Court (*Landesarbeitsgericht Bremen*), 29 June 2010, 1 Sa 29/10: In case of discriminatory dismissal, claim to compensation for immaterial damages (Sec. 15.2 AGG) is not excluded by Sec. 2.4 AGG, which states that "only the provisions governing the protection against unlawful dismissal in general and specific cases shall apply to dismissals".

Cologne *Land* Labour Court (*Landesarbeitsgericht Köln*), 13 December 2010, 2 Sa 924/10: A discrimination in a multi-level application procedure consists in not being approved to the next stage; a discrimination is disproved if several applicants with the same attribute (e.g. advanced age, or "migrational background") as the plaintiff have reached the next level of application procedure.

Freiburg Administrative Court (*Verwaltungsgericht Freiburg*), 28 December 2010, 5 K 989/10: Compensation for immaterial loss according to Sec. 15.2 AGG may be regarded as "income" and thus may exclude entitlement to legal aid (for further lawsuits).

2) Age

Hamburg *Land* Labour Court (*Landesarbeitsgericht Hamburg*), 19 January 2010, 4 Sa 40/09: A (meanwhile modified, see Fn.) provision which exempts employees younger than 35 years old at the moment their employment ends from claiming non-forfeitable future occupational pensions (*unverfallbare Betriebsrentenanwartschaft*) is justified by the public interest to encourage, not to discourage, the granting of such benefits by employer.[60]

[59] Cf. for similar decision: Berlin-Brandenburg *Land* Labour Court, 10 November 2010, 17 Sa 1410/10 (not final).
[60] Marburg Labour Court (*Arbeitsgericht Marburg*), 15 October 2010, 2 Ca 192/10: Same result for new age limit of 25 years, justified, inter alia, by employer's interest to reward seniority and thereby constancy of employment.

Cologne *Land* Labour Court (*Landesarbeitsgericht Köln*), 10 February 2010, 5 Ta 408/09: The comment by the manager of human resources department that an applicant was "anyway too old" does not constitute evidence for a discrimination on the ground of age if the very applicant is evidently not qualified for a position due to his "provocative behaviour" in job interview (appearing without appointment and ultimately demanding employment).

Federal Labour Court (*Bundesarbeitsgericht*), 25 February 2010, 6 AZR 911/08: An employer who offers the termination of work contracts and payment of compensation only to employees born after 1951 does not (illegitimately) discriminate against older employees if the latter remain employed (part-time) until retirement.[61]

Düsseldorf Administrative Court (*Verwaltungsgericht Düsseldorf*), 8 March 2010, 13 K 6883/09: A provision which prescribes retirement age of 65 years (now subsequently elevated to 67 years) for judges is justified, inter alia, by legitimate aim to cause "beneficial mixture in age structure" among judges.

Federal Hight Court of Justice (*Bundesgerichtshof*), 22 March 2010, NotZ 16/09: Age limit of 70 years for notaries is not covered by Directive 78/2000; otherwise it would be justified in order to give younger generations a chance to employment.[62]

Federal Labour Court (*Bundesarbeitsgericht*), 23 March 2010, 1 AZR 832/08: A provision in a social plan (redundancy programme, *Sozialplan*) which allows for less compensation for employees above the age of 59 is justified if the remaining amount still accomplishes the purpose to grant aid for the transitional period until drawing of retirement allowance.

Berlin-Brandenburg *Land* Labour Court (*Landesarbeitsgericht Berlin-Brandenburg*), 24 March 2010, 20 Sa 2058/09 (not final): A provision on the number of leave days in a collective agreement for public employees which differentiates according to age with the consequence that younger employees can demand less vacations days than older employees is justified by the consideration that older employees need more time for recreation.[63]

Federal Labour Court (*Bundesarbeitsgericht*), 20 April 2010, 3 AZR 509/08: A provision in an occupational pension scheme which grants benefits to surviving dependants

[61] Same result: Lower Saxony *Land* Labour Court (*Landesarbeitsgericht Niedersachsen*), 15 March 2010, 9 Sa 517/09.
[62] An appeal against this decision to the Federal Constitutional Court (*Bundesvefassungsgericht*), 5 January 2011, 1 BvR 2870/10 was rejected (after cut-off date of this report).
[63] Conflicting case-law. Wesel Labour Court (*Arbeitsgericht Wesel*), 11 August 2010, 6 Ca 736/10 (not final) decided that a similar provision in a framework collective agreement (*Manteltarifvertrag*) constitutes an unjustified discrimination on the ground of age.

only when married before (premature) termination of employment is justified by considerations to minimize employer's risk concerning duration of granting benefits.
Federal Labour Court (*Bundesarbeitsgericht*), 4 May 2010, 9 AZR 184/09: A public employee is not discriminated against on the ground of age if – following a certain kind of part-time employment (en-bloc-model) prior to retirement in which the (public) employee for a certain period works 100 percent and in a second period 0 percent – he/she is released from any actual work in the second period and is thus exempt from an otherwise automatic progression to a higher salary group (*Bewährungsaufstieg*.

Hagen Labour Court (*Arbeitsgericht Hagen*), 11 May 2010, 1 Ca 200/10 (not final): A provision in a labour agreement for employees of church institutions which prescribes age limit, by cross reference to general retirement age of 65 years (now gradually elevated to 67), is justified by difficult situation on labour market.

Stuttgart Labour Court (*Arbeitsgericht Stuttgart*), 12 May 2010, 20 Ca 2326/09 (not final): An employment agreement which assigns so-called "short-time work zero" (*Kurzarbeit Null*) – continued payment of large percentage of salary for a certain period without work – to all employees of a company close to retirement age (in the case: above age of 58) constitutes an unjustified discrimination on the ground of age and is thus void.

Schleswig-Holstein *Land* Labour Court (*Landesarbeitsgericht Schleswig-Holstein*), 22 June 2010, 5 Sa 415/09 (not final): A provision which grants entitlement to part-time employment prior to retirement (*Altersteilzeit*) only to employees from the age of 60 years may be disadvantageous for younger employees but is justified in light of health protection of elderly employees as well as in order to provide opportunities to young professionals and unemployed people.

Federal Labour Court (*Bundesarbeitsgericht*), 23 June 2010, 7 AZR 1021/08: As decided in a very similar case before,[64] a provision in a framework collective labour agreement which limits the employment of flight attendants to the age of 60 is in breach of anti-discrimination-law.

Berlin-Brandenburg Administrative Appeals Court (*Oberverwaltungsgericht Berlin-Brandenburg*), 28 June 2010, OVG 4 S 98.09: Age limit of 42 years for use in special police forces (*Sondereinsatzkommando*) is legitimate in order to uphold functioning of special police forces since length of selection procedure and training period do not allow for quick replacement in case of sudden decline of mental and physical fitness.

Hamburg Labour Court (*Arbeitsgericht Hamburg*), 26 July 2010, 22 Ca 33/10: A provision in a collective agreement which automatically terminates all employment

[64] Federal Labour Court (*Bundesarbeitsgericht*),16 October 2008, 7 AZR 253/07. Cf. the 2008 country report for the European network of legal experts in the non-discrimination field by this author.

contracts under the collective agreement when the employee reaches the general retirement age constitutes a discrimination on the ground of age.
Cologne Higher Regional Court (*Oberlandesgericht Köln*), 29 July 2010, 18 U 196/09 (not final): Denial of continued employment of a 65 years old medical director of a municipal hospital firm is not justified by the purpose of long-term employment of a (younger) director in face of fundamental changes in the health care market.

Hamburg Administrative Appeals Court (*Hamburgisches Oberverwaltungsgericht*), 10 August 2010, 1 Bs 121/10: If a public employer has to transfer a civil servant to a different location and therefore has to make a social choice (*Sozialauswahl*) among his or her employees, it constitutes a discrimination on the ground of age if age as a factor of social choice is disproportionally taken into account compared to other interests, e.g. familial situation.

Saarland Administrative Court (*Verwaltungsgericht des Saarlands*),10 August 2010, 2 L 547/10 (not final): A provision which prescribe retirement age of 60 years for police officers is justified due to the consideration that, because of special mental and physical stress, police officers tend to be unfit for service earlier than other public employees.

Federal Social Security Court (*Bundessozialgericht*),18 August 2010, B 6 KA 18/10 B: Following the CJUE decision *Petersen* (12 January 2010, C-341/08), the (meanwhile abrogated)[65] maximum age requirement of 68 years for physicians as far as their licence for the public health system (*gesetzliche Krankenversicherung*) is concerned is justified in order to give younger generations a chance to employment.

Hessian Higher Administrative Court (*Hessischer Verwaltungsgerichtshof*), 14 September 2010, 2 A 1337/10: Higher prices for train tickets when purchased at a counter as opposed to purchase via the internet or at a ticket machine do not constitute a discrimination on the ground of age since statistics of interviews show that decisions to buy ticket at a counter are more often based on reasons of convenience than on technical skills.

Bremen Administrative Appeals Court (*Oberverwaltungsgericht der Freien Hansestadt Bremen*), 14 September 2010, 1 A 265/09: Age limit of 68 for authorisation as medical-aeronautical expert with the permission to issue certificates of pilot's fitness is legitimate due to considerations of safety of air traffic.

Baden-Württemberg *Land* Labour Court (*Landesarbeitsgericht Baden-Württemberg*)27 September 2010, 4 Sa 7/10: A provision which limits the accountable years of seniority for future occupational pensions to 40 years may disadvantage employees who started to work in the respective company before the age of 25 but can be justified, inter alia, by company-related reasons.

[65] See the 2009 country report for the European network of legal experts in the non-discrimination field by this author, p. 91, Fn. 285.

Saarland Administrative Appeals Court (*Oberverwaltungsgericht Saarland*), 29 September 2010, 1 A 157/10: A minimum age requirement of 40 years for the promotion to the upper grade of civil service (*Laufbahn des gehobenen Dienstes*) in the field of tax administration is justified due, inter alia, to significance of "experience of life" and the assumption that older men and women are more likely to be accepted as superiors by their colleagues.

Federal Labour Court (*Bundesarbeitsgericht*), 13 October 2010, 5 AZR 378/09: No discrimination on the ground of age by collective agreement which sets up a method of calculation to transform overtime and working hours during night and public holidays into work time bonus even if this has the effect that bonus is smaller for employees with higher income since, the court argues, there was "no necessary correlation" between income group and age.

3) Disability

Bavarian Administrative Appeals Court (*Bayerischer Verwaltungsgerichtshof*), 27 January 2010, 12 B 08.1978: Although a discrimination on the ground of disability is presumed when severely disabled candidate for the position of a judge is not invited to job interview (as required by Sec 82 Social Code IX (*Sozialgesetzbuch IX*) for all public employers), the employer can disprove the presumption by showing that he/she selected applicants decisively by grade reached in state examination for future jurists.

Nürnberg *Land* Labour Court (*Landesarbeitsgericht Nürnberg*), 24 February 2010, 3 Sa 273/09 (not final): A provision in the guidelines for working contracts of the *Caritas* organisation (a Catholic social service organisation) which exempts disabled employees who are employed for the purpose of rehabilitation or social reintegration from the scope of application of the guidelines is not evidently adequate to justify a disadvantageous treatment of severely disabled employees.

Hessian *Land* Labour Court (*Hessisches Landesarbeitsgericht*), 24 March 2010, 6/7 Sa 1373/09 (not final): A (future) employee is allowed to falsely deny when asked by an employer in a standard form – irrespective of concrete professional tasks – whether the employee is legally recognized as a severely disabled person; rescission of employment contract or dismissal because of false answer are inadmissible.

Düsseldorf *Land* Labour Court (*Landesarbeitsgericht Düsseldorf*), 25 March 2010, 11 Sa 1618/09 (not final): No discrimination if a disabled employee is dismissed because of duration of absence due to unfitness to work if the dismissal is based on illness, not on disability.

Düsseldorf Labour Court (*Arbeitsgericht Düsseldorf*), 23 April 2010, 10 Ca 7038/09: The requirement to completete an assessment procedure can be justified even if person with certain disability cannot participate in the specific procedure.

Karlsruhe Higher Regional Court (*Oberlandesgericht Karlsruhe*), 27 May 2010, 9 U 156/09: Although „illness" and „disability" are not equivalent in anti-discrimination law, it may constitute an indirect discrimination if an insurance company takes into account an illness which is the cause for a disability when deciding about the conclusion of a private insurance contract; however, such a disadvantageous treatment is justified when the decision of insurance company is based on reasonable – not necessarily statistically based – considerations of risk.

Hamm *Land* Labour Court (*Landesarbeitsgericht Hamm*), 30 June 2010, 2 Sa 49/10 (not final): An employer can ask an employee whether he/she is severely disabled if the only reason to ask such a question is to inform the employee of protective provisions for severely disabled persons (in the case: necessary approbation of reintegration agency (*Integrationsamt*)) in the context of imminent dismissal; the employee cannot invoke violation of these protective provisions by his/her employer if employee has denied status as severely disabled person when asked; this is even more the case if reintegration agency finally consented to his/her dismissal.

Baden-Württemberg Administrative Appeals Court (*Verwaltungsgerichtshof Baden-Württemberg*), 12 July 2010, 4 S 1333/10: Claims to compensation for immaterial damages because of discrimination on the ground of disability do not concern the public welfare system for the severely disabled (*Schwerbehindertenfürsorge*) and are thus not exempt from court fees.

Federal Labour Court (*Bundesarbeitsgericht*), 17 August 2010, 9 AZR 839/08: Not to be included in a selection procedure leading to employment or promotion already constitutes a disadvantageous treatment; a causal connection between disability and such a treatment is already given if disability is only part of a "bundle of motives" (*Motivbündel*); omission of certain actions by employer with the consequence that severely disabled person has objectively smaller chances to employment are sufficient, culpability or intention are not necessary.

Baden-Württemberg *Land* Labour Court (*Landesarbeitsgericht Baden-Württemberg*), 6 September 2010, 4 Sa 18/10 (not final): Sec 82 Social Code IX (*Sozialgesetzbuch IX*) requires that a public employer invites a severely disabled applicant to a job interview also if the position is to cover maternity leave (*Mutterschaftsvertretung*); however, if the candidate does not clearly indicates the severity of his/her disability, the employer does not have an obligation to ask for degree of disability.

North Rhine-Westphalia Administrative Appeals Court (*Oberverwaltungsgericht Nordrhein-Westfalen*), 6 September 2010, 6 A 1313/08: No discrimination on the ground of disability by dismissal of teacher from appointment as civil servant on probation (*Beamtenverhältnis auf Probe*) due to psychiatric illness; no "disability" in the sense of Directive 78/2000 if certain impairments are not permanently present but commonly arise in situations of stress and conflict.

Hamm *Land* Labour Court (*Landesarbeitsgericht Hamm*), 28 September 2010, 9 Sa 865/10 (not final): Not contacting the Agency for Labour (*Agentur für Arbeit*) in order to verify that a position cannot be filled by a severely disabled unemployed person, as required by Sec. 81.1 Social Code XI (*Sozialgesetzbuch IX*) is sufficient for presuming a discrimination; the causality for non-employment, however, is not given when the (private) employer can substantiate that the candidate was not qualified due to previous behaviour; the employer can bring up these reasons for the first time during the proceedings (no preclusion).

Hessian *Land* Labour Court (*Hessisches Landesarbeitsgericht*), 5 October 2010, 13 Sa 488/10: A discrimination on the ground of disability is presumed when a public employer does not invite a severely disabled applicant to a job interview (as required by Sec 82 Social Code IX (*Sozialgesetzbuch IX*)); a provision of a works agreement which states that severely disabled candidates are not to be invited when all parties involved in the selection procedure agree that the person is not qualified violates the prohibition of discrimination and is thus ineffective.

4) Sexual Orientation

Sigmaringen Administrative Court (*Verwaltungsgericht Sigmaringen*), 19 January 2010, 3 K 1552/08: Civil servant living in registered same sex partnership (*eingetragene Lebenspartnerschaft*) is entitled to allowance in case of his/her partner's illness as married civil servant is in case of his/her spouse's illness.

Berlin Labour Court (*Arbeitsgericht Berlin*), 27 January 2010, 55 Ca 9120/09: No discrimination on the ground of sexual orientation by disadvantageous treatment (concerning promotion among other things) of employee because of her heterosexual relationship with a colleague, since having a relationship with a colleague, not heterosexuality was decisive in the specific case.

5) Race and ethnic origin

Hamburg Labour Court (*Arbeitsgericht Hamburg*), 26 January 2010, 25 Ca 282/09: The institutionalized procedure of an employer (in the case: a postal delivery company) to first contact job applicants (in the case: as postman) by telephone before arranging a personal meeting in order to figure out whether each applicant has a sufficient level of German language skills, constitutes an indirect discrimination on the ground of ethnic origin.

6) Religion and belief

Ludwigshafen Labour Court (*Arbeitsgericht Ludwigshafen*), 26 May 2010, 3 Ca 2807/09: Dismissal of a nurse for the elderly (of Muslim faith) by church institution cannot be based on the fact that the nurse is not affiliated to Christian church if this circumstance was known in the moment of employment and did not have any negative effect on the actual employment.

Frankfurt Regional Court (*Landgericht Frankfurt*), 22 June 2010, 12 O 17/10: The ban on entering a hotel, declared by the hotelier against the chairman of an extreme rightist party does not constitute an unjustified discrimination on the ground of philosophical belief (*Weltanschauung*), since neither the AGG nor the Directives cover civil law claims on the ground of philosophical belief.

Federal Labour Court (*Bundesarbeitsgericht*), 8 August 2010, 2 AZR 593/09: Consistent with previous case-law on elementary school teachers,[66] a provision which prohibits the religiously motivated wearing of symbols like the headscarf by kindergarten teacher in municipal nursery is justified by the principle of the religious neutrality of the state, the children's (negative) freedom of religion, the parents' rights to prevent religious instruction of their children and the prevention of the abstract danger to the (religious) "peace in the kindergarten".

Federal Labour Court (*Bundesarbeitsgericht*), 19 August 2010, 8 AZR 466/09: Confirmation of reversal of a decision by a court of first instance which, in 2007, held that the rejection of a Muslim applicant for a position as social educator (*Sozialpädagogin*) in a project of vocational integration for migrants, conducted by a church institution of welfare constituted an unjustified discrimination based on religion not justified by the special regulations on religious discrimination.[67] The Federal Labour Court (*Bundesarbeitsgericht*) argued that the applicant, lacking a certain university degree, was not objectively qualified for the position. Thus, it held, a discussion of Sec.9 AGG (corresponding Art. 4.2 of the Directive 2000/78) was not necessary.

[66] Cf. the Country report 2008 for the European network of legal experts in the non-discrimination field by this author, p. 13.
[67] On the original decision by Labour Court Hamburg (*Arbeitsgericht Hamburg*), 4 December 2007, 20 Ca 105/07, see: Country report 2007 for the European network of legal experts in the non-discrimination field by this author.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

The guarantee of equality[68] provides, first, for equality before the law,[69] which has been interpreted by the Federal German Constitutional Court 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.[70] The guarantee of equality contains, second, special protection against discrimination on the ground of sex,[71] parentage, race, language, homeland and origin, faith, or religious or political opinions.[72] There is a prohibition against disadvantaging somebody because of his or her disability, which implies the admissibility of positive action.[73] The same applies to sex. It is explicitly stated that the state should support the effective realization of the principle of equality for women and men and works towards abolishing current inequalities.[74]

The equality provision of the German Constitution thus combines a broad open-textured guarantee of equality with special prohibitions of discrimination on certain enumerated grounds and certain explicit regulations on positive action.[75] The broad open-textured guarantee of equality makes it possible to extend the protection against unjustified unequal treatment to grounds not explicitly covered in the special prohibitions. Most notably, sexual orientation was therefore included among the forbidden grounds of discrimination though not explicitly listed in the guarantee of equality. Age is without doubt another characteristic covered, though there is so far no differentiated jurisdiction of the German Constitutional Court on age discrimination.

[68] Article 3 Basic Law (*Grundgesetz*).
[69] Article 3.1 All humans are equal before the law.
[70] Settled case law, BVerfGE (Decisions of the Federal Constitutional Court) 49, 148 (165); 98, 365 (385).
[71] Article 3.3 and Article 3.2 Basic Law (*Grundgesetz*): Men and women are equal.
[72] Article 3.3 sentence 1 Basic Law (*Grundgesetz*).
[73] Article 3.3 sentence 2 Basic Law (*Grundgesetz*).
[74] Article 3.2 sentence 2 Basic Law (*Grundgesetz*).
[75] There are other provisions, e.g. Article 9.3 sentence 2 Basic Law (*Grundgesetz*) makes null measures directed at impeding the activities of unions and its members.

As Germany is a federal state, the *Länder* (states) have constitutions with their own guarantee of equality whose details differ from the guarantee of equality of the Basic Law.[76] In practice, this has not had any significant legal effect due to the supremacy of the federal constitution and the congruent interpretation of fundamental rights by *Land* constitutional courts and the Federal German Constitutional Court.[77]

b) Are constitutional anti-discrimination provisions directly applicable?

All fundamental rights, and therefore the guarantee of equality, are binding on the legislature, executive, and judiciary as directly valid law, Art. 1.3 Basic Law.

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

[76] State/Provision /Ground/Content concerning differences from the federal guarantee of equality: Bavaria: Constitution of the Free State of Bavaria (*Verfassung des Freistaates Bayern*), Article 118a; Disability; promotion of equalisation; Berlin: Constitution of Berlin (*Verfassung von Berlin*), Article 10 Section 2; Sexual identity; prohibition of discrimination; Ibid., Article 11; Disability; promotion of equality; Brandenburg: Constitution of the *Land* of Brandenburg (*Verfassung des Landes Brandenburg*), Article 12 Section 2; Sexual identity, nationality, social background; prohibition of discrimination; Ibid., Article 12 sec 4; Disability; promotion of equality; Ibid., Article 25; Ethnic minority of the Sorbs; Right to own national identity, language, culture, schools, participation in legislation regarding Sorbian affairs; Bremen: Constitution of the Free Hanseatic City of Bremen (*Landesverfassung der Freien Hansestadt Bremen*), Article 2 Section 2; Social background; prohibition of discrimination; Ibid., Article 2 Section 3; ; Disability; promotion of equality; Mecklenburg - West Pomerania: Constitution of the *Land* of Mecklenburg - West Pomerania (*Verfassung des Landes Mecklenburg-Vorpommern*), Article 17a, Article 18; Old age, disability, ethnic and national minorities and groups; special protection, when minority or group consists of German citizens; North Rhine - Westphalia: Constitution for the *Land* of North Rhine-Westphalia (*Verfassung für das Land Nordrhein-Westfalen*), Article 13; Religion; prohibition on denying schooling for religious reasons in public schools in absence of confession schools; Rhineland - Palatinate: Constitution for Rhineland-Palantine (*Verfassung für Rheinland-Pfalz*), Article 17 Section 2; Diverse grounds (groups of persons (*Personengruppen*)); Prohibition of discrimination; Ibid., Article 17 Section 4; Ethnic and linguistic minorities; Respect (*Achtung*); Ibid., Article 64; Disability; protection, promotion of equality and integration; Saxony: Constitution of the Free State of Saxony (*Verfassung des Freistaates Sachsen*), Article 6; Ethnic minority of the Sorbs; Right to own national identity, language, culture, tradition, schools; Saxony - Anhalt: Constitution of the *Land* of Saxony-Anhalt (*Verfassung des Landes Sachsen-Anhalt*), Article 37; Ethnic minorities; Protection of cultural independence and political participation; Ibid., Article 38; Old age, disability; protection of disabled and elderly people, promotion of equality; Schleswig - Holstein: Constitution of the *Land* of Schleswig-Holstein (*Verfassung des Landes Schleswig-Holstein*), Article 5 Section 1, 2; Ethnic minorities, especially Danes and Frisians; Protection of cultural independence and political participation, protection of Danes and Frisians and promotion of their affairs; Ibid., Article 5a; protection of rights and interests of people in need of care; promotion of accommodation; Thuringia: Consitution of the Free State of Thuringia (*Verfassung des Freistaats Thüringen*), Article 2 Section 3; Ethnos, social background, sexual orientation; Prohibition of discrimination; Ibid., Article 2 Section 4; special protection of people with disabilities, promotion of equal participation in social life.

[77] See Article 31 Basic Law (*Grundgesetz*): Federal Law takes precedence over *Land* law. However, Article 142 Basic Law (*Grundgesetz*) states that notwithstanding the provision of Article 31, provisions of *Land* constitutions guaranteeing basic rights in conformity with Articles 1 to 18 of the Federal Constitution remain in force. This provision gives *Länder* some space for independent guarantees of fundamental rights.

Fundamental rights have according to settled case law no direct horizontal effect.[78]

However, they 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.[79]

[78] BVerfGE 7, 198.
[79] BVerfGE 7, 198, settled case law, see supra O.1. A possible exception to this rule is Art. 1 Basic Law (*Grundgesetz*).

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

The constitutional guarantee of equality covers explicitly sex, parentage, race, language, homeland and origin, faith, religion, political opinion and disability. As the guarantee includes an open-textured general principle, other grounds are potentially included as well. The Federal Constitutional Court regards sexual orientation and identity as part of the human personality as protected by the guarantee of human dignity and the general right to personality.[80] The guarantees in the constitutions of the *Länder* differ in their details from this list, without this being – as mentioned – of practical significance.[81]

The AGG covers all grounds of the directives. Sexual orientation is substituted by the term sexual identity, without this having any discernable practical legal relevance.

The SoldGG covers all grounds with the exception of age and disability, taking advantage of the exception for the military service in Art. 3.4 Directive 2000/78. There are, however, regulations on severely disabled soldiers.[82]

Other specialised legislation contains slightly modified lists. The main examples are the following: Section 9 Federal Law on the Civil Service (*Bundesbeamtengesetz*) repeats the principle of access to the civil service according to aptitude, qualifications, and professional achievements and prohibits discrimination in access to the civil service on the grounds of sex, parentage, race or ethnic origin, disability, religion and belief, political opinions, origin, relations or sexual identity.[83] Age (*Alter*) is not explicitly included, though implicitly covered, among others through Sec. 24 AGG. Section 67 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*) obliges employers and employees in the public sector to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities, or attitude or sex or sexual identity.[84]

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

[81] See Footnote 76.

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

[83] *Geschlecht, Abstammung, Rasse oder ethnische Herkunft, Behinderung, Religion oder Weltanschauung, politische Anschauungen, Herkunft, Beziehungen oder sexuelle Identität.*

[84] *Rasse, ethnische Herkunft, Abstammung oder sonstige Herkunft, Nationalität, Religion oder Weltanschauung, Behinderung, Alter, politische oder gewerkschaftliche Betätigung oder Einstellung, Geschlecht, sexuelle Identität.*

At *Land* level, the legal regulations for civil servants and other public employees were amended because of a change of the legal regulation of civil servants in 2008/2009.[85]

According to Section 75.1 Work Constitution Act (*Betriebsverfassungsgesetz*), employers and work councils are under an obligation to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitudes, sex or sexual identity.[86] Section 27.1 Law on Bodies of Executives *(Sprecherausschussgesetz*) contains an equivalent provision for executives.

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

The general principle of equal treatment of employees protects employees generally against unequal treatment without objective reason. It is generally held that discrimination on the ground of characteristics listed in Section 67.1 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*) or Section 75.1 Work Constitution Act (*Betriebsverfassungsgesetz*) lack objective reason and can be regarded as unlawful arbitrary treatment. The AGG enforces this view.

Legislation regulating public and private employment includes several measures at federal and *Länder* level prohibiting discrimination on the ground of disability.[87]

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[85] See Annex 1.

[86] *Rasse, ethnische Herkunft, Abstammung oder sonstigen Herkunft, Nationalität, Religion oder Weltanschauung, Behinderung, Alter, politische oder gewerkschaftliche Betätigung oder Einstellung, Geschlecht, sexuelle Identität*.

[87] Cf. Section 81.2 Social Code IX (*Sozialgesetzbuch* IX), referring to the AGG. The prohibition of discrimination on the basis of disability binds the partners to a collective wage agreement (unions and management), BAGE (Decisions of the Federal Labour Court) 108, 333. *Land* anti-discrimination laws exist in all German *Länder*: Baden-Wuerttemberg: *Land* Law on Promoting the Equality of People with Disabilities (*Landesgesetz zur Gleichstellung von Menschen mit Behinderungen*), Date: 03.05.2005, Gesetzblatt 2005, 327; Bavaria: Bavarian Law on Promoting the Equality, Integration and Participation of People with Disabilities (*Bayerisches Gesetz zur Gleichstellung, Integration und Teilhabe von Menschen mit Behinderung*), Date: 09.07.2003, Gesetz- und Verordnungsblatt 2003, 419, last amendment: 22.07.2008, Gesetz- und Verordnungsblatt 2008, 479; Berlin: Law on Equal Opportunities for People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung*), Date: 17.05.1999, last amendment 15.12.2010; Brandenburg: Law on Promoting the Equality of Disabled People in the *Land* of Brandenburg (*Gesetz zur Gleichstellung behinderter Menschen im Lande Brandenburg*), Date: 20.03.2003, Gesetz- und Verordnungsblatt I 2003, 42; Bremen: Bremen Law on Promoting the Equality of Disabled People (*Bremisches Gesetz zur Gleichstellung von Menschen mit Behinderung*), Date: 18.12.2003, Gesetzblatt 2003, 413, last amendment: 24.02.2009, Gesetzblatt 2009, 45; Hamburg: Hamburg Law Promoting the Equality of Disabled People (*Hamburgisches Gesetz zur Gleichstellung behinderter Menschen*), Date: 21.03.2005, Hamburgisches Gesetz- und Verordnungsblatt 2005, 75; Hessen: Hesse Law on Promoting the Equality of People with Disabilities (*Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen*), Date: 20.12.2004, Gesetz- und Verordnungsblatt I 2004, 482, last amendment: 14.12.2009, Gesetz- und Verordnungsblatt I 2009, 729; Mecklenburg – West Pomerania; Law on Promoting the Equality, Equal Participation, and Integration of Disabled People *(Gesetz zur Gleichstellung, gleichberechtigten Teilhabe und Integration von Menschen mit Behinderungen)*, Date: 10.07.2006, Gesetz- und Verordnungsblatt Mecklenburg-Vorpommern 2006, 539, last amendment 17.12.2009, Gesetz- und Verordnungsblatt 2009, 726; Lower Saxony Law on the

There is some law on the prohibition of discrimination on the grounds of sexual orientation[88] and other *Land* laws against discrimination.[89]

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?
Is there a definition of disability at the national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

The AGG contains no legal definitions of the characteristics.[90]

Equality of People with Disabilities (*Niedersächsisches Behindertengleichstellungsgesetz*), Date: 25.11.2007, Niedersächsisches Gesetz- und Verordnungsblatt 2007, 661; North Rhine – Westfalia: Law of the *Land* of North Rhine –Westfalia on Promoting the Equality of People with Disabilities (*Gesetz des Landes Nordrhein-Westfalen zur Gleichstellung von Menschen mit Behinderung*), Date: 16.12.2003, Gesetz- und Verordnungsblatt Nordrhein-Westfalen 2003, 766, last amendment: 18.11.2008, Gesetz- und Verordnungsblatt Nordrhein-Westfalen 2008, 766; Rhineland – Palatinate: *Land* Law on Promoting the Equality of Disabled People (*Landesgesetz zur Gleichstellung behinderter Menschen*), Date: 16.12.2002, Gesetz- und Verordnungsblatt 2002, 481; Saarland: Law No.1541 on Promoting the Equality of People with Disabilities in Saarland (*Gesetz Nr. 1541 zur Gleichstellung von Menschen mit Behinderungen im Saarland*), Date: 26.11.2003, Amtsblatt 2003, 2987; last amendment: 15.02.2006, Amtsblatt 2006, 474; Saxony: Law on Improving Integration for People with Disabilities in the Free State of Saxony (*Gesetz zur Verbesserung der Integration von Menschen mit Behinderung im Freistaat Sachsen*), Date: 28.05.2004, Sächsisches Gesetz- und Verordnungsblatt 2004, 196, 197, last amendment: 14.07.2005, Sächsisches Gesetz- und Verordnungsblatt 2005, 167, 176; Saxony-Anhalt: Law on the Equality of Opportunity and Against Discrimination of Disabled People in the *Land* of Saxony-Anhalt (*Gesetz zur Chancengleichheit und gegen Diskriminierung behinderter Menschen im Land Sachsen-Anhalt*), Date: 20.11.2001, Gesetz- und Verordnungsblatt LSA 2001, 457, last amendment: 16.12.2010, Gesetz- und Verordnungsblatt LSA 2004, 856; Schleswig – Holstein: Law on Promoting the Equality of Disabled People of the *Land* of Schleswig-Holsten (*Gesetz zur Gleichstellung behinderter Menschen des Landes Schleswig-Holstein*), Date: 16.12.2002, Gesetz- und Verordnungsblatt 2002, S. 264, last amendment: 18.11.2008, Gesetz- und Verordnungsblatt 2008, 582; Thuringia: Thuringian Law on Promoting the Equality and Improving the Integration of People with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderungen*), Date: 16.12.2005, Gesetz- und Verordnungsblatt 2005, 383.

[88] See Berlin: Law on Article 10.2 of the Constitution of Berlin (*Gesetz zu Artikel 10 Abs. 2 der Verfassung von Berlin),* 24.06.2004; Saxony-Anhalt: Law on Eliminating the Disadvantages faced by Lesbians and Homosexuals (*Gesetz zum Abbau von Benachteiligungen von Lesben und Schwulen*), 22.12.1997, last amendment 19.03.2002.

[89] Section 15.2 sentence 3 of the Saarland Media Law (*Saarländisches Mediengesetz*) provides for non-discriminatory radio programmes that increase – among others the – respect for the sexual identity of persons; Section 6.3 Law on Public Security and Order of the Saxony-Anhalt *Land* (*Gesetz über die öffentliche Sicherheit und Ordnung des Landes Sachsen-Anhalt*) provides that discretion of the police has to be non-discriminatory, listing sex, parentage, race, disability, sexual identity, language, home and origin, belief, religious or political opinions (*Geschlecht, Abstammung, Rasse, Behinderung, sexuelle Identität, Sprache, Heimat, Herkunft, Glaube, religiöse oder politische Anschauungen*).

Disability

Section 2 Social Code IX (*Sozialgesetzbuch* IX) and Section 3 of the Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) provide the most important legal definition of disability. According to these provisions human beings are disabled if their physical functions, mental faculties or their psychological health have a high probability of differing from the state typical for the given age for longer than 6 months and if, in consequence, their participation in society is impaired. This definition is close to the findings of the CJUE in C-13/05 (*Chacón Navas*).

Human beings are *schwerbehindert* (severely disabled) if their disability reduces their ability to participate in working life by at least 50%. Persons with a degree of disability of less than 50% but more than 30% are treated as severely disabled persons if they cannot find or maintain employment due to their disability.[91] The degree of disability is established by the administration[92] applying standards defined by experts and the administration, the details of which are contentious. A minimum impairment of 20% is necessary for an declaration of the degree of disability in this procedure.[93]

The *Land* disability laws mostly follow the definition of disability.[94]

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?

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[90] The explanatory report gives some, however, not binding indication, cf. Bundestagsdrucksache 16/1780, 31. It is explained that the term race does not imply the acceptance of racist theories. It is stated that ethnic origin is to be understood according to the definitions of CERD, including race, colour, parentage, national origin or ethnicity, without clarifying the exact delineation of these terms. Disability is to be understood as in Section 2 Social Code IX (*Sozialgesetzbuch* IX) and Section 3 of the Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) (see below in the text). This reference was recently affirmed by the Federal Labour Court (*Bundesarbeitsgericht*), 22 October 2009, 8 AZR 642/08. Sexual identity is to include homosexual, bisexuel, transsexual and intersexual persons. In legal commentary, transsexuality is regarded as a matter of gender, not sexual identity, cf. Mahlmann, in: Rudolf/Mahlmann, GleichbehandlungsR, § 3 para 63 with further references to the correspondent jurisdiction of the ECJ.

[91] Section 2.3 Social Code IX (*Sozialgesetzbuch* IX).

[92] Section 69.1 Social Code IX (*Sozialgesetzbuch* IX).

[93] Section 69. 1 sentence 6 Social Code IX (*Sozialgesetzbuch* IX).

[94] See for the standard formulation Section 3.1 Law on the Equality of the Disabled (*Behindertengleichstellungsgesetz*) Nordrhein-Westfalen; Section 4 Berlin *Land* Equality Law (*Landesgleichberechtigungsgesetz*); for a slightly different definition cf. Section 2.1 Law on the Equality of the Disabled (*Behindertengleichstellungsgesetz*) Saxony-Anhalt: People are disabled if they have physical, psychological or mental impairments or limitation which is not only temporary (i.e. longer than six months) and who are the object of measures, circumstances or treatment by the State and society that limit or worsen their living conditions.

Race and ethnic origin

The guarantee of equality of 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 which has an impact on the legal terminology used in (draft) legislation dealing with the matter.[95]

Race is defined as actual or alleged characteristics that are biologically inherited.[96] It is noteworthy that anti-Semitism is regarded as discrimination on the ground of race, not of religion, because of the historic background of Nazi ideology.[97] Ethnic origin is covered by the term "race". The belonging to autochthonous minorities (i.e. the Danish minority, the Sorbian people, the Frisians in Germany and the German Sinti and Roma)[98] is determined in *Land* law with reference to subjective standards such as self-definition and other indicators.[99]

Apart from constitutional law, there are various special laws that refer to race, for example the law on residence,[100] or the law on the restitution of victims of persecution during the period of Nazi government.[101] In criminal law, there are provisions penalising incitement to racial hatred.[102] In these contexts race is defined along the lines of constitutional law.

Religion and belief

The most important definition of religion and belief stems from the interpretation of the guarantee of freedom of religion[103] by the Federal German Constitutional Court. Here the freedom of faith, conscience and of religious and philosophical (*weltanschaulichen*) belief is protected. The terms religion and belief are not defined at constitutional level. However, through the rulings of the Federal Constitutional Court and legal science these terms have gained a more or less uncontested meaning.

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[95] The Federal German Constitutional Court used the term "racial" (*rassisch*) only in quotation marks, cf. BVerfGE 23, 98, 105 et seq.
[96] See Osterloh, in: Sachs, Grundgesetz, 5. ed., 2009, Article 3 para 293, 294.
[97] See BVerfGE 23, 98; Federal Constitutional Court, 1 BvR 1056/95, 6 September 2000.
[98] These groups come under the Council of Europe Framework Convention for the Protection of Minorities, see the declaration of Germany stating: "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".
[99] See below 3.2.8 and references.
[100] E.g. Section 60.1 Residence Law (*Aufenthaltsgesetz*): residence rights in the case of persecution on the grounds of race in a person's home country.
[101] E.g. Section 1.6 Property Law (*Vermögensgesetz*).
[102] Section 130 Penal Code (*Strafgesetzbuch*).
[103] Article 4.1 Basic Law (*Grundgesetz*).

Faith in this context is interpreted as a subjective conviction relating to religion or a philosophical belief (*Weltanschauung)* independently of the content of the religion or belief. Religion and belief encompass a wide range of systems of convictions not limited to those which are well-established.[104] Often, religion and belief are taken to be any specific views as regards the whole of the world and the origin and purpose of mankind which gives sense to human life and the world.[105] 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 immanent system of convictions.[106] This distinction is contested in detail in legal science. But these questions have little practical relevance.

For example, the Federal Constitutional Court accepted as self-evident that Bahá'í is a religion.[107] It relied in this context on current trends in society, cultural tradition and the understanding of religion in general and in religious science.[108] Beyond that, a teleological interpretation of the fundamental freedom of religion is regarded as being decisive.[109]

Sexual orientation

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

Age

Age is generally understood as biological age.

There is no explicit reference to Recital 17 of Directive 2000/78/EC.

c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?

There are no such general restrictions (but cf. 4.7.3).

[104] The Federal German Constitutional Court held in an early decision (BVerfGE 12, 1 (4)) that religion refers only to the traditional religions established among the cultured people. This jurisdiction has been given up.
[105] BVerfGE 90, 112 (115).
[106] Ibid.
[107] BVerfGE 83, 341 (353).
[108] Ibid.
[109] Ibid.
[110] See Article 10.2 Constitution of Berlin (*Verfassung von Berlin*).
[111] See Federal Constitutional Court *(Bundesverfassungsgericht*), 6.12.2005, 1 BvL 3/03, para 48.
[112] Ibid. para 48 et seq. On transsexuals, cf Fn 90.

d) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*
Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?

Sec. 4 AGG provides that any unequal treatment on the basis of several prohibited grounds has to be justified as to every of these grounds. Sec. 27.5 AGG states that in cases of multiple discrimination the Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*) and the competent agents of the Federal government and the German *Bundestag* are supposed to cooperate. The rules in place (within their general limits) would allow for tackling these cases.

Despite some new expertises, few statistical data is available to this day.[113]

So far, case-law on multiple discriminations is very limited. Although in a number of cases several grounds were concerned,[114] the courts regularly did not (legally) categorize these as cases of "multiple discrimination" but rather focused on one ground. Thus, there is no case-law so far on the amount of damages in cases of multiple discriminations.[115]

In the absence of more statistical data and respective case-law it is hard to say if legislation on this matter would be necessary.

e) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

[113] Two expertises, commissioned by the Federal Anti-Discrimination Agency, were published in early 2011, after the cut-off date of this report.[113] They concern the conceptual framing and legal handling of "multidimensional discrimination" as well as an empirical study on the very phenomenon. Due to the methodical orientation (a focus on qualitative analysis) of the latter, a generalisation of the results seems to be difficult. However, it was found that a very high percentage of the individuals chosen by the researchers because of an experience of social injustice on the base of one ground equally suffered from such an experience on another ground (181 out of 290). This held particularly for the ground of sex (as second ground), cf.: Baer, Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse; Dern/ Inowlocki/Oberlies, Mehrdimensionale Diskriminierung – Eine empirische Untersuchung anhand von autobiographisch-narrativen Interviews, both published on 11 January 2011, cf.: http://www.antidiskriminierungsstelle.de/ADS/downloads.html. An online survey equally cane to the result that in most of the cases reported by victims, discriminations were experienced as „multidimensional" instead of „one-dimensional", cf. above, Rottleuthner/Mahlmann, Fn. 27.
[114] For example Cologne Labour Court (*Arbeitsgericht Köln*), 6 March 2008 19 Ca 7222/07; Düsseldorf Administrative Court (*Verwaltungsgericht Düsseldorf*), 5 June 2007, 2 K 26225/06; Frankfurt Administrative Court (Verwaltungsgericht Frankfurt), 9 December 2009, 9 L 3454/09. For an overview cf. Baer (Fn. 113), p. 53 et seqq.
[115] Baer (Fn. 113), p. 52 et seqq.

There is up to now limited case law on the matter of discrimination involving Art. 19 TFEU grounds, regarding grounds separately.[116]

2.1.2 Assumed and associated discrimination

a) Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).

There is no explicit regulation of this matter in the AGG. The definition of discrimination (see below 2.2) is, however, generally understood as covering assumed characteristics. This is necessarily the case for race, as different human races in the scientific sense do not exist.

b) Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?

There is no explicit regulation of discrimination based on association. The new regulations of the AGG are interpreted as potentially covering such cases, though there is no reported case law in this respect.[117]

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

a) How is direct discrimination defined in national law?

The AGG contains the following definition of direct discrimination, following the German version of the directives:

Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the prohibited grounds.[118]

The guarantee of equality establishes the principle of equal treatment as a fundamental right at the constitutional level.[119]

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[116] Cf. Frankfurt Administrative Court (*Verwaltungsgericht Frankfurt*), 9 December 2009, 9 L 3454/09. For an analysis and further case law on the matter cf.: Baer (Fn. 113), p. 53 et seqq.
[117] Däubler, AGG, § 1 para 97; on the background in European law, Mahlmann, in: Mahlmann/Rudolf, GleichbehandlungsR, § 3 para 83, 104.
[118] Sec. 3.1 sentence 1 AGG: *Eine unmittelbare Benachteiligung liegt vor, wenn eine Person wegen eines in § 1 genannten Grundes einer weniger günstige Behandlung erfährt, als eine andere Person in einer vergleichbaren Situation erfährt, erfahren hat oder erfahren würde.*
[119] Article 3 Basic Law (*Grundgesetz*).

This provision, however, contains no explicit legal definition of direct discrimination. The definitions in use have been developed by the German Constitutional Court.

At the constitutional level, most doctrinal developments have been initiated by cases implying discrimination on the ground of sex.[120] This case law forms the blueprint for the concept of discrimination as used in other areas of the law as well.

According to settled case law, unequal treatment presupposes the unequal treatment of essentially equal matters. In the case of a direct discrimination (though this term is not necessarily used), the unequal treatment must be based on the particular characteristic. The German Federal Constitutional Court has emphasised in some early decisions the need of an intention of the discriminator.[121] This precondition has been weakened in a more recent decision. A discrimination is given even if the act concerned was not deliberately discriminatory but had other aims or if discrimination is only one factor in a "bundle of motives" (*Motivbündel*).[122] Consequently, no decisive causal link between the characteristic and the discrimination is needed. It suffices that the characteristic is part of the (negative) criteria that lead to the discriminatory behaviour.

Section 81.2 Social Code IX (*Sozialgesetzbuch* IX) prohibits discrimination on the ground of disability in work relations for severely disabled persons and persons of equivalent status,[123] referring to the AGG, including its regime of justifications.[124]

Section 7.2 sentence 2 Disabled Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz)* defines discrimination as follows: Discrimination shall be deemed to occur if disabled and able-bodied persons are treated differently without a compulsory reason and the equal participation of disabled persons in society is in consequence directly or indirectly impaired.

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

b) Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)

[120] Article 3.2 and 3.3 Basic Law (*Grundgesetz*).
[121] BVerfGE 75, 40 (70).
[122] BVerfGE 89, 276 (289).
[123] The Federal Labour Court ruled that already before the coming into force of the AGG and amendment of Art. 81.2 Social Code IX, the personal scope of the non-discrimination rule in the old version of 81.2 Social Code IX was to be interpreted as covering all kinds of disability as understood in EU Law (direct/indirect discrimination), cf. Federal Labour Court (*Bundesarbeitsgericht*), 4 April 2007, 9 AZR 823/06.
[124] The Federal Labour Court has interpreted this provision before the enactment of the AGG with explicit reference to the definitions of Directive 2000/78/EC. According to the Federal Labour Court, a direct discrimination shall be deemed to occur where one person is treated less favourably than another has been or would be treated in a comparable situation, cf. Federal Labour Court *Neue Zeitschrift für Arbeitsrecht* 2005, p. 870, 872.

Sec. 11 AGG states that discriminatory job vacancy announcements are prohibited. Such an advertisement, e.g. expressing a preference for applicants of a certain age,[125] may constitute a direct discrimination.[126] As 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 an interpretation covering these cases.

c) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).

The AGG provides in Sec. 8.1, that an unequal treatment which is based on a characteristic shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate, following closely the wording of the Directives.

Sec. 9 AGG contains a regulation of the justification on the ground of religion and belief. A difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity, Sec. 9. 1. Sec. 9.2. AGG provides that the prohibition of different treatment on the grounds of religion or belief shall be without prejudice to the right of the religious community referred to under Section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation.

Sec. 10 AGG provides that differences of treatment on grounds of age shall not constitute discrimination, if, they are objectively and reasonably justified by a legitimate aim.

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

[125] Cf. for example: Schleswig-Holstein *Land* Labour Court (*Landesarbeitsgericht Schleswig-Holstein)*, 9 December 2008, 5 Sa 286/08.
[126] Däubler, AGG, § 3 para 16a.

- the setting of special conditions on access to employment and vocational training, including special employment and work conditions, including remuneration and dismissal conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection, Sec. 10 No 1;
- the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment, Sec. 10 No 2;
- the fixing 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, Sec. 10. No 3;
- the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those 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, Sec. 10 No. 4;
- an agreement, that provides for the termination of an employment relation without dismissal at the time, when the employee is entitled to apply for pension on the ground of age, notwithstanding the regulations in Sec. 41 Social Code VI (*Sozialgesetzbuch* VI), Sec. 10 No 5;
- differentiations of benefits in social plans in the sense of the Work Constitution Act (*Betriebsverfassungsgesetz*), if the parties have created a settlement graduated according to age and staff membership in a firm, in which the chances on the labour market, which are essentially dependent on age, are visibly considered, or that excluded employees who are economically secure from benefits of the social plan, as they are entitled to pensions, be it after reception of unemployment benefits, Sec. 10 No 6.

There are further justifications for general civil law. According to Sec. 20.1 AGG differences in treatment on the ground of religion, disability, age, sexual identity or sex (the latter not covered in this report) are not prohibited if there is an objective reason for the treatment. As exemplary cases the following are listed:

- the avoiding of dangers, the prevention of damage or other comparable aims, Sec. 20.1 Nr. 1;
- the protection of the intimate sphere or personal security, Sec. 20.1 Nr. 2;
- the granting of special advantages without a given interest in equal treatment, Sec. 20.1 No. 3;[127]
- in case of differences in treatment on the ground of religion, if the treatment by religious communities, their institutions independently of their legal form or associations, the aim of which is to cultivate in common a religion is justified in the light of freedom of religion and the respective self-understanding, 20.1 No 4.

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

Sec. 20.2 sentence 3 AGG provides that a difference in treatment on the ground of religion, disability, age or sexual identity is for private insurances only admissible, if it is based on acknowledged principles of calculations adequate to the risks, especially on actuarial evaluation based on statistical data.

Sec. 19.3 AGG contains a special justification for unequal treatment in the case of housing. Differences in treatment in the context of letting housing is permissible to create and maintain socially stable structures of inhabitants and balanced structures of settlement and balanced economic, social and cultural relations.[128]

Sec. 24 AGG provides for an analogous extension of the regulations of the AGG to civil servants, including exceptions.

Other areas of the law contain no explicit regulations of justifications.

As to the constitutional guarantee and the justification of unequal treatment, the Federal German Constitutional Court holds that any unequal treatment on the grounds of sex (which is, as mentioned above, the standard setting characteristic in the framework of Art. 3 Basic Law) is unconstitutional unless it is a necessary consequence of attempts to resolve problems which by their very nature affect men or women only.[129] Whether any direct discrimination on the grounds listed in Article 3.3 Basic Law can be justified or not is the subject of debate. Some argue for this interpretation, others regard Article 3.3 Basic Law as a strict interdiction of any discrimination.[130]

The general doctrine of justification of unequal treatment is of relevance in this context as well, given the open-textured nature of Art. 3 Basic Law, that extends its scope of application to such characteristics as age or sexual identity. Art 3.1 Basic Law has been interpreted in the older case law of the Court as an interdiction of arbitrary treatment within the limits of material justice.[131] More recent decisions have increased the demands for unequal treatment to be justified beyond this position. The Federal German Constitutional Court has ruled that as the principle of equality before the law intends to prevent the unjustified unequal treatment of persons, the legislature is regularly subject to strict constraints in cases of unequal treatment. These legal constraints become stricter depending on the extent to which the personal characteristics that constitute the ground for unequal treatment resemble the characteristics listed in Article 3.3 of the Basic Law and there is therefore greater danger that unequal treatment based on them will lead to discrimination against a minority. The strict constraint is, however, not limited to discrimination against persons. It also exists where unequal treatment of subject matters leads to the unequal treatment of groups of people.

[128] Cf. 3.2.10 on the question whether or not this exception is in line with EU Law.
[129] BVerfGE 57, 335 (342); 85, 191 (207).
[130] Cf. Osterloh, in Sachs, GG, Article 3 para 241, 254 (justification possible).
[131] BVerfGE 1, 14 (52); 25, 101 (105).

The strictness of the constraint depends on the degree to which the persons affected are able to change the characteristics that are the ground for unequal treatment through their behaviour. In addition, the limits on the legislature are more narrowly circumscribed depending on the extent to which the unequal treatment of persons or subject matters can affect disadvantageously the enjoyment of basic liberties.[132] 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.

d) In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?

There is no special indication how the comparison is to be made.

2.2.1 Situation Testing

a) Does national law clearly permit or prohibit the use of 'situation testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.

There is no explicit regulation of situation testing in German law. Its use depends therefore on the law of evidence of the respective field. One can only speculate what role situation testing could play given the absence of any significant practical use of it in a legal context by NGOs or other agents or clarifying case law.[133]

As far as a shift of the burden of proof is regulated, Sec. 22 AGG, situational testing could be used as evidence which makes the assumption of discrimination plausible.[134]

b) Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc)

There is no such practice of any relevant scope, cf. 2.2.1.a).

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[132] BVerfGE 88, 87 (96).
[133] E.g. in civil proceedings an expert opinion, Section 404 Code of Civil Procedure (*Zivilprozessordnung*), could refer to the results of situation testing. There is, however no reported case law on the matter. According to Section 284 sentence 2 Code of Civil Procedure (*Zivilprozessordnung*) evidence beyond the legally prescribed type and form can be used if the parties agree. For a rare case on the matter cf. Oldenburg Local Court (*Amtsgericht Oldenburg*), 23 July 2008, E2 C 2126/07 reported in Sec. 0.3 in the Country report 2008 for the European network of legal experts in the non-discrimination field by this author.
[134] Cf. the explanatory report, Bundestagsdrucksache 16/1780 p. 47.

c) Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?

Given the lack of case-law, cf. 2.2.1 a), this question cannot be answered.

d) Outline important case law within the national legal system on this issue.

There is no important case-law on the matter, cf. 2.2.1.a).

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

a) How is indirect discrimination defined in national law?

Sec. 3.2 AGG provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having one of the characteristics within the scope of the AGG at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[135]

The criterion has to affect a group of persons protected by the AGG significantly more than others.[136] This can be determined by statistical comparison,[137] though the recourse to statistics is not mandatory.[138] It is instead sufficient if the criterion is typically apt to have these consequences.[139]

The case law on predecessors of this norm gives some further indications of its possible interpretation.[140]

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[135] Sec. 3.2 AGG: *Eine mittelbare Benachteiligung liegt vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen wegen eines in § 1 genannten Grundes gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn, die betreffenden Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich.*

[136] Federal Labour Court (*Bundesarbeitsgericht*), 18 August 2009, 1 ABR 47/08; Saarland *Land* Labour Court, 11 February 2009, 1 TaBV 73/08.

[137] Federal Labour Court (*Bundesarbeitsgericht*), 24 September 2008, 10 AZR 639/07.

[138] Federal Labour Court (*Bundesarbeitsgericht*), 18 August 2009, 1 ABR 47/08.

[139] Federal Labour Court (*Bundesarbeitsgericht*), 18 August 2009, 1 ABR 47/08; thus a job announcement limiting the list of applicants to those "in their first year on the job" constitutes an indirect discrimination on the ground of age, cf. above O.3.

[140] Below the constitutional level, the concept of indirect discrimination has been elaborated in particular by the labour courts and legal science in the context of the application of sex discrimination, cf. former Sec. 611a, and 612.3 Civil Code, 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. Though indirect discrimination was not defined in Section 611a Civil Code 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 is explicitly stated in Article 2.1. As other examples from the case law, referred to in the text show, indirect discrimination is no new concept in German law.

Courts have ruled that discrimination on the ground of sex is not only supposed to have taken place if one sex is always disadvantaged in respect to working conditions but if there are significant differences (*wesentliche Unterschiede*) between the number of men and women among privileged and disadvantaged employees.[141] According to this ruling, the discrimination can 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 Art. 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 object of debate. A ratio of 1 woman to 10 men enjoying better working conditions has been regarded as a significant difference.[142] In another decision, a ratio of about 80% women to 20% men was deemed sufficient.[143]

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

The objective reason for the discrimination has to 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 has to 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.[146]

The former prohibition of discrimination based on disability, Section 81.2 Social Code IX (*Sozialgesetzbuch* IX), which now refers to the AGG, has been interpreted already before by the Federal Labour Court in this manner, explicitly referring to Article 2.2 b) of Directive 2000/78/EC.[147]

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[141] See Federal Labour Court (*Bundesarbeitsgericht*) *Neue Juristische Wochenschrift* 1992, 1125; Federal Labour Court (*Bundesarbeitsgericht*), *Neue Juristische Wochenschrift* 1993, 3091, 3093.
[142] Federal Labour Court (*Bundesarbeitsgericht*) *Neue Juristische Wochenschrift* 1993, 3091, 3094.
[143] Federal Labour Court (*Bundesarbeitsgericht*), *Neue Juristische Wochenschrift* 1992, 1125, 1126f.
[144] Federal Labour Court (*Bundesarbeitsgericht*) *Neue Juristische Wochenschrift* 1993, 3091, 3094.
[145] ECJ, ECR Cs. 170/84, 1986 I-1607 (*Bilka*).
[146] Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 11th ed. 2011, § 3 AGG, para 9 et seq. for an overview.
[147] Federal Labour Court (*Bundesarbeitsgericht*), *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 Federal Labour Court (*Bundesarbeitsgericht*), *Der Betrieb* 2004, 1106, thus extending the standard conception to discrimination on the ground of disability.

Other federal courts also apply this interpretation of indirect discrimination along the lines of CJUE case law and the Directives, though important details such as references to hypothetical comparators are not explicitly mentioned.[148]

Section 7.2 sentence 2 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) defines discrimination as follows: Discrimination shall be deemed to occur if disabled and able-bodied people are treated differently without a compulsory reason and the equal participation of disabled persons in society is in consequence directly or indirectly impaired.

The meaning of an indirect impairment is not further specified. Most *Land* disability laws follow this definition closely.[149]

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

[148] See Federal Administrative Court (*Bundesverwaltungsgericht*), 23 June 2005, 2 C 21/04.
[149] See Section 4 of the Baden-Württemberg Law on the Equality of the Disabled (*Landes-Behindertengleichstellungsgesetz Baden-Württemberg*); Article 5 of the Bavarian Law on the Equality of the Disabled (*Bayerisches Behindertengleichstellungsgesetz*); Section 6 of the Brandenburg Law on the Equality of the Disabled (*Brandenburgisches Behindertengleichstellungsgesetz*); Section 3 of the Bremish Law on the Equality of the Disabled (*Bremisches Behindertengleichstellungsgesetz*); Section 6.2 Hamburg Law on the Equality of the Disabled (*Hamburgisches Gesetz zur Gleichstellung behinderter Menschen*); Section 4 of the Hesse Law on the Equality of the Disabled (*Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen*); Section 5 of the Law on Promotion of Equality, Equal Participation, and Integration of Disabled People Mecklenburg-West Pomerania (*Landesbehindertengleichstellungsgesetz Mecklenburg Vorpommern*); Section 4.2 of the Lower Saxony Law on the Equality of People with Disabilities (*Niedersächsisches Behindertengleichstellungsgesetz*); Section 3.2. North Rhine-Westfalen Law on the Equality of the Disabled (*Behindertengleichstellungsgesetz Nordrhein-Westfalen*); Section 2.2 of the Rheinland-Pfalz Law on the Equality of the Disabled (*Landesgesetz zur Gleichstellung behinderter Menschen Rheinland-Pfalz*); Section 3.2 of the Saarland Law on the Equality of the Disabled (*Saarländisches Behindertengleichstellungsgesetz*); Section 4.3 of the Saxony Integration Law (*Sächsisches Integrationsgesetz*); Section 2.2 of the Schleswig-Holstein Law on the Equality of the Disabled (*Landesbehindertengleichstellungsgesetz Schleswig-Holstein*); Section 4 of the Thuringian Law on the Promotion of Equality and Integration of People with Disablities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderungen*). Section 3 of the Berlin Law on the Equality of the Disabled (*Berliner Behindertengleichstellungsgesetz*) states that any unjustified case of unequal treatment is considered to be discrimination. Unequal treatment is not justified if it is based solely or decisively on circumstances that are in indirect or direct connection with the disability. Unequal treatment shall not be deemed to occur if the consideration of disability is necessary or serves the interest of the disabled person. The similar Section 2 of the Saxony-Anhalt Law on the Equality of the Disabled (*Behindertengleichstellungsgesetz Sachsen-Anhalt*) includes cases where the development of people with disabilities is limited due to a lack of positive accommodation for their needs.

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

b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

In legal science it is widely held that CJUE case law forms a suitable model to answer the question of justification for indirect discrimination in constitutional law.[151]

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.[152]

In a more recent decision, the Court stated that the strict test of proportionality developed for cases of direct discrimination[153] also applies to cases where the unequal treatment of facts indirectly leads to disadvantage for certain persons. The Federal Constitutional Court determines in each case whether there are reasons of such weight to justify the unequal treatment.[154]

In recent case law, the Federal Labour Court (*Bundesarbeitsgericht*), affirmed that an indirect discrimination by a "neutral criterion" may be justified by any legitimate aim as long as the principle of proportionality is not violated.[155]

Beyond these clarifications, there are no clear contours of the grounds accepted (cf. 0.3).

[150] BVerfGE 97, 35 (43).
[151] See Gubelt, in: v. Münch/Kunig, Grundgesetzkommentar, 5th ed. 2000, Article 3 para 91.
[152] Federal Constitutional Court *(Bundesverfassungsgericht)* 2 BvR 1476/01, 19 November 2003, www.bverfg.de.
[153] See above 2.2 c).
[154] Federal Constitutional Court *(Bundesverfassungsgericht)* 1 BvR 1748/99 20 April 2004, www.bverfg.de.
[155] Federal Labour Court (*Bundesarbeitsgericht*), 18 August 2009, 1 ABR 47/08 referring to ECJ, 5 March 2009, C-388/07 (*Age Concern England*).

c) Is this compatible with the Directives?

The AGG definition is compatible with the directive. In addition, the concept of indirect discrimination has mostly been defined in line with the definition and interpretations of the respective European law and especially the case law of the CJUE on this matter. It is to be expected, that the definition in Art. 3.2 AGG will inform the understanding of indirect discrimination of all courts.

As far as objective reasons and justifications excluding indirect and direct discriminations are concerned, there is a great variety of constellations in the case law (cf. 0.3 and previous Country reports for the European network of legal experts in the non-discrimination field by this author) that would need detailed argument to assess convincingly whether or not they are in conformity with European standards.[156]

d) In relation to age discrimination, does the law specify how a comparison is to be made?

There is no such clarification in the law.

e) Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?

The AGG does not contain any specification on differences in treatment based on language. There are singular cases[157] on the matter, without establishing yet clear patterns of jurisdiction.

[156] To take an example, where case law of the ECJ exists: One Chamber of the Federal German Constitutional Court held that the unequal treatment of same sex couples as to certain (social) benefits is justified despite ECJ, *Tadao Maruko* because in heterosexual couples one partner is supposed to be in a greater need of financial support due to the necessities of child rearing than the partner in a same sex partnership where these necessities typically do not exit and the assumed positive effects of such unequal treatment on social procreation. For critical comments M. Mahlmann, EuZW 2008, 218f. A (senate) decision of the Federal Constitutional Court has not followed this line of argument but affirmed the right of same sex couples living in registered partnerships to the same benefits like married spouses, Federal Constitutional Court (*Bundesverfassungsgericht*), 7 July 2009, 1 BvR 1164/07. For the practically important matter on justification of unequal treatment on the ground of religion or belief cf. below.

[157] E.g. Berlin Labour Court (*Arbeitsgericht Berlin*), 11 February 2009, 55 Ca 16952/08: rejection of application because candidate is "not a native speaker" constitutes discrimination on the ground of ethnic origin even if perfect mastery of German language is mandatory requirement for employment; Hamm *Land* Labour Court (*Landesarbeitsgericht Hamm*), 17 July 2008, 16 Sa 544/08: unnecessary demand of language skill for long term employee (repealed by Federal Labour Court (*Bundesarbeitsgericht*), 28 January 2010, 2 AZR 764/08). Hamburg Labour Court (*Arbeitsgericht Hamburg*), 26 January 2010, 25 Ca 282/09: institutionalized procedure of employer to contact job applicants by telephone in order to figure out whether applicant has sufficient level of German language skills, constitutes indirect discrimination.

However, in a recent decision, the Federal Labour Court (*Bundesarbeitsgericht*), although explicitly leaving the question open, indicated that such a treatment may constitute an indirect discrimination on the ground of ethnic origin.[158]

2.3.1 Statistical Evidence

a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?

In the AGG the admissibility of statistical evidence is not explicitly regulated but presupposed.[159]

b) Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?

Courts take routinely recourse to statistical evidence to establish indirect discrimination (cf. 2.3.1 c))

c) Please illustrate the most important case law in this area.

The regulation in the AGG is in line with the case law on the matter:

The Federal German Constitutional Court has used statistical evidence to establish whether or not indirect discrimination exists.[160] The data in the specific case (concerning sex) were derived from statistics provided by the defendant, the City of Hamburg.

The groups compared are formed according to the general doctrine of equality law on a case by case basis. It has been consistently held in case law that *essentially* equal groups have to be treated equally. It depends on the specific context which criteria are used to establish that groups are essentially equal or not. There is no settled case law as to a specific quantitative measure for establishing a disproportional application of a regulation to one group in comparison to another group.

As the examples discussed before indicate,[161] statistical evidence establishes a *prima facie* case of indirect discrimination. The statistics used are social statistics if available. In other cases, the ratio is determined for the individual case.

[158] Federal Labour Court (*Bundesarbeitsgericht*), 28 January 2010, 2 AZR 764/08.
[159] Cf. the explanatory report Bundestagsdrucksache 16/1780, p. 47.
[160] See BVerfGE 97, 35 (44).
[161] See above 2.3 a).

In legal science there are voices that regard any difference stable over some period of time as sufficient to establish indirect discrimination. If the ratio is small, the justification of this discrimination becomes easier for the employers.[162] Others propose a threshold of about 75%.[163]

The groups to be compared are determined by the personal scope of the regulation challenged. For example, for a collective agreement all people bound by this agreement form the relevant group. The group of applicants is relevant for a guideline on the selection of applicants for employment though it is disputed whether all applicants should be considered or only sufficiently qualified applicants. The case law of the Federal Constitutional Court supports the former interpretation as it ruled that § 611a Civil Code (*BürgerlichesGesetzbuch*) (repealed by the AGG) not only forbids a refusal to employ someone on the grounds of a particular characteristic (in the case sex), but that it suffices if the characteristic is one of a "bundle of motives" for not choosing this applicant.[164] It is not far-fetched to assume that these other considerations include the applicant's other qualifications, which precludes the possibility that only qualified applicants are considered. The Federal Labour Court however, regards the objective qualification of a job candidate as a condition for a possible discrimination.[165]

Sec. 71.1 Social Code IX (*Sozialgesetzbuch* IX) establishes the duty of any employer employing more than 20 employees to employ at least 5% severely disabled persons. This rule is interpreted as not directly prejudicial for individual claims, as it establishes only a general duty for the employer. If the employer does not fulfil this duty in general, it does not mean that discrimination has occurred in an individual case.

There are, however, voices in the literature that argue that at least in a case where the employer does not employ 50% of the quota prescribed by law (2.5%) this should lead to a presumption of discrimination which can shift the burden of proof.[166] As these regulations are only a few years old, there is no settled case law on these matters.

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

d) Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?

[162] Annuß, Staudinger, 2005 ed., § 611a BGB, para 40.
[163] Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 11th ed., 2011, § 3 AGG, para 7.
[164] BVerfGE 89, 276 (189), see above.
[165] Cf. above, 0.3, Federal Labour Court (*Bundesarbeitsgericht*), 19 August 2010, 8 AZR 370/09.
[166] See Großmann, *Gemeinschaftskommentar*, *Sozialgesetzbuch* IX, § 81, para. 240.

Germany enjoys a differentiated set of statutory regulations on data protection. A great deal of case-law exists on these matters. The regulations have their constitutional basis in the interpretation of the fundamental right to the protection of the personality, Article 2.1 in conjunction with Article 1 *Grundgesetz* (Basic Law). The Federal German Constitutional Court ruled that everybody enjoys the right to *informationelle Selbstbestimmung* (informational self-determination). This right is not restricted to sensitive data. Everyone has the right to determine generally which data can be used and which not. The limits of this right are fundamentally those of the principle of proportionality. If the person concerned consents to the use of data, their use is of course permissible. Given the doctrine of the requirement for a specific statutory regulation (*Gesetzesvorbehalt*) for matters that touch upon fundamental rights, detailed legal regulations on data protection have been established in many spheres of life.

These laws encompass the relations between the State and citizens, and private relations. For public authorities, the Federal Law on the Protection of Data (*Bundesdatenschutzgesetz*) stipulates as a general principle that a public authority is allowed to collect data, if it is necessary for carrying out its tasks.[167] The provision sets out further restrictive conditions as a precondition for data collection for such purposes. The law groups cases according to a strict test of proportionality for data collection that serves the public good in order to protect the fundamental right to informational self-determination. These general rules are specified in legislation dealing with certain areas of public law.

The Federal Law on the Protection of Data provides further that the collection, storing, exchange and communication of personal data by private natural or legal persons is permissible, first, if these actions serve the aim of contractual relations; second, if they serve the justifiable interest of the party collecting the data, if there is no reason to assume that the other party does not have interests to the contrary which it can legitimately expect to be protected; or third, if the data are publicly accessible, if the other party does not have a legitimate interest in these actions not being taken.[168]

Public and private actors have a duty to report on the collection of data on racial and ethnic origin, political opinion, religious and philosophical belief, membership of unions, health and sexual life.[169]

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

[167] Section 13.1 Federal Law on the Protection of Data (*Bundesdatenschutzgesetz*).
[168] Section 28.1 Federal Law on the Protection of Data (*Bundesdatenschutzgesetz*).
[169] Section 4d.5 in conjunction with Section 3.9 Federal Law on the Protection of Data (*Bundesdatenschutzgesetz*). The report can be directed to the Ombudsman for Data Protection.

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

Section 131 Social Code IX (*Sozialgesetzbuch IX*) stipulates the collection of federal statistics on severely disabled persons, including number, personal characteristics such as age, sex, nationality and place of residence, and type, cause and grade of disability.

The Commissioners for Integration/Foreigners publish periodical reports on the situation of foreigners in Germany, including statistical data.

It should be observed that given historic experience, German authorities are explicitly reluctant to gather data for whatever purposes on certain characteristics that have been the basis of discrimination in the Nazi-Period.

As far as there are positive action measures (see below), social statistics play a role in the context of designing policies.

2.4 Harassment (Article 2(3))

a) How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.

Sec. 3.3 AGG defines harassment as discrimination when unwanted conduct related to any of the grounds covered by the AGG intend or cause that the dignity of a person is violated and an intimidating, hostile, degrading, humiliating or offensive environment is created. According to German jurisdiction on Sec. 3.3 AGG, such an "environment" is generally not created by singular but only by continuous behaviour,[170] of certain severity, beyond mere onerosity.[171]

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 violation of the right to personality, which is protected by tort law.[172]

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

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

[172] Section 823.1 Civil Code (*Bürgerliches Gesetzbuch*). In legal science it has been argued that the protection against harassment through tort law is much wider than protection would be through a specific prohibition.

Such an action can give rise to compensation for material and immaterial damage. In criminal law e.g. the provisions against criminal insult can also cover cases of harassment, with the relevant sanctions.[173]

b) Is harassment prohibited as a form of discrimination?

Yes, cf. 2.4 a).

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

There are no other authoritative additional sources on the concept of harassment.

2.5 Instructions to discriminate (Article 2(4))

Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?

An instruction to discriminate against persons on any of the grounds covered by the AGG shall be deemed to be discrimination, Sec. 3.5 AGG. This is especially the case, if somebody instigates somebody to a behaviour that disadvantages an employee due to one of the covered grounds, Sec. 3.5. Sentence 2 AGG.

In addition, general legal provisions can cover these cases.[174] Responsibility for agents in contractual relations and in tort law is relevant in this respect.[175] Another example from criminal law is instigation to discrimination that amounts to a criminal offence, e.g. criminal insult.[176]

The AGG does not contain any particular provision regarding the liability of legal persons. Instead, the general rule of Sec. 31 civil code (*Bürgerliches Gesetzbuch*) is applicable, according to which legal persons are liable for damage caused by executive employees.[177]

[173] Section 185 Penal Code (*Strafgesetzbuch*).
[174] A first instance labour court regarded before the enactment of the AGG 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 in at the next instance, see *Arbeitsgericht Wuppertal*, 3 Ca 4927/03, 10 December 2003.
[175] Section 31, 278, 831 Civil Code (*Bürgerliches Gesetzbuch*).
[176] Section 26, 185 Penal Code (*Strafgesetzbuch*).
[177] Reuter, MüKo, BGB, 5th ed., 2006, § 31, para 11, 22, 30.

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

a) How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?
Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.

The AGG contains no additional regulation on reasonable accommodation of a general scope, as prescribed in Art. 5 Directive 2000/78/EC for employment.
The law on disability, constitutionally buttressed by the disability clause of the Basic Law[178] and the obligations created by the *Convention on the Rights of Persons with Disabilities*, signed and ratified by Germany (cf. annex II) and *Land* constitutions, foresees, however, reasonable accommodation in various contexts, including the following:

The social security system has the general aim of integrating disabled persons into society through individual help and accommodation to their needs[179] and establishes claims to material means of integration.[180] The German social agencies provide support for participation in the working life.[181] This support encompasses support for obtaining employment, including vocational training, special medical and psychological support for participation in working life, housing near the work place, transport or the creation of housing adequate for the disabled persons, to name some examples.[182]

Section 81.4 Social Code, Part IX (*Sozialgesetzbuch* IX) imposes various duties on public and private employers in providing reasonable accommodation for severely disabled persons.[183]

For example, the severely disabled persons have a right to:

[178] Article 3.3 sentence 2 Basic Law (*Grundgesetz*).
[179] Section 10 Social Code I (*Sozialgesetzbuch* I).
[180] Section 4 et seq. Social Code IX (*Sozialgesetzbuch* IX) ; Sec. 53 et seq. Social Code XII (*Sozialgesetzbuch* XII). Special regulations for blind people: Section 72 Social Code XII (*Sozialgesetzbuch* XII).
[181] Section 97 et seq. Social Code III (*Sozialgesetzbuch* III), Section 104 Sozialcode IX *(Sozialgesetzbuch* IX).
[182] See e.g. Section 33 Social Code, Part IX (*Sozialgesetzbuch* IX).
[183] On the definition of this, see above 2.1.1.

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

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 measures of accommodation. The severely disabled person has no claim if these measures would be unreasonable (*unzumutbar*) for the employer or cause a disproportionate burden or are contrary to other legal regulations.[184] The employers are under a duty to promote part-time work.[185] Under certain circumstances, the severely disabled person can have a claim to part-time work.[186] They also have a claim to additional paid holidays.[187]

A measure of accommodation is regarded as unreasonable for the employer in these cases if the financial burden is disproportionate despite support from the Federal Labour Agency and the integration agencies using funds from the equalisation levy.[188] There is only limited case law clarifying precise standards.[189]

According to the Law on Promoting the Equality of the Disabled, organisations and social partners are to conclude agreements (*Zielvereinbarungen*) to provide for reasonable accommodation. This regulation is not limited to severely disabled persons.[190]

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[184] Section 81.4 sentence 3 Social Code IX (*Sozialgesetzbuch* IX).
[185] Section 81.5 Social Code IX (*Sozialgesetzbuch* IX).
[186] Section 81.5 sentence 3 Social Code IX (*Sozialgesetzbuch* IX).
[187] Section 125 Social Code IX (*Sozialgesetzbuch* IX).
[188] Section 77.5, 102.3 Social Code IX (*Sozialgesetzbuch* IX).
[189] Cf. Baden-Württemberg *Land* Labour Court (*Landesarbeitsgericht Baden-Württemberg*), 22 June 2005, Az: 2 Sa 11/05 with further references: The duty of accommodation of the workplace includes organisational matters such as a new distribution of work if the disabled person cannot work as much as before. It has been held that an accommodation is not reasonable if it poses a disproportionate burden on the employer despite state financial help. The burden is deemed to be disproportionate if the measure demands significant financial investment even though the work relationship will end soon because of a fixed-term contract or age limits. If the measure jeopardises employment or places an undue burden on other employees, the same holds. It has been regarded as unreasonable to demand that an employer introduces 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-Palantine *Land* Labour Court (*Landesarbeitsgericht Rheinland-Pfalz*), 4 March 2005, Az: 12 Sa 566/04. On the duty to create a procedural precondition for measures of accommodation in dealing with the Work Council, see Federal Labour Court (*Bundesarbeitsgericht*), 3 December, 2002, Az: 9 AZR 481/01.
[190] Section 5 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*). On the definition of disability in this law, cf. 2.1.1.

Public and private employers are to conclude integration agreements with the representatives of disabled employees for enterprises and authorities as to the working conditions and other issues of integration of severely disabled persons.[191]

As indicated, some of these regulations apply to *severely* disabled persons as defined above (2.1.1) only. Such a differentiation of grades of disability does not exist in Art. 5 Directive 2000/78/EC and raises therefore concerns as to conformity with EU law.[192] As a result, the personal scope for claiming a reasonable accommodation is as far as the above mentioned provisions limited to severely disabled persons are concerned only partly the same as for claiming protection from non-discrimination in general which is not limited in that way.

There are special regulations in the pension law, including a lower minimum age for severely disabled persons for collecting state pensions.[193]

b) Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of "disproportionate burden" in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?

As to education, there are several dimensions to the question of integrated education. The general aim is not to separate disabled children from their social background and to educate them with children without disabilities through integrated schooling.[194]

In the leading case concerning integrated schooling, the German Federal Constitutional Court held that the decision to put a child in a special school for disabled persons against the will of the parents constituted a breach of Article 3.3 sentence 2 of the Basic Law (*Grundgesetz*) 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.[195] Higher education in universities should take account of the needs of the disabled persons.[196]

There are various provisions stipulating that reasonable accommodation should be made to allow disabled persons to communicate with public authorities and in court.

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[191] Section 83 Social Code IX (*Sozialgesetzbuch* IX).
[192] For case law on the matter cf. Country report 2007 for the European network of legal experts in the non-discrimination field by this author.
[193] Section 37 Social Code VI (*Sozialgesetzbuch* VI).
[194] Section 4.3 Social Code IX (*Sozialgesetzbuch* IX). The school laws of the *Länder* contain detailed regulations on the matter.
[195] See BVerfG 96, 288.
[196] Section 2.4 sentence 2 University Framework Law (*Hochschulrahmengesetz*) which will presumably be abrogated in near future and corresponding regulations at the *Land* level (subject to reform).

Severely disabled people suffering from 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)[197]and other aspects of mobility, to name just a few examples.[198]

There are special regulations for disabled persons in civil law relating to their special needs.[199]

A special regulation of general contract law allows for valid contracts with intellectually disabled persons.[200]

There is no reference to the concept of "disproportionate burden" in those provisions. The Federal German Constitutional Court implied in its decision on integrated schooling mentioned above materially such a consideration in the framework of its weighing of interests.

c) Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?

The Federal German Constitutional Court found that disabled persons are not only discriminated against if there is unequal treatment, but also when a disadvantage results from the lack of appropriate measures to accommodate the needs of the disabled person.[201] This principle was developed in the context of integrated schooling (cf. above 2.6) but applies as a constitutional principle to other spheres of life as well.

d) Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?

[197] Section 145-147 Social Code IX (*Sozialgesetzbuch* IX).
[198] See Section 7 – 11 Law on Promoting the Equality of the Disabled (*Behindertenlgeichstellungsgesetz*) and the corresponding regulations in *Land* laws on disability, on a special regulation on mobility, e.g. Section 9 of the [Berlin] Law on the Promotion of Equality of People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung*); on communication with public authorities and in court see also e.g. Section 17.2 Social Code I (*Sozialgesetzbuch* I); Section 57 Social Code IX (*Sozialgesetzbuch* IX); Section 19.1 sentence 2 Social Code X (*Sozialgesetzbuch* X); Section 186, 191a Judicature Act (*Gerichtsverfassungsgesetz);* Section 483 Code of Civil Procedure (*Zivilprozessordnung*); Section 66, 259.2 Code of Criminal Procedure (*Strafprozessordnung*); Section 22 et seq. Law on Authorisation (*Beurkundungsgesetz*) on notarial instruments; Section 2233.2 Civil Code (*Bürgerliches Gesetzbuch*).
[199] Section 305.2 No. 2 Civil Code (*Bürgerliches Gesetzbuch*) establishes for example the duty to pay due regard to the needs of disabled persons when general terms and conditions are included in a contract; on other matters see Section 138.6 Social Code IX (*Sozialgesetzbuch* IX).
[200] See Section 105a Civil Code (*Bügerliches Gesetzbuch*).
[201] BVerfG 96, 288. This judgement is not limited to severely disabled persons.

As far as religion is concerned, public authorities are under a duty to take the special needs of religious communities and the individuals that form these communities into account because of the fundamental right to freedom of religion.[202]
Employers have to pay due consideration to the fundamental right to freedom of religion.[203] The same principle holds for belief.

Under the German Law on social security, there are provisions providing for special means to accommodate the needs of older people. These include help in the household, adaptation of the housing to the needs of older people, support for inclusion in social and cultural life, etc.[204]

e) Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?

There is no such provision in the relevant codifications, apart from the general regulations providing for the shift of the burden of proof (see below).

f) Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?

According to the Law on Promoting the Equality of the Disabled, the principle of *Barrierefreiheit* (lack of barriers) is the leading principle for the organisation of public services, including that new federal buildings and major changes of existing federal buildings should accommodate the needs of disabled persons. The same principle holds for other buildings, public streets and squares and public transport.[205]

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[202] See e.g. Federal Constitutional Court (*Bundesverfassungsgericht*) 1 BvR 1783/99, 15.1.2002 that held: If a non-German butcher who is a pious Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to facilitate to his customers, in accordance with their religious conviction, the consumption of the meat of animals that were ritually slaughtered, the constitutionality of this activity is to be examined in accordance with Article 2.1 in conjunction with Articles 4.1 and 4.2 of the *Grundgesetz* (Basic Law). Sec. 4a.1 in conjunction with Sec. 4a.2, No. 2 of the Animal Protection Act (*Tierschutzgesetz*) provides for the possibility that an exceptional permission for ritual slaughter can be granted.

[203] Cases include religious dress codes, e.g. Mala (*Land* Labour Court (*Landesarbeitsgericht)* Düsseldorf, 22 March 1984, 14 Sa 1905/83), turban of Sikhs (Labour Court (*Arbeitsgericht*) Hamburg, 3 January 1996, 19 Ca 141/95, or the head-scarf (Federal Labour Court *(Bundesarbeitsgericht*), 10 October 2002, 2 AZR 472/01; Labour Court (*Arbeitsgericht*) Dortmund, 16 January 2003, 6 Ca 5736/02), though it is constitutional to prohibit a teacher in a public school from wearing a headscarf (Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 1436/02; Federal Administrative Court *(Bundesverwaltungsgericht*), 2 C 45/03, 24.6.2004). Other cases concern breaks for prayers (Land Labour Court (*Landesarbeitsgericht*) Hamm, 18 January 2002, 5 Sa 1782/01: balancing of interest in case of break of prayers, no obligation if disruption of process of production.

[204] Section 70 Social Code XII (*Sozialgesetzbuch* XII) provides for help to maintain a household; for further social security benefits for older people see Sec. 71 Social Code XII (*Sozialgesetzbuch* XII).

[205] Section 8 in conjunction with Section 4 Law on Promoting the Equality of the Disabled *(Behindertengleichstellungsgesetz).* Similar provisions exist at the *Land* level.

The *Länder* have passed laws on building standards which relate to accessibility of buildings at *Land* level for the disabled, older people and people with small children.[206]

According to Section 554a Civil Code (*Bürgerliches Gesetzbuch*), a disabled person has the right to demand consent to changes in rented property that are necessary for his or her adequate use. The landlord can refuse consent if his or her interest in the unchanged status of the property carries more weight than the interest of the disabled person.[207] The AGG incorporates in Sec. 19.1 the prohibition of discrimination on the ground of disability in its regulation of general civil law which covers in principles services etc. if governed by private law.

g) Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?

As mentioned above, Cf. 2.6 f), the leading principle in this field is *Barrierefreiheit* (lack of barriers). According to the definition in Sec. 4 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*) buildings, transportation, technical objects of utility, acoustic and visual sources of information, means of communication as well as other formed areas of life (*gestaltete Lebensbereiche*) are free of barriers (*barrierefrei*) when disabled people have access to them and can make use of them in the common way without particular difficulty and generally unassisted (i. e. independently of third parties).

As for higher education, Art 2.4 sentence University Framework Law (*Hochschulrahmengesetz*)[208] states that disabled students should preferably have access to university services without needing assistance of others.

h) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?

There is a differentiated, wide ranging set of specialised norms for disabled persons, partly referred to above, including Art. 3.3 sentence 2 of the Basic Law (*Grundgesetz*).

[206] See e.g. Section 51 Berlin Regulation on Construction (*Bauordnung Berlin*). On minimum standards of homes: Regulation on Home Building (*Heimmindestbauverordnung*).
[207] Case law has underlined that the claim of the disabled tenant does not suppose extreme sacrifices on his side, see Regional Court (*Landgericht*) Hamburg, April 29, 2004, Az: 307 S 159/03.
[208] Due to a general reform of the federal system in Germany, the University Framework Law (*Hochschulrahmengesetz*) will presumably be abrogated in the near future, as mentioned before.

2.7 Sheltered or semi-sheltered accommodation/employment

a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?

The law on disability contains provisions on sheltered accommodation and employment. There are also special regulations in social law.

Under these provisions, people with disabilities may be granted social security benefits to help them live independently in sheltered accommodation.[209]

The provisions stipulate that vocational rehabilitation institutions and sheltered workshops should provide work opportunities for people who are unemployed or cannot find work on the labour market due to their disability.[210]

b) Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law ?

If disabled persons take part in programmes run by these institutions of vocational rehabilitation, they do not become part of the institution staff and are not employees in the sense of the Work Constitution Act (*Betriebsverfassungsgesetz*). They therefore elect special representatives. Labour law, however, is applied analogously regarding the protection of personality, limitation of liability, safety at work, protection against discrimination, holidays and equal treatment of men and women.[211]

[209] Section 55.2 No. 6 Social Code IX (*Sozialgesetzbuch* IX).
[210] Section 33 – 43 Social Code IX (*Sozialgesetzbuch* IX).
[211] Sec. 36 and 138.4 Social Code IX (*Sozialgesetzbuch* IX).

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)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

The AGG is not restricted to Germans or residents. It applies to all persons within the German jurisdiction.

The personal scope of the constitutional guarantee of equality is not limited to German citizens as it is a human right with universal application. Any person who is the target or is otherwise affected by an action of a public authority which is contrary to the guarantee of equality is protected.

The regulations on the special protection of severely disabled persons apply to people who are legally resident or employed in Germany.[212] Other special legislation applies to German citizens only.[213]

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

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

As to the liability for discrimination, there is no such distinction. As to protection, Art. 7 in conjunction with Sec. 6.1 AGG protects employees, thus natural persons. The prohibition of discrimination against disabled persons in employment, now referring to the AGG, applies only to natural persons, but legal persons may also be liable.[214] If general law applies, depending on the circumstances, natural and legal persons can be protected or be liable.

The constitutional guarantee of equality protects natural persons. Legal persons are within the ambit of the norm to the extent that the nature of that right permits.[215] It is directly applicable to actions by public authorities, and indirectly to actions by private actors through the interpretation of private law.

[212] Section 2.2 Social Code IX (*Sozialgesetzbuch* IX).
[213] For example: Section 7 Federal Civil Service Law (*Bundesbeamtengesetz*), German nationality (respectively the 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 the respective professional qualification) is a pre-requisite for employment as a civil servant.
[214] E.g. Section 81.2 Social Code IX (*Sozialgesetzbuch* IX).
[215] Article 3 in conjunction with Article 19.3 Basic Law (*Grundgesetz*).

Here, legal persons can be held liable as well. Other prohibitions of public law apply to natural persons only, due to the nature of the matter concerned.[216]

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

The violation of the prohibition of discrimination by employers or employees is a violation of a contractual duty, Sec. 7.3 AGG, giving rise to contractual liability.

The AGG establishes organisational duties for the employer. According to Sec. 12.1 AGG, the employer is under a duty to provide for appropriate measures of protection against and prevention of discrimination. According to Sec. 12.2 AGG, the employer has to educate employees as to principles of non-discrimination. Sec. 12.3 AGG established the duty of the employer to act against discriminations by his or her employees through appropriate measures, including dismissal. Sec. 12.4 AGG provides that employers have the duty to take the appropriate measures to protect employees against discrimination by third parties. A wider liability of employers is – though discussed – not part of the AGG. The employer is under a duty to make the AGG in the enterprise known, Sec. 12.5 AGG.

According to Sec. 15.1 AGG employers are liable for material damages caused by violations of the prohibition of discrimination in case of fault. For immaterial damages there is strict liability.[217] If the discrimination occurs while applying collective agreements, intent or gross negligence is necessary, Sec. 15.3 AGG. Equivalent claims can be based on Sec. 21.2 AGG in the case of provision of services covered by the AGG (see below 6.5.).

The general rules of responsibility of agents apply to the extension of liability.[218] There are no special rules for discrimination.[219] A service provider can therefore for example be liable for the action of his representative. Beyond the listed specific duties, there is no general responsibility for discrimination of third parties.

[216] E.g. the Anti-Discrimination clauses in the Laws on the Civil Service, or the Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*).
[217] Federal Labour Court (*Bundesarbeitsgericht*) 22 January 2009, 8 AzR 906/07.
[218] Most important Sec. 31, 278 and 831 Civil Code (*Bürgerliches Gesetzbuch*), see above 2.5.
[219] 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 Federal Labour Court (*Bundesarbeitsgericht*), 5 February , 2004, Az 8 AZR 112/03.

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

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

The AGG applies in principle to all sectors of employment (including self-employment) for all grounds (race, ethnic origin, sex, religion or belief, disability, age or sexual identity) (see in detail below 3.2.2 – 3.2.5). The military service is covered by the SoldGG. The AGG is to be applied to the civil service taking notice of its particularities, Sec. 24 AGG.

In addition, public employment (civil service and other employees) is covered by the guarantee of equality,[220] the guarantee of equal access,[221] civil service laws (which exclusively concern civil servants),[222] prohibitions of discrimination in the law on the representation of public employees[223] and – as to disability – a special regulation prohibiting discrimination which applies to private employers as well.[224] Equal access to any kind of (self-)employment is guaranteed by the freedom of profession, Art. 12 Basic Law (*Grundgesetz*). For the public sector, there are additional duties e.g. the early registration of vacancies to facilitate the employment of disabled persons.[225] The prohibition of discrimination in the Work Constitution Act (*Betriebsverfassungsgesetz*) applies only to certain enterprises, in particular excluding under certain conditions enterprises based on a certain religious, philosophical or political ethos (*Tendenzbetriebe*).[226] The general principle of equal treatment of employees applies in all matters of labour law, including collective agreements, though contentiously not to recruitment.[227]

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

[220] Article 3 Basic Law (*Grundgesetz*).
[221] Article 33.2 and 33.3 Basic Law (*Grundgesetz*).
[222] On sexual orientation, see Art. 1; Law on Article 10.2 of the Constitution of Berlin (*Gesetz zu Art. 10 Absatz 2 der Verfassung von Berlin*). For the changing legal basis in this area cf. annex 1.
[223] See Section 67.1 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*) and the respective state regulations.
[224] Section 81.2. Social Code IX (*Sozialgesetzbuch* IX), now referring to the AGG.
[225] Section 82 Social Code IX (*Sozialgesetzbuch* IX).
[226] Work Councils are formed in all enterprises with more than five employees; on the exclusion of enterprises based on an ethos, see Section 118 Work Constitution Act (*Betriebsverfassungsgesetz)*.
[227] See Richardi, Betriebsverfassungsgesetz, 12th ed. 2010, § 75 para 8.

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

The AGG follows in Sec. 2.1 No. 1 closely the regulation of the Directives in this respect, covering all these areas. Sec. 11 AGG contains a prohibition of discriminatory job advertisements. Sec. 24 AGG provides for an application of the regulations of the AGG that takes account of the particularities of the civil service. In addition, Sec. 9 Federal Civil service law (*Bundesbeamtengesetz*) repeats the prohibition of discrimination for access to civil service, relevant for other areas as well, Sec. 22.1 sentence 1 Federal Civil Service law, with the exception of age, which is, however, covered through Sec. 24 AGG.

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

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

The AGG covers employment and working conditions, including pay and dismissals, in Sec. 2.1 No. 2. For dismissals, the AGG contains a special regulation in Sec. 2.4 which provides that for dismissals only the existing general and particular regulations for dismissal are to be applied, most importantly the Law on Protection against Dismissal (*Kündigungsschutzgesetz*). As there are no prohibitions of discrimination in these norms, it seems to be hardly possible to interpret these norms due to their wording in conformity with the Directives. Henceforth, this exception is not in accordance with European Law.[228] However, the Federal Labour Court (*Bundesarbeitsgericht*) argued that a discriminating dismissal may be contrary to social choice (*Sozialwidrigkeit)* and hence lead to the invalidity of the dismissal according to the Law on Protection against Dismissal (*Kündigungsschutzgesetz*).[229] It held that such an interpretation of the German law on protection against dismissal is in conformity with the Directives.

[228] Accordingly, this regulation, which has been created in the very last moments of the legislative process as part of political bargaining, has been widely criticised in legal science, cf. Düwell, jurisPR-ArbR 28/2006 para 7; Thüsing/Bauer/Schunder (Thüsing) NZA 2006, 777; Däubler, Däubler/Bertzbach, AGG § 2, para 259 et seq.

[229] Federal Labour Court (*Bundesarbeitsgericht*), 6 November 2008, 2 AZR 523/07; Federal Labour Court (*Bundearbeitsgericht*), 5 November 2009, 2 AZR 676/08.

According to Sec. 2.2 Sentence 2 AGG, for occupational pensions (*betriebliche Alterversorgung*), the Law on Occupational Pensions (*Betriebsrentengesetz*) is applicable, which contains no general prohibition of discrimination, though through case-law, some prohibitions have been established.

This regulation can be regarded as a deficit in transposing the Directives, given the consistent CJUE-case-law regarding occupational pensions as part of pay.[230] The only possibility to avoid this result is to interpret the norm as not excluding the applicability of the AGG, as it does not contain an explicit clause – like for comparison Sec. 2.4 AGG that exclusively the Law on Occupational Pensions (*Betriebsrentengesetz*) is applicable.[231] The same reasoning applies to occupational pension schemes in the public domain.

For recent case-law on pension schemes, cf. above, 0.3.

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

Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning courses?

The AGG follows the regulation of the Directives closely in Sec. 2.1 No. 3. There is no explicit reference to vocational training outside employment relationships (cf. 3.2.8). Sec. 19a Social Code IV (*Sozialgesetzbuch IV*) contains a prohibition on all grounds for benefits concerning the access to all forms and levels of vocational guidance, vocational training, vocational advanced training, vocational retraining including practical work experience. In addition, Sec. 36.2 Social Code III *(Sozialgesetzbuch III)* provides that the Agency of Labour (*Agentur für Arbeit*) is only allowed to consider limitations imposed by employers on job applicants on the grounds of age (among other grounds) if they are indispensable given the kind of work. A consideration of race or ethnic origin, religion or belief, disability or sexual identity is according to this norm possible if this is allowed on the base of the AGG. The constitutional guarantee of equality is in addition applicable in public law of which social law forms a part.

[230] There was a preliminary reference to the ECJ by the Federal Labour Court (*Bundesarbeitsgericht*)) as to the question of age discrimination in the case in which a surviving dependents' pension is not paid if the surviving spouse is 15 years younger than the employee (BAG, 27 June 2006, 3 AZR 352/05). The ECJ, however, did not answer this question since it ruled that due to the nature and time of the specific case, EU Law was not applicable, ECJ, 23.09.2008, C-427-06.

[231] Cf. e.g. Federal Labour Court (*Bundesarbeitsgericht*), 6.11.2008, 2 AZR 523/07. The Federal Labour Court (*Bundesarbeitsgericht*) decided that despite Sec. 2.2 sentence 2 AGG, the AGG applies to occupational pensions as far as the Law on Occupational Pensions (*Betriebsrentengesetz*) does not contain a special regulation, Federal Labour Court (*Bundearbeitsgericht*), 11 December 2007, 3 AZR 249/06.

There are no explicit rules on harassment and instruction to discrimination in public law in this area, as the rules of the AGG are not made applicable, which might, however, depending on judicial interpretation be derived by implication from the existing norms.

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

The AGG follows the regulation of the Directives in Sec. 2.1 No. 4. Sec. 18 provides for the application of the regulation on labour law in the AGG in this area, including a claim to membership in these organisations, Sec. 18.2 AGG.

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

It is important to keep in mind for the following that the AGG applies in principle to all grounds. As far as general contract law is concerned, for the areas covered by 3.2.6 – 3.2.8 the AGG is fully applicable for discrimination on the grounds of race and ethnic origin, Sec. 19.1 and 19.2 AGG. For other grounds, this is only so for qualified contracts (cf. 3.2.9).

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

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

According to Sec. 2.1 No. 5 AGG, the AGG applies - for all grounds covered - in these areas. (On the special regulation of social law, cf. 3.2.7).

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

This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.

Sec. 2.1 No 6 AGG covers social advantages.[232] Social advantages are understood in a wide sense.

[232] Cf. Eichenhofer, Däubler/Bertzbach, AGG, § 2 para 66.

Social welfare benefits (*Sozialhilfe*) are taken to be social advantages as well.[233] According to Sec. 2.2 Sentence 1 AGG Sec. 33c Social Code I (*Sozialgesetzbuch* I) and Sec. 19a Social Code IV (*Sozialgesetzbuch* IV) are applicable.[234] Given the scope of the Social Code, this regulation is applicable both to social protection and social advantages. Sec. 33c Social Code I (*Sozialgesetzbuch* I) prohibits discrimination on the grounds of race, ethnic origin and disability in the case of claiming social rights.

This provision is applicable to the whole social code, including social insurance, educational benefits, social compensation, benefits for families, housing allowances, support for children and adolescents, social welfare benefits, or participation of disabled persons. The norm intends to implement Directive 2000/43/EC and adds the ground of disability. The constitutional guarantee of equality is in addition applicable.

The exception in Art. 3 (3) Directive 2000/78 does not lead to an absence of any protection against discrimination.[235] There are no explicit rules on harassment and instruction to discrimination in public law in this area, as the rules of the AGG are not made applicable, which might, however, depending on judicial interpretation, be derived by implication from the existing norms.

As far as social advantages in the public service are concerned, the guarantee of equality with the scope already outlined applies. It has been held[236] that it is e.g. lawful as far as employment benefits are concerned to treat married partners better than civil servants living in a *Lebenspartnerschaft* (life partnership, registered partnership for homosexuals and lesbians) because of the special protection for marriage provided by the Basic Law.[237] Such jurisdiction is contrary to the regulation through the AGG.[238] The CJUE has clarified that it is a violation of the principle of non-discrimination, Art. 1, 2 Directive 2000/78/EC, if a surviving life partner has no right to receive a survivor's pension unlike a surviving spouse if life partners and spouses are in a comparable position according to national law.[239]

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[233] Cf. Eichenhofer, Däubler/Bertzbach, AGG, § 2 para 78.
[234] On Sec. 19a Social Code IV (*Sozialgesetzbuch* IV) see above 3.2.4.
[235] There is, however, some case law on the question what is covered by Article 3 (3) Directive 2000/78/EC, arising from the terms used in the English, French and German versions of the Directive, especially regarding whether only payments (as in the English version) or other services as well are included. See Federal Social Security Court (*Bundessozialgericht*), 29 January 2004, B 4 RA 29/03 (left open); for narrow interpretation (only monetary payments) Hesse Social Security Court (*Hessisches Landessozialgericht*), 10. June 2005, L 6/7 KA 58/04 ER: continuing position as contractual doctor of public health insurance no benefit (*Leistung*) of social security. Survivors' pensions are exempt from the application of Directive 2000/78 by Article 3.3 Federal Social Security Court (*Bundessozialgericht*), 29 January 2004, B 4 RA 29/03 R; concurrent Hesse Social Security Court (*Hessisches Sozialgereicht*) 29. July 2004 L 12 RJ 12/04 compared to Düsseldorf Social Security Court (*Sozialgericht Düsseldorf*), 23 October 2003, S 27 RA 99/02; cf. ECJ, 1 April 2008, C-267/06, *Tadao Maruko* and 0.3 above.
[236] Federal Administrative Court (*Bundesverwaltungsgericht*) 2 C 43.04, 26 January 2006, NJW 2006, 1828.
[237] Article 6 Basic Law (*Grundgesetz*).
[238] Mahlmann, in Däubler/Bertzbach, AGG, § 24 para 50.
[239] ECJ, 1 April 2008, C-267/06, *Tadao Maruko*.

Accordingly, the Federal German Constitutional Court (*Bundesverfassungsgericht*) has held that both same sex couples living in a life partnership and married spouses have to be treated equally as to social benefits, overruling contradicting case law on this matter[240] (for recent case law on this matter, cf. above 0.3 and 2.3. c).

Sec. 46.4 Social Code VI (*Sozialgesetzbuch* VI) extends the entitlements of state pensions to registered partners.

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

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.
Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported.

The AGG, Sec. 2.1 No. 7 covers education for all grounds. It is clear that this norm applies to any form of education provided on the base of a private contract. There is no explicit extension by the AGG to education ruled by public law as in Sec. 24 AGG for civil servants. For public education (schools, universities, universities of applied sciences etc), - the greatest part of education in Germany - the constitutional equality guarantee is thus central.[241]

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.[242] Private schools, possibly with a religious or philosophical ethos, have a right to equal treatment as regards state support.[243] There is an explicit prohibition in the Basic Law (*Grundgesetz*) on discrimination according to income by private schools that function as a substitute for public schools.[244] Beyond this prohibition, the organisation responsible for the school has the right to select pupils freely, e.g. according to confession, as long as pupils in the area can visit an alternative public school. There are rules on reasonable accommodation for disabled children.[245] All these rules on equal treatment in schools apply irrespective of nationality, and thus to immigrants as well.

[240] Federal German Constitutional Court (*Bundesverfassungsgericht*), 7 July 2009, 1 BvR 1164/07.
[241] Cf. Rudolf in Rudolf/Mahlmann, GleichbehandlungsR, § 6 para 154.
[242] See e.g. Article 7 North Rhine-Westphalia Constitution (*Landesverfassung Nordrhein-Westfalen*), Section 1.1 North Rhine-Westphalia School Law (*Schulgesetz Nordrhein-Westfalen*): no discrimination on base of economic status, origin or sex.
[243] BVerfGE 75, 40.
[244] Article 7.4 sentence 3 Basic Law (*Grundgesetz*).
[245] See above 2.6.b).

There are no explict rules on harassment and instruction to discrimination in public law in this area, as the rules of the AGG are not made applicable, which might, however, depending on judicial interpretation, be derived by implication from the existing norms.[246] For a brief description of the concept of integrated schooling for children with disabilities cf. above 2.6 b), which varies among the *Länder* because of the federal structure of Germany.

There are special regulations for autochthonous minorities in Germany,[247] which provide special protection of cultural identity, including the use of language in schools.

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

a) Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.

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

The prohibition of discrimination on the ground of race and ethnic origin extends to all legal transactions available to the public, Sec. 19.2 AGG. The interpretation of the term "available to the public" is contentious in legal science.

[246] Segregation – unlike individual cases of discrimination – is therefore not an issue in the German public school system, though different educational chances of persons with migrational background are well documented, cf. Klose, Rudolf/Mahlmann, GleichbehandlungsR, § 10 for further details. Given the statements on the issue 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. 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. These reports have to draw, however, in the absence of reliable statistical data from interviews and other less comprehensive data (cf. e.g. ERRC/EUMAP Joint EU Monitoring and Advocacy Program / European Roma Rights Centre Shadow Report Provided to the Committee on the Elimination of Discrimination Against Women Commenting on the fifth periodic report of the Federal Republic of Germany Submitted under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, Budapest, 09.01.04). There is the widespread perception – again including voices from the German Sinti and Roma community – that these kinds of studies do not convincingly establish any patterns of segregation, 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.

[247] See Footnotes 76 and 98 above and Footnote 324 et seq. below.

Most convincing is an interpretation – in line with EU law on this matter[248] – that regards any good or service that is offered (including an *invitatio ad offerendum*) to an unlimited group of people by any means as available to the public.[249]

The prohibition for 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 (so-called *Massengeschäfte* (bulk business) or to legal transactions, where the characteristics of the person have only subordinate importance, Sec. 19.1 No. 1 AGG. The principle of non-discrimination is supposed not to apply in principle (though exceptions are supposed to be possible), if a landlord does not let more than 50 flats, as in this case a *Massengeschäft* is assumed not to be given, Sec. 19.5 sentence 3 AGG. Furthermore, the prohibition of discrimination extends to private insurances, Sec. 19.1 No. 2 AGG.

The prohibition of discrimination does not apply to legal relations of a personal kind or if there is a special relation of confidence between the parties concerned or their relatives, Sec. 19.5 sentence 1 AGG. As recital 4 of Directive 2000/43/EC underlines, and as it follows from European fundamental rights, the protection of the private sphere is a (fundamental and important) content of European law. As the Directive 2000/43/EC – unlike Art. 3.1 Directive 2004/113/EC – contains no explicit exception in this respect it is, however, 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 in 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.[250]

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

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

[248] Cf. Mahlmann, in Rudolf/Mahlmann, GleichbehandlungsR, § 3 pra 89.
[249] Cf. Armbrüster, in Rudolf/Mahlmann, GleichbehandlungsR, § 7 para 75 et seq.; explanatory report, Bundestagsdrucksache 16/1780 p. 32.
[250] For the reconcilabilty of Sec. 19.5 sentence 1 and 2 AGG with Directive 2000/43/EC, cf. e.g. Armbrüster in Rudolf/Mahlmann, GleichbehandlungsR, § 7 para 84 et seq.

There are laws which either allow public authorities to act against certain forms of discrimination in the private sector or require equal treatment of clients in specific market segments where specific market conditions apply. For example, insurance premiums must not be calculated on the basis of nationality or ethnic origin.[251]

The Law on the Transport of Persons (*Personenbeförderungsgesetz*) requires that a company must be reliable in order to receive a license, and establishes the duty to provide services to anybody who abides by the transport regulations.[252] Telecommunication and postal service regulations require companies with a dominant market position to offer their services to everybody on the same conditions.[253] The Licensing Law (*Gaststättengesetz*) makes authorisation to establish a restaurant dependent on the provision of rooms that reasonably accommodate the needs of disabled persons.[254] The license itself can be denied in cases of discriminatory behaviour.[255] There is some case law in this area.[256]

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. The case law in this respect is, however, despite some literature on the matter, limited.[257]

b) Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?

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[251] Section 81e Insurance Supervison Law (*Versicherungsaufsichtsgesetz*).
[252] Section 22 Law on the Transport of Persons (*Personenbeförderungsgesetz*). Disabled persons are consequently included.
[253] Section 2 Regulation on the Protection of Telecommunications Customers (*Telekommunikations-Kundenschutzverordnung*); Section 2 Regulation on the Postal Service (*Postdienstleistungsverordnung*). Furthermore, Sec. 1.3 No. 4 Regulation on Universal Postal Services (*Postdienstleistungsverordnung*) excludes postal items with racist statements written on their envelopes from delivery.
[254] Section 4.1 Nr. 2a Licensing Law (*Gaststättengesetz*).
[255] Cf. Klose in Rudolf/Mahlmann, GleichbehandlungsR, § 6 para177 et seq.
[256] Cf. Schleswig-Holstein Administrative Court *(Schleswig-Hosteinisches Verwaltungsgericht*) 27 September 2000, 12 B 81/00: no denial of license for restaurant on basis of political belief (Neo-nazi) if no crime committed; for further case law Klose in Rudolf/Mahlmann, GleichbehandlungsR, § 6 para 177 et seq.
[257] Examples from case law: The practise of a taxi control centre of offering "German taxi drivers" was regarded as a violation of the guarantee of equality which was held to apply indirectly to the legal relationship between the taxi driver and the taxi control centre, making joint decision in this respect null and void, see Higher Regional Court Düsseldorf (*Oberlandesgericht Düsseldorf*), 28 May 1999, 14 U 238/98; *Land* Court Karlsruhe *(Landgericht Karlsruhe*), 11 August 2000, 2 O 243/00: Violation of Section 826 Civil Code (*Bürgerliches Gesetzbuch*) through exclusion of gay singing club by association of such clubs; termination of contract with executive because of ethnic origin is offending against good morals and consequently null and void, *Land* Court (*Landgericht)* Frankfurt, 7 March 2001, 3-13 O 78/00; *Land* Court (*Landgericht*) Frankfurt, 17 January 2001, 3-13 O 78/00 (British citizen of Indian origin). Extraordinary termination of contract, Section 626 Civil Code (*Bürgerliches Gesetzbuch*) void if severe disability has not been duly considered, *Land* Labour Court (*Landesarbeitsgericht*) Brandenburg, 19 February 2003, 7 Sa 385/02.

As far as financial services are provided on the basis of private contract the general rules of the AGG apply. Sec. 19.1 No. 2 AGG extends the prohibition of discrimination to private insurances. The grounds covered are race and ethnic origin, sex, religion, disability, age and sexual identity.

Discriminations on the ground of race or ethnic origin may not be justified. As to unequal treatment on the ground of religion, disability, age or sexual orientation, Sec. 20.2 sentence 3 AGG provides that a difference in treatment is only admissible, if it is based on acknowledged principles of calculations adequate to the risks, especially on actuarial evaluation of risks based on statistical surveys.

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

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

Within the conditions set out before (3.2.9 a)), the AGG applies to housing. Unequal treatment is, however, permissible for all grounds if it serves to create and maintain stable social relations of inhabitants, and balanced patterns of settlement and economic, social and cultural relations, Sec. 19.3 AGG. According to the explanatory report, this clause is not to be interpreted as justifying the underrepresentation of any racial or ethnic minority.[258] This question has practical importance for various groups of residents with migratory background, given the residential structures in some cities where people with such background find housing predominantly in some areas, but not others, but less so for Roma as comparable housing patterns in their case do not exist. Some measures will be justifiable as positive action insofar they increase the presence of some minority. In other cases a possible indirect discrimination on race and ethnic origin because of the application of certain socio-economic parameters might be justified by the objective reason to create a socially balanced structure of inhabitants, if these measures are proportional. Given that there is no explicit exception or possibility of justification of such unequal treatment under the Directive 2000/43/EC beyond that, the reconcilability of the clause with European law depends on the question whether the interpretation of the clause is limited to this framework.[259]

As mentioned, the prohibition of discrimination in contract law does not apply to legal relations of a personal kind or if there is a special relation of confidence between the parties concerned or their relatives, Sec. 19.5 sentence 1 AGG.

[258] Bundestagsdrucksache 16/1780 p. 42.

[259] Arguing for permissibility on the ground of a teleological reduction of the regulation of the Directive 2000/43/EC as the prevention of ghettoisation is not against the telos of the directive, Armbrüster in Rudolf/Mahlmann, GleichbehandlungsR, § 7 para 109 et seq.; for the impermissibility of exclusive quotas but the permissibility of supporting quotas implying maximum representation of certain minorities, Ambrosius in Däubler/Bertzbach, AGG § 19 para 40 et seq.

In case of housing this is supposed to be the case if the parties or their relatives live on the same premises, Sec. 19.5 sentence 2 AGG. This raises the same problems discussed under 3.2.9 a) as there is no explicit exception to this extent in the Directive. The reconcilability of this clause depends on the interpretation of the Directive 2000/43/EC (cf. 3.2.9 a)).
There is a special clause enabling registered partners (*Lebenspartner*) to succeed in rental contracts after their partner's demise.[260]

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

Support to people with disabilities is granted for finding, modifying, equipping and preserving of housing adequate to their special needs (Sec. 55.2 No. 5 Social Code IX (*Sozialgesetzbuch* IX)). As mentioned above (2.7 a)) people with disabilities may be granted social security benefits to help them live independently in sheltered accommodation (Sec. 55.2 No. 6 Social Code IX (*Sozialgesetzbuch* IX)).

Further provisions provide for special means to accommodate the needs of older people, including adaptation of the housing to their needs (Sec. 70 and 71.2 No. 2 Social Code XII (*Sozialgesetzbuch* XII)). (Cf. as well 2.6 f).

[260] Section 563.1 sentence 2 Civil Code (*Bürgerliches Gesetzbuch*).

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

Sec. 8 AGG contains a provision on genuine and determining occupational requirements following closely the Directives.

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

a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?

In German law an elaborate system of justifications exists for religious communities – an area of considerable social, cultural and political importance.[261] The legal basis for this are the constitutional provisions on the status of religious communities: the Constitution separates religion and State and establishes the principle of the neutrality of the state. This principle is not explicitly stated, but implied by various constitutional provisions on freedom of religion and the legal status of churches. It has been interpreted in an "open" fashion. This concept of "open" neutrality was formulated by the Federal German Constitutional Court and means that to a certain degree, religious confessions can play a role in public life, subject to strict equal treatment of all religions.[262] Article 140 Basic Law (*Grundgesetz*) incorporates several articles of the Weimar Constitution, 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 Basic Law (*Grundgesetz*) 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 Weimar Constitution abolished any "state church".

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[261] Religious communities are understood as associations of at least two persons based on a consensus of faith aiming at least partly to manifest this faith.

[262] The head scarf issue is in its core not conceptualised by the Federal German Constitutional Court as a matter relating to unequal treatment of religions, but instead as relating to possible limits on the freedom of religion, see Federal Constitutional Court *(Bundesverfassungsgericht)*, 2 BvR 1436/02 para 32 et passim. Even the yardstick for the guarantee of equality of Article 33.3 Basic Law (*Grundgesetz*) is the compatibility of a regulation with freedom of religion, ibid. para 39. The Court, however, emphasises that any prohibition of religious symbols has to respect the strictly interpreted equality of religions, ibid. para 43, 71. The Federal German Administrative Court confirmed this principle of equal treatment in its second head scarf decision, Federal Administrative Court (*Bundesverwaltungsgericht*), 2 C 45/03, 24.6.2004 para 35, on further cases cf. 0.3. On the general legal framework cf. Kunig and Mager in Mahlmann/Rottleuthner (eds.), Ein neuer Kampf der Religionen?, 2006, p. 161 et seq.; 185 et seq.

This entails the separation of the secular and religious spheres and creates a basis for the autonomy of churches and other religious communities.

Art 137.3 Weimar Constitution forms the legal basis for this autonomy from the State. Some landmark decisions by the Federal Constitutional Court have elaborated the nature of this autonomy.[263] 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 an inner relationship to the religious mission of the religious community. Whether such an inner relationship exists is not to be determined by state institutions, 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 religion mission of the Christian faith. Acts concerning the internal workings of a church are not acts by public authorities and thus not regulated by public law.

Given this autonomy, provisions of law do not apply to religious communities without qualification. For example, according to the Federal Constitutional Court, the Work Constitution Act (*Betriebsverfassungsgesetz*) is not applicable to hospitals as employers if their operation is part of the religious mission of a religious community. The Work Constitution Act contains a general provision in this respect that exempts from its scope all organisations that are of a directly or predominantly confessional nature, among others.[264] Another provision in the Law directly exempts religious communities.[265]

According to Article 140 Basic Law and Article 137.3 Weimar Constitution, the autonomy of a church is limited by the laws applicable to all. 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 everybody else. For example, given the special mission of churches, labour laws do not have the same meaning for churches as for anybody else. These laws cannot therefore limit the autonomy of churches, without paying due regard to their special status when interpreting them, the Court argued.

[263] BVerfGE 46, 73 (Application of the Work Constitution Act (*Betriebsverfassungsgesetz*) 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).
[264] Section 118.1 Work Constitution Act (*Betriebsverfassungsgesetz*). This provision applies if the character of the organisations justifies the exemption.
[265] Section 118.2 Work Constitution Act (*Betriebsverfassungsgesetz*).

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.[266]

If, however, they take advantage of private autonomy, they are in principle regulated by general labour law.[267]

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

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

For example, courts have ruled that there are special reasons for terminating employment contracts if special duties and obligations of loyalty are violated.[268] Thus a doctor in a religious hospital can be dismissed if she leaves the church concerned or marries a divorced man if this contradicts the ethos of the religious community concerned. Another pertinent issue is homosexuality of employees.[269]

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.[270]

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

[266] BVerfGE 70, 138, 164.
[267] Ibid.
[268] Cf. e.g. Rhineland-Palantine *Land* Labour Court (*Landesarbeitsgericht Rheinland-Pfalz*), 2 July 2008, 7 Sa 250/08: no discrimination if employee in a nursing home which is attached to a Church is dismissed because the employee leaves the Church as this is justified by breach of duty of loyalty (parties settled in next instance, Federal Labour Court (*Bundearbeitsgericht*), 21 December 2010, 2 AZR 516/09).
[269] On this matter with reference to some case law: Wedde in: Däubler/Bertzbach, AGG (2nd ed.) § 9 para 58.
[270] BVerfGE 70, 138, 168.

Sec. 9 AGG contains an exception for religion mirroring this general legal framework: A difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity, Sec. 9.1. The prohibition of different treatment on the grounds of religion or belief shall be without prejudice to the right of the religious community referred to under Section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation, Sec. 9.2 AGG.

This general legal regime is in principle in accordance with the regime of exceptions in Article 4 (2) and – relevant as well – Art. 4.1[271] of Directive 2000/78. There are, however, problems as to details of the regulations. The AGG regulation is problematic in this respect. Sec. 9.1 AGG refers to the *Selbstverständnis* (self-understanding, the ethos) *or* the nature of the particular activity, whereas the Directive combines both: The requirement has to be justified through a test of proportionality implied in Art. 4.2 Directive 2000/78/EC both as to the self-understanding *and* as to the kind of work concerned.

A regulation like Sec. 9.1 AGG which seems not to differentiate necessarily between kinds of work seems therefore not in accordance with European Law.[272] Sec. 9.1 AGG refers only to justified (*gerechtfertigt*) not to legitimate and justified requirements, as the Directive, though this might not lead to any difference through judicial interpretation.

[271] 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 in Rudolf/Mahlmann, GleichbehandlungsR, § 3, para 110 et seq. Differentiations based on religious motives, e.g. as to sexual orientation, have to be justified according to Art. 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.

[272] It should be noted that the Federal German Constitutional Court accepted as constitutional that it is up to the religious communities to determine to which kind of work their specific requirements applies to, including the possibility that all requirements apply fully to all kinds of work, cf. BVerfGE 70, 138, 162 et seq. It is a matter of debate, whether this regime is in accordance with Directive 2000/78/EC and other regulations of EU Law on the status of religious communities, including the (not binding) 11th Declaration on the status of churches and non-confessional organisations annexed to the Treaty of Amsterdam and the corresponding regulation in Article 17 of the Treaty on the functioning of the European Union as amended by the Treaty of Lisbon, cf. for further details Mahlmann, in Rudolf/Mahlmann, GleichbehandlungsR, § 3 para 110 et seq. One case, Labour Court Hamburg (*Arbeitsgericht Hamburg*), 4 December 2007, 20 Ca 105/07, has modified this approach differentiating as to the kind of work concerned, concluding that under EU Law it is not a justified requirement that for work that does not belong to the core area of the activity of a religious community only members of that religious community are employed. This decision was overturned by Hamburg *Land* Labour Court (*Landesarbeitsgericht Hamburg*) on 29 October 2008, 3 Sa 15/08 (for the reasoning see 0.3 Country report 2008 for the European network of legal experts in the non-discrimination field by this author). The reversal was confirmed by Federal Labour Court (*Bundearbeitsgericht*), 19 August 2010, 8 AZR 466/09.

As in German labour law, the persons with a religious office (e.g. priests) are regularly not regarded as employees, the AGG does not apply to them.[273] Though professional requirements in this core area of the activities of the religious community will be justifiable under Art. 4.1 and .2 Directive 2000/78/EC, the Directive does not have an exception in this respect.

b) *Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

As mentioned, one of the practically important issues is the right of religious communities to dismiss homosexual employees, if this sexual orientation is contrary to the ethos of the respective community, cf. above 4.2 a).

c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

According to Art. 7.3 sentence 2 Basic Law (*Grundgesetz*) religious instruction in public schools is – with the exception of non-denominational schools – organised in harmony with the principle of religious communities. This creates no directional competencies 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 as to Chairs in Theology in public universities. Apart from that, 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) as to appointment of chairs of other subjects than theology (philosophy, history, pedagogy). In practice, these chairs are not necessarily limited to catholic applicants as a protestant applicant has been appointed on one of these chairs with the consent of the Catholic Church. The Catholic Church enjoys a veto as to the appointment but not as to the exercise of the professorship (e.g. the actual content of teaching), which has no "missio canonica". In 1980, the Constitutional Court of Bavaria has decided that these regulations do not violate constitutional norms, among them the neutrality of the state. The Court argued that this form of cooperation with the Church is necessary in order to reach the educational goals (*Bildungsziele*) in public schools laid down in Sec. 131 and 135 of the Bavarian Constitution (among others the awe of God, respect for religious convictions and human dignity as well as an education according to the principles of the Christian denominations).

[273] As to further case law on the matter, cf. 0.3 of Report 2007.

It held that for future teachers in order to be able to educate according to the principles of the Christian denominations, it is necessary to provide corresponding course offerings at university level.[274]

However, the question of the legitimacy of those chairs continues to be highly contentious. While proponents follow mainly the reasoning of the Bavarian Constitutional Court, arguing that as long as there is a need for denominational informed teachers these agreements are legitimate[275] opponents criticize breaches of the constitutional principles of neutrality and separation of state and church, of the constitutional guarantee of equal access to public employment irrespective of religious denomination, of the constitutional freedom of sciences as well as of Directive 2000/78/EC and of the AGG.[276]

In a recent case, the actions of several applicants for an appointment to a professorship of philosophy for which the Catholic Church exercises a veto right, were dismissed on the base of procedural issues. The Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*) stated, in addition that given the non-discriminatory practise of the university not considering the religion of the applicants no unequal treatment has been substantiated by the applicant.[277]

The protestant church has concluded contracts with Bavaria that the *Land* has to take into account the need of theology students when appointing chairs of church law at two of its universities.[278]

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

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

The SoldGG covers – as mentioned above – all grounds with the exception of age and disability, taking advantage of the exception for the military service in Art. 3.4 Directive 2000/78.

[274] Constitutional Court of Bavaria (*Bayerischer Verfassungsgerichtshof*), BayVerfGHE 33, p. 65 et seq.
[275] E.g. von Campenhausen, in Mangoldt/Klein/Starck, GG (6th ed. 2010), Art. 136 WRV, para 25 et seq for philosophy and pedagogy but not history; Ehlers, in Sachs, GG, Art. 140, 136, para 3, both with further references to the extensive discussion.
[276] Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts (2000), para 338 et seq.; Morlok, in Dreier, GG, Art. 140/136 WRV para 18; Czermak, Religions- und Weltanschauungsrecht (2008), para 406 both with further references.
[277] Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*), 30.4.2009,7 CE 09.661, 7 CE 09.662.
[278] Law on the concordats 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, GVoBl. 22 January 1925, p. 53.

Sec. 18.1 SoldGG, however, provides for a prohibition of discrimination for severely disabled soldiers, provided that physical function, mental ability or psychic health is not a genuine and determining occupational requirement for the military service. Sec. 18.2 SoldGG provides for compensation for a violation of this prohibition.

There is in addition in the Soldiers Act (*Soldatengesetz*) a legal prohibition of discrimination against soldiers on the grounds of sexual identity, parentage, race, faith, belief, religious or political opinion, ethnic origin, amongst others.[279] According to social law, the legal status of severely disabled soldiers is as to certain legal provisions the same as for other severely disabled persons. The provisions for severely disabled persons are applied as far as they are compatible with the special requirements of military service.[280]

b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?

There are no such exceptions.

4.4 Nationality discrimination (Art. 3(2)

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

a) How does national law treat nationality discrimination? Does this include stateless status?
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?

In German law there is, as in other legal systems, a differentiated system of treatment of non-German nationals. On the most fundamental level, their status is protected by fundamental rights in the German constitution that are human rights and therefore applicable to every human being in his or her relation to German state authorities. Most import is here the guarantee of human dignity.[281] The bearers of other fundamental rights are only Germans, though special laws might grant the respective freedom for non German citizens as well.[282]

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[279] Section 3.1 Soldiers Act (*Soldatengesetz*): *Der Soldat ist nach Eignung, Befähigung und Leistung ohne Rücksicht auf Geschlecht, sexuelle Identität Abstammung, Rasse, Glauben, Weltanschauung, religiöse oder politische Anschauungen, Heimat, ethnische oder sonstige Herkunft zu ernennen und zu verwenden.*
[280] Section 128.4 Social Code IX (*Sozialgesetzbuch* IX).
[281] Article 1 Basic Law (*Grundgesetz*).
[282] As for example in the case of freedom of assembly, see Section 1 Law on Assembly (*Versammlungsgesetz*).

Citizens of the Member states are treated like Germans in most respects due to EU law. Within this framework, German law differentiates between Germans and non-Germans in various legal spheres, as residence rights, work permits or some social security rights.[283]

Some professions are open only to Germans and specified groups of non-Germans, such as EU citizens and stateless people.[284] Nationality discrimination, including the example cited, can however be judged unlawful, if it is not justifiable under the general guarantee of equality.

Under the AGG, nationality discrimination is generally regarded as possible indirect discrimination on the base of race or ethnic origin and as such forbidden. There are prohibitions of discrimination that list nationality as forbidden ground, e.g. Sec. 75.1 Work Constitution Act (*Betriebsverfassungsgesetz*, see above 2.1). In other spheres of law, unequal treatment on the basis of nationality can be considered a breach of the general provisions of private law.

b) Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?

There is no explicit exception in anti-discrimination law. It is, however, generally accepted that the AGG does not apply to the issues listed in Art. 3 (2), cf. 4.4 a).

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

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?

[283] Some examples: The federal scheme to support educational costs through grants is not only open to Germans, but to non-Germans of various legal status as well as persons entitled to asylum, refugees, long term legal residents, and persons enjoying exceptional leave to remain, see Section 8.1 No. 2 – No. 7; 8.2 Federal Law on Promotion of Education (*Bundesausbildungsförderungsgesetz*). See also Section 63.1 and 63.2 Social Code III (*Sozialgesetzbuch* III).

[284] See Section 3.1 No. 1 Federal Medical Regulation (*Bundesärzteordnung*): admission to medical practice only for German citizens according to Article 116 Basic Law (*Grundgesetz*), citizens of EU Member States, contractual parties to the Treaty on the European Economic Area, other contractual partners in this respect or stateless people; there are similar regulations in other areas, for example pharmacists, see Section 2.1 Nr. 1 Law on Pharmacies (*Apothekengesetz*).

Due to the principle of freedom of collective bargaining[285], contracting partners are free to include provisions based on marriage in collective agreements.

There has to be, however, a connection to the professional tasks or working conditions.[286] Marriage in this context can only refer to the status of family, not to its reproductive function.

The family status of registered life partnerships (*eingetragene Lebenspartnerschaft*) is not covered by the law on the remuneration of civil servants.[287]

The case law in previous years has been rather restrictive.[288] Because of the CJUE decision *Tadao Maruko* the differential treatment of spouses and life partners within the scope of Directive 2000/78/EC has to be considered as violating EU law.[289] Accordingly, the Federal German Constitutional Court (*Bundesverfassungsgericht*) has clarified – as has been already mentioned – that same sex life partners and spouses have to be treated equally.[290] Meanwhile, the Federal Labour Court (*Bundesarbeitsgericht*) and other courts have adapted their jurisprudence to follow this interpretation (cf. above, 0.3).

b) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?

Such limitation could form a discrimination, though there is no case law on the matter.

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

a) Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

b) Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

There are general legal rules on health and safety measures that are relevant for aspects of personal appearance influenced by religion or ethnic origin, for example regulations on hair cuts for policemen or soldiers but no special regulations in this respect on discrimination. Other examples include such measures in the case of disability. Any such exceptions would have to be in agreement with Sec. 8 AGG on genuine and determining occupational requirements.

[285] Article 9.3 Basic Law (*Grundgesetz*).
[286] Federal Labour Court (*Bundesarbeitsgericht*), 29 April, 2004, Az: 6 AZR 101/03.
[287] Section 40 Law on the Salaries of Federal Employees *(Bundesbesoldungsgesetz*).
[288] Cf. 0.3 in the previous country reports.
[289] ECJ, 1 April 2008, C-267/06, *Tadao Maruko* (for case law on this matter cf. above, 2.3.c); 3.2.7).
[290] Federal Constitutional Court (*Bundesverfassungsgericht*), 7 July 2009, 1 BvR 1164/07.

For disability, the duty for reasonable accommodation has to be considered in this respect. For soldiers there is a special regulation in Sec. 18.1 SoldGG cf. 4.3 a).
For general civil law contracts outside labour relations covered by the Directive 2000/78/EC, justification can be based on Sec. 20.1 No. 1 AGG (see 2.2 c)).

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

4.7.1 Direct discrimination

a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?

Sec. 10 AGG contains a detailed provision to justify direct discrimination on the ground of age, see above 2.2 c). Sec. 10 AGG implies a test of proportionality which is at the core of *Mangold*.

The regulations follow in Sec. 10 No. 1 – 4 AGG the regulations of the Directives. Sec. 10 No. 5 and 6 AGG cover additional (exemplary) grounds.[291] Sec. 10 No. 6 seems to be justifiable in the light of Art. 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.[292] For Sec. 10 No. 5 on retirement ages see below 4.7.4. Before the CJUE *Age Concern* decision,[293] objective reasons were taken not to be limited to those contained in legislation or that are in the public interest. Entrepreneurial interests were regarded as being legitimate as well[294] (on the wider interpretation of objective reasons excluding an indirect discrimination cf. above 2.3 b)).

[291] The norms name as examples:
- an agreement, that provides for the termination of an employment relation without dismissal at the time, when the employee is entitled to apply for pension on the ground of age, notwithstanding the regulations in Sec. 41 Social Code VI (*Sozialgesetzbuch* VI), Sec. 10 No. 5 AGG.
- differentiations of benefits in social plans in the sense of the Work Constitution Act (*Betriebsverfassungsgesetz*), if the parties have created a settlement graduated according to age and staff membership in a firm, in which the chances on the labour market, which are essentially dependent on age, are visibly considered, or excluded employees who are economically secure from benefits of the social plan, as they are entitled to pensions, be it after reception of unemployment benefits, Sec. 10 No. 6 AGG.

[292] Cf. the issue is contentious in legal science, for discussion cf. Brors in Däubler/Bertzbach, AGG, § 10 para 129 et seq.; Voggenreiter in Rudolf/Mahlmann, GleichbehandlungsR, § 8 para 46 (both: admissible).

[293] ECJ, 5 March 2009, C-388/07, (*Age Concern England*).

[294] Federal Labour Court (*Bundesarbeitsgericht*), 22 January 2009, 8 AzR 906/07. But see above, 0.3, the recent preliminary reference to the ECJ by Siegburg Labour Court (*Arbeitsgericht Siegburg*), 27 January 2010, 2 Ca 2144/09 (= ECJ, C-86/10).

According to the equality guarantee, any different treatment on the ground of age as a personal unchangeable characteristic through legislation or other acts of public authorities falls in principle under a strict scrutiny of proportionality. This matches the Mangold-test, which is a test of proportionality, as other existing case law.[295]

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

As explained, cf. 4.7.1 a), this possibility exists, implementing the framework of Directive 2000/78/EC and its judicial interpretation.

c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2) ?

The regulation in Sec. 10 No. 4 AGG provides for this possibility.

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

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

There are various measures that aim to integrate older and younger workers.[296]

[295] See 0.3 in Report 2007 for some examples.

[296] The provisions under scrutiny in the Mangold case are an example of this. The legal provision at the centre of this case was introduced by the Law on part-time work and fixed-term contracts, amending and repealing provisions of employment law (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen*) of 21 December 2000, the "TzBfG", last amendment: 19 April 2007, BGBl. I, 538. This legislation establishes the principle that a fixed-term contract may only be concluded if there are objective reasons for doing so (Sec. 14.1 of the TzBfG). As an exception, the Law provided that the conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 52 by the time the fixed-term employment relationship begins (former Sec. 14.3 of the TzBfG). This threshold was lowered from 58 to 52 till 31 December 2006. This exception did not apply if there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Consequently, fixed-term contracts could be concluded until 31 December 2006 without the need to be objectively justified if the worker had reached the age of 52 and a close connection to a previous employment contract of indefinite duration did not exist. As the employee was 56 years old when the fixed-term contract was concluded, this rule applied to him. The purpose of this regulation was to include older worker in the labour market. This aim was accepted by the ECJ; the means to achieve it, however, were deemed disproportionate. Recent amendment has lowered the age to 52 permanently and added the qualification that the fixed term contract with the formerly unemployed person is of up to 5 years of duration, Sec. 14.3. For other example from the case law cf. 0.3 Country report 2007 for the European network of legal experts in the non-discrimination field by this author, e.g. on age limits intended to integrate younger workers.

There are provisions protecting persons with caring responsibilities, e.g. parents, and, in addition, Sec. 10 No. 1 AGG mentioned above, provides for the possibility for preferential treatment of these persons.[297]

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

There is a plethora of minimum and maximum age requirements in German law.[298]

[297] See above 2.2 c).

[298] Examples include:
Federal President: minimum: 40 years, no maximum, Article 54.1 Basic Law (*Grundgesetz*).
Judges: maximum: 65 years: Sec. 21.2 No 3, 5 (dismissal) and Sec. 48 (retirement) Law on Judges (*Deutsches Richtergesetz*). Note that this maximum age requirement was lifted to 67 by amending law from 5 February 2009, BGBl. 2009 I S. 160.
Constitutional Judges: minimum 40: Sec. 3.1; maximum: 68 years: Sec. 4 Federal Consitutional Court Law (*Bundesverfassungsgerichtsgesetz*).
Federal civil servants: maximum: 67 years, Sec. 51 Federal Civil Servants Law (*Bundesbeamtengesetz*). Age requirement can be neglected for official purposes, maximum however 70, Sec. 53 Federal Civil Servants Law (*Bundesbeamtengesetz*). Note that the *Bundesbeamtengesetz* was amended, newly arranged and published on 5.2.2009 (last amendment: 19.11.2010).
Application for service training (*Vorbereitungsdienst*) in criminal investigation department: maximum: 33 years, Sec. 5.2 Regulation on Service in the Federal Criminal Police (*Kriminallaufbahnverordnung*). It is notable that the former general maximum age requirement of 32 years for applications for federal service training (*Beamtenausbildung*), former Sec. 14.2 Regulation on Careers in Federal Service (*Bundeslaufbahnverordnung*), was abrogated in 2009;
Promotion to a higher service level (*Aufstieg in eine höhere Laufbahn*) of federal employees: maximum: 57 years, Sec. 36.2 Regulation on Careers in Federal Service (*Bundeslaufbahnverordnung*); Federal Criminal Police Servants: maximum: 52 years, Sec. 10 Regulation on Service in the Federal Criminal Police (*Kriminal-Laufbahnverordnung*)
Executive police service (*Polizeivollzug*) maximum: 62 years, Sec. 5.1 Federal Executive Police Service Law (*Bundespolizeibeamtengesetz),*.
Universal compulsory military service (*Wehrpflicht*), minimum: 17, maximum: between 22 and 31 years, Sec. 5.1 Law on Universal Compulsory Military Service (*Wehrpflichtgesetz*).
Military Service: common maximum: 62 years, maximum corresponding to the military rank: 40 to 65 years, Sec. 45 Soldier Law (*Soldatengesetz*).
Air craft personnel: maximum: 60 years, Sec. 41.1 sentence 2 Service Regulations on the Operation of Aircraft (*Betriebsordnung für Luftfahrtgerät*).
Midwifes: maximum: 70 years, Sec. 29 Law on Midwives (*Hebammengesetz*). The minimum requirement of 17 years (former Sec. 7) was abrogated in 2008 (cf. amending law, 30.9.2008 BGBl I 2008, 1910).
Chimney Sweeps: maximum: 65 years, Sec. 9 Law on Chimney Sweeps (*Schornsteinfegergesetz*).
Education support (*Ausbildungsförderung*): maximum: 29 years (34 years for master's degree programs), Sec. 10.3 Law on Federal Educational Support (*Bundesausbildungsförderungsgesetz)*.
Federal Ombudsman on Data Protection: minimum 35 years, Sec. 22 Federal Law on Data Protection (*Bundesdatenschutzgesetz*).

The maximum age requirement of 68 years for physicians, dentists and psychotherapists as far as their licence for the public health system (*gesetzliche Krankenversicherung*) is concerned (Sec. 95.7 sentence 3 Social Code V (*Sozialgesetzbuch* V) was abrogated in 2008.[299]

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?

After a reform in 2008, the normal state pension age for both women and men is 67 (instead of 65).[300] However, the new threshold fully applies only to those who were born in 1964 or later. The state pension age of age cohorts from 1947 to 1963 will be lifted 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.

In 1989 and 1996, two laws were passed[301] to change the normal pension age for women to a universal level of 65 (now 67). Prior to that, women could collect pensions before 65.[302] This gradual process was accomplished in 2009.

[299] The abrogation came into force retroactively by 1 October 2008, cf. Art. 1 Nr. 1 i. and Art. 7 Abs. 3 *Gesetz zur Weiterentwicklung der Organisationsstrukturen in der gesetzlichen Krankenversicherung* (*GKV-OrgWG*), 15.12.2008, Bundesgesetzblatt 2008, Teil I, S. 2426 (2427f. and 2444). A preliminary reference on the same provision was submitted before it was abrogated, cf.: ECJ, C-341/08, 12 January 2010 (*Petersen*). The submitting court (Dortmund Social Court (*Sozialgericht Dortmund*), 25 June 2008, S 16 KR 117/07) argued that an unjustified discrimination might be assumed since the provision does not take into account individual differences in deterioration of performance because of age. The ECJ held that if the sole aim of the respective regulation is to protect the health of patients, it would be in breach of European law since the age limit does not apply to dentists outside the public health system; if the aim was to share employment opportunities among the generations, it would be reconcilable.

[300] Section 35 Social Code VI *(Sozialgesetzbuch* VI), amended on 20 April 2007, BGBl. I, 554.

[301] See Pension Reform Law (*Rentenreformgesetz*) 1992 (Bundesgesetzblatt 1989 I, 2261), Law on Promoting Development and Employment (*Wachstums- und Beschäftigungsförderungsgesetz*) 1996 (Bundesgesetzblatt 1996 I, 1461).

[302] See Sec. 237a Social Code VI *(Sozialgesetzbuch* VI).

The Federal Constitutional Court held the different treatment to be constitutional as it would compensate for the typical disadvantages faced by female employees, such as an unequally distributed family burden and discriminatory patterns in working life, including during education.[303]

There is no restriction on individuals working at the same time while receiving a normal state pension after the age of 67. There is, however, a limit on how much money can be earned if an individual is receiving a pension before this age.[304]

b) Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?

Usually payments start from the same time as state pensions.[305] It has been held constitutional to regulate occupational pension schemes according to the state pension regulation. Hence, women and men could be treated unequally in this context.[306] However, this was only considered acceptable for a transitional period.[307]

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?

There is no general state-imposed mandatory retirement age, but there are various special regulations.[308]

d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?

German law allows for employment contracts to be ended at a certain age by individual agreement and by collective bargaining.

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[303] Federal Consititutional Court (*Bundesverfassungsgericht*), 28 January, 1987, Az: 1 BvR 455/82, *Neue Juristische Wochenschrift* 1987, 1541; Federal Constitutional Court, *Bundesverfassungsgericht*, January 19, 2001, Az: 1 BvR 2130/00, *Neue Zeitschrift für Sozialrecht* 2001, 357.
[304] Sec. 34.2 Social Code VI (*Sozialgesetzbuch* VI).
[305] See Sections 2, 6 Law on Work Pensions (*Betriebsrentengesetz*).
[306] Federal Constitutional Court (*Bundesverfassungsgericht*), 19 January, 2001, Az: 1 BvR 2130/00, Neue Zeitschrift für Sozialrecht (2001), 357.
[307] Federal Labour Court (*Bundesarbeitsgericht*), 18 March, 1997, Az: 3 AZR 759/95; *Bundesarbeitsgericht*, 3 June, 1997, Az: 3 AZR 910/95, both ruling that ex-Article 119 EC and ECJ, C-262/88 Barber ruling is only applicable as far as time worked after 1990 is concerned.
[308] See above 4.7.3.

In both cases, an objective reason must exist for the respective agreements to be valid.[309]

Such objective reasons are widely held to exist for ending an employment contract at the age of 65, subject to reconsideration given the new pension age.[310] In addition, cf. 4.7.1 a) above and 4.7.4 e) below.

e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?

The laws on protection against dismissal apply in principle to all ages, though exceptions exist, see above 4.7.1 a). The claim to a state pension does not constitute a reason for dismissal by the employer.[311] 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.[312] 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, age might have the similar effect within selection procedures for redundancy though there is conflicting case law.[313]

The interest of the employer in maintaining an age balance among employees was also held to be reasonable.[314]

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[309] See Section 14.1 Law on Part-time Work and Fixed Term Contracts (*Teilzeit- und Befristungsgesetz*). No such objective reason is needed if the employee is older than 51, Section 14.3 Law on Part-time Work and Fixed Term Contracts (*Teizeit- und Befristungsgesetz*), though there are some qualifications (see Footnote 296).

[310] Reasons cover entitlement to a state pension and consequently social security, decreased performance typical of this age, and the need for intergenerational planning of the workforce, Müller-Glöge, *Erfurter Kommentar*, 11th ed. 2011, § 14 TzBfG para 56 et seqq.; Federal Labour Court (*Bundesarbeitsgericht*), October 20, 1993, Az: 7 AZR 135/93; Federal Labour Court (*Bundesarbeitsgericht*), 1 December 1993, 7 AZR 428/93; Federal Labour Court (*Bundesarbeitsgericht*), 19 November 2003, 7 AZR 296/03; Before that age, special requirements can justify early retirement.

[311] Section 41 Social Code VI (*Sozialgesetzbuch* VI).

[312] See Sec. 1.3 sentence 1 Law on Protection against Dismissal *(Kündigungsschutzgesetz)*. In case of dismissal due to urgent entrepreneurial reasons, the dismissal is – among others – not justified if the employer does not take or does not take sufficiently account of the age of the person concerned. On case law, cf. 0.3 of the Country report 2008 for the European network of legal experts in the non-discrimination field by this author.

[313] See *Land* Labour Court, Lower Saxony (*Landesarbeitsgericht Niedersachsen*), 28 May, 2004, Az: 10 Sa 2180/03, arguing that a guideline according to which employees older than 55 can be more easily dismissed is not in violation with Directive 2000/78 because these employees can live more easily with a higher risk of unemployment due to social security. See Land Labour Court, Düsseldorf (*Landesarbeitsgericht Düsseldorf*) 21 January 2004, Az: 12 Sa 1188/03: Proximity to the pension age no reason for choosing older employee for dismissal.

[314] Federal Labour Court (*Bundesarbeitsgericht*), 23 November 23, 2000, Az: 2 AZR 533/99: employee working in a kindergarten.

The regulation in this respect can be interpreted in accordance with EU law as a concretisation of the general clause of Art. 6 Directive 2000/78/EC, as long as there is no schematic preferential treatment of age groups.[315] On the new regulations of the AGG, see 4.7.2.

4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

Cf. 4.7.4 e). In addition, Sec. 622.2 sentence 2 Civil Code (*BürgerlichesGesetzbuch*) provides that employment periods under the age of 25 are not taken into account when determining notice periods. This regulation is not reconcilable with Art. 6 Directive 2000/78/EC, as the European Court of Justice decided,[316] and is consequently not applied by German courts anymore (cf. above, 0.3).

b) If national law provides compensation for redundancy, is this affected by the age of the worker?

Age can play a role in social plans for redundancy, cf. 4.7.1.a).

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

Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?

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

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

The regime of exceptions has been outlined above.

[315] Cf. Brors, Däubler/Bertzbach, AGG, § 10 para 100.
[316] ECJ, 19 January 2010, C-555/07 (*Kücükdeveci*).

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

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.

Sec. 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 has to be reconcilable with the constitutional guarantee of equality.[317] Explicit regulations make permissible positive action promoting the equality of men and women and disabled persons.[318] 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).[319] This has not been authoritatively clarified by the Federal Constitutional Court. Positive action in form of preferential employment is legally regulated according to the relevant CJUE case law,[320] which allows such treatment in principle, as long as the schemes allow for individual cases to be assessed.[321]

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

There are various special regulations on positive action, partly mentioned above.[322] Work Councils and the staff councils of public authorities have the competence to promote the integration of disabled persons, older and foreign workers and to initiate measures against racism and xenophobia.[323]

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[317] Article 3, 33.2 and .3 Basic Law (*Grundgesetz*).
[318] Article 3.2 sentence 2, Article 3.3. sentence 2 Basic Law (*Grundgesetz*). On *Land* constitutions see Footnote 76. The disability law provides for the explicit admissibility of positive action, see Section 7.1 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*).
[319] For this see: Gubelt in: v. Münch/Kunig, GGK I, Article 3 para 104; Ebsen, in: *Handbuch des Verfassungsrechts*, 2nd ed. 1994, § 8, para 23; Osterloh in: Sachs, *GG*, Article 3 para 241 et. seq., 254.
[320] See ECJ, ECR 1995, I-3069, *Kalanke*, ECJ, ECR I-6363, *Marschall*, ECJ, ECR 2000, I-5539 *Abrahamsson*, cf. Mahlmann, in Rudolf/Mahlmann, GleichbehandlungsR, § 3 para 70.
[321] Compare for such legislation e.g. Section 9 sentence 3 Federal Civil Service Law (*Bundesbeamtengesetz*).
[322] See above 2.6.
[323] Section 80.1 No. 4 Work Constitution Act (*Betriebsverfassungsgesetz*): integration of severely disabled persons, No. 6: integration of older employees, No. 7: integration of foreign workers, initiating measures against racism and xenophobia and see Section 68 No. 4, 5, 6 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*).

There are provisions on positive action, including institutional arrangements for autochthonous minorities, the promotion of their language, the protection of their territory, etc., preferential rules for political representation and so on,[324] constitutionally buttressed by basic policy clauses of the constitutions of the *Länder*.[325]

According to the Law on Protection against Dismissal, the preferential treatment of older employees under certain circumstances in case of dismissals is to be taken into account in the context of social choice (see above 4.7.4 e).[326] Employers and Work Councils have to ensure vocational training for older workers.[327]

Section 71.1 in conjunction with Sec. 73 Social Code IX (*Sozialgesetzbuch* IX) establishes the duty of any employer employing more than 20 employees to employ at least 5% severely disabled persons. This rule is interpreted as not being directly prejudicial for individual claims, as it establishes only a general duty for the employer. If the employer does not fulfil this duty, as indicated before, it does not mean that discrimination has occurred in a specific case.[328]

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[324] See on the regulations of the *Land* constitutions, above Footnote 76; 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*) 7.7.1994, GVBl 1994, 294*;* Brandenburg / Saxony: State Agreement on the Foundation of a "Foundation for the Sorbian People" (*Gesetz zum Staatsvertrag über die Errichtung der "Stiftung für das sorbische Volk"*), Date: 09.12.1998, Sächsisches Gesetz- und Verordnungsblatt 1998, 629; Saxony: Law on the Rights of the Sorbs in the Free State of Saxony (*Gesetz über die Rechte der Sorben im Freistaat Sachsen*), Date: 31.03.1999, Sächsisches Gesetz- und Verordnungsblatt 1999, 161; Schleswig-Holstein: Law on the Promotion of Frisian in the Public Sphere (*Gesetz zur Förderung des Friesischen im öffentlichen Raum*), Date: 13.12.2004, Gesetz- und Verordnungsblatt 2004, 481; Schleswig-Holstein: Schleswig-Holstein School Law (*Schleswig-Holsteinisches Schulgesetz*), Gesetz- und Verordnungsblatt 1990, 451, last amendment: 17.12.2010, ,GVOBl. 2010, 798, 818 (amended after cut-off date of this report: 28.2.2011, GVOBl. 2011, 23, 48); Law on the Legal Status and Financing of Fractions in the Schleswig-Holstein Parliament (*Gesetz zur Rechtsstellung und Finanzierung der Fraktionen im Schleswig-Holsteinischen Landtag*), Date: 18.12.1994, Gesetz- und Verordnungsblatt 1995, 4, last amendment: 26.5.1999, GVOBl 134; Electoral Law for the Schleswig-Holstein Parliament (*Wahlgesetz für den Landtag Schleswig-Holstein*), Date: 07.10.1991, Gesetz- und Verordnungsblatt 1991, 442, last amendment: 30.3.2010, GOVBl. 2010, 392.

[325] See Footnote 76. Brandenburg *Land*: Constitution of Brandenburg (*Verfassung von Brandenburg*): Article 25: Rights of the Sorbs (Wends) (*Rechte der Sorben [Wenden])*. Law on the Definition of the Rights of the Sorbs in the *Land* of Brandenburg (*Gesetz zur Ausgestaltung der Rechte der Sorben (Wenden) im Land Brandenburg* (GVBl 1994, 294)): Sec 1: Right to national identity; Section 2 sentence 3: No disadvantage because of commitment to ethnic group; Section 5: Council for Sorbian affairs; Section 10: Education, see 3.2.8; Schleswig-Holstein: Danes, Frisians: Article 5 Constitution of Schlesweig Holstein (*Verfassung des Landes Schleswig-Holstein*): minorities and ethnic groups (*Minderheiten und Volksgruppen*).

[326] Sec. 1.3 Law on Protection against Dismissal (*Kündigungsschutzgesetz*).

[327] Sec. 96.2 sentence 2 Work Constitution Act (*Betriebsverfassungsgesetz*).

[328] The general employment quota applies to all employers employing 20 employees or more in average, Sec. 71, 73 Social Code IX (*Sozialgesetzbuch* IX). There are modifications for smaller companies. If the quota is not met, penalties/payments up to € 260 for every disabled person who should have been employed are possible, ibid Sec. 77. In 2008 846166 severely disabled persons were employed in this framework according to the Federal Agency of Work (Bundesagentur für Arbeit). In 2005 the equalisation levy paid amounted to 490 million Euros.

Social security law grants state funding to help people with disabilities participate in working life in areas such as training and education, equipment and transport,[329] and also gives financial assistance to the employer for costs such as training and education, equipment and costs relating to integration.[330]
A disabled person can uphold his/her right against the employer to suitable working conditions, for example regarding working hours, equipment, general working conditions, and risk of accident.[331]

The disabled person can claim preferential treatment regarding promotion and training. The employer is under a duty to check if qualified disabled persons are available for posts which are vacant.[332] S/he is under a duty to communicate and co-operate with public authorities. People with disabilities have the right to part-time work if it is necessary for reasons related to their disability.[333] There is furthermore the duty to conclude integration agreements,[334] which are concrete binding legal provisions. There exists a claim to such agreements, but the law does not offer a mechanism to solve conflicts in cases where no agreement is reached.[335]

There is an obligation to create a representative body for severely disabled persons if there are at least five severely disabled workers.[336] Severe disability has to be taken into account within social choice (*Sozialauswahl*) in case of dismissals (*betriebsbedingte Kündigungen*).[337] There is a special procedure involving public authorities in the case of an ordinary dismissal of a disabled person.[338] The employer is under an obligation to cooperate with the representative body of disabled persons and the integration authority to avoid dismissal.[339]

It is part of the task of the Work Councils to promote equal treatment,[340] as it is for the representative bodies of public employees[341] or of severely disabled persons.[342]

b) Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored.

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[329] Section 33 Social Code IX (*Sozialgesetzbuch* IX).
[330] Section 34 Social Code IX (*Sozialgesetzbuch* IX).
[331] Section 81.3 and .4 Social Code IX (*Sozialgesetzbuch* IX).
[332] Section 81.1 Social Code IX (*Sozialgesetzbuch* IX).
[333] Section 81.5 sentence 3 Social Code IX (*Sozialgesetzbuch* IX).
[334] Section 83 Social Code IX (*Sozialgesetzbuch* IX).
[335] On all this see above 2.6.
[336] Sec. 94 Social Code IX (*Sozialgesetzbuch* IX).
[337] Section 1.3 Law on Protection against Dismissal (*Kündigungsschutzgesetz)*.
[338] Sec. 85 et seq. Social Code IX (*Sozialgesetzbuch* IX). There is a period of 3 months between dismissal and conclusion of employment (comparable with a period of notice), § 89.1 Social Code IX (*Sozialgesetzbuch* IX); an extraordinary dismissal is nevertheless admissible.
[339] Section 84 Social Code IX (*Sozialgesetzbuch* IX).
[340] See Section 75, 88 No. 4 Work Constitution Act (*Betriebsverfassungsgesetz*).
[341] See 67.1 Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*).
[342] See 95 Social Code IX (*Sozialgesetzbuch* IX).

c) *Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.*

Apart from action taken on the ground of the provisions listed under a), there are other policy programmes, e.g. to foster integration of ethnic minorities.
There are quotas for disabled persons (cf. 5.a)), but not for Sinti and Roma. It should be noted that representatives of the Sinti and Roma community have voiced scepticism to this author about the usefulness of such quotas in the German situation because of potential labelling and disintegrative effects of such measures. The Sinti and Roma community pursues a decisively integrative policy that focuses on non-discrimination, not positive action. There are in consequence no quotas for Sinti and Roma or other "hard" positive action measures.

There are, however, some state policies by the Federation and the *Länder* that might be mentioned in the context of positive action.[343]

[343] The organisations representing Sinti and Roma have received publicly funded financial support since 1991 as has the Documentation and Cultural Centre of the Sinti and Roma both by the Federation and on the *Land* level. A special topic is the promotion of the language of the Sinti and Roma, given the perception of parts of the community that their linguistic heritage should be handed down only within the community. There are some initiatives by the local Sinti and Roma organisations (with the mentioned public support) to foster the achievements of Sinti and Roma in school, e.g. through supplementary lessons. There are initiatives for adult education as well. Educational and awareness-raising initiatives include trips to memorial sights of the Sinti and Roma holocaust or exhibitions on the topic. There are various initiatives to promote cultural events by public subsidies. Further activities include social counselling.

6 REMEDIES AND ENFORCEMENT

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

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.
In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).
Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

a) What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?

According to Sec. 13 AGG, employees have a right to complaint to the competent body within the enterprise. In the case of harassment, they have according to Sec. 14 AGG the right to withhold their services insofar this is necessary for their protection.

There are no special procedures for discrimination claims, only general procedures, including administrative review in public matters and finally leading to binding court decisions. There is the possibility of alternative dispute solution. Procedures of mediation enjoy an increasing interest in Germany that will certainly encompass the rather new matters of discrimination law.

In some procedure there is the necessity to instruct a lawyer (e.g. higher instance civil procedures). For persons in need, legal aid can be granted.

There are few statistics on the number of cases related to discrimination brought to justice. However, in a recent study, conducted between summer 2006 and December 2009, 147 courts (and 1385 judges) reported 1113 cases related to discrimination. Nearly 90 per cent 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.[344]

b) Are these binding or non-binding?

Administrative acts and court decisions are binding. The binding power of alternative dispute resolution depends on circumstance. Mediation e.g. often (though not always) leads to a binding settlement.

[344] In the empirical EU/German government commissioned study by the author and Prof. Dr. Hubert Rottleuthner mentioned above, data were collected in this respect. Cf. for the executive summary (in German): http://ec.europa.eu/ewsi/UDRW/images/items/docl_16487_986472583.pdf.

c) What is the time limit within which a procedure must be initiated?

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

There is, according to Sec. 15.4 and 21.5 AGG, a time limit of two months for claiming material or immaterial damages in labour or civil law. The time limit begins in the case of Sec. 15.4. AGG with the reception of the rejection of a job application or promotion, in other cases the knowledge of the disadvantageous behaviour.[345]

d) Can a person bring a case after the employment relationship has ended?

A claim can be brought after employment has ended, within the limits of general law, especially the statute of limitations.[346] As mentioned, the AGG foresees special time-limits to bring claims, two months for claiming material or immaterial damages in labour or civil law, Sec. 15.4 and 21.5 AGG.

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

Please list the ways in which associations may engage in judicial or other procedures

a) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).

Sec. 23 AGG provides for legal support through anti-discrimination associations (*Antidiskriminierungsverbände*). Anti-discrimination associations are defined as associations of persons that promote by way of their charter the interests of persons or groups of persons discriminated on the grounds covered by the AGG on a non-commercial basis, Sec. 23.1 AGG. They have to have at least 75 members or have to be the association of seven associations of such purposes. Legal personality of these associations is not a precondition. They have to operate permanently, and not only on an ad hoc basis to support one claim.[347]

[345] Given among others the ECJ jurisdiction on the matter of effective pursuit of claims there is an argument that the rule has to be interpreted in such a manner that the earliest beginning of the time limit is the reception of the refusal. Otherwise the rule is contrary to European Law, cf. Deinert, in Däubler/Bertzbach, AGG, § 15 para 109 the shortness of which should anyway be a matter of concern. On this matter cf. the preliminary reference by Hamburg *Land* Labour Court (*Landesarbeitsgericht Hamburg*), 3 June 2009, 5 Sa 3/09, ECJ, 8 July 2010, C-246/09.

[346] A dismissal protection case needs to be brought within 3 weeks, Section 4 Law on Protection against Dismissal (*Kündigungsschutzgesetz*); partly particular regulations for disabled persons, Section 4 sentence 4 Law on Protection against Dismissal (*Kündigungsschutzgesetz*) in conjunction with Section 85 Social Code IX (*Sozialgesetzbuch* IX).

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

There is no centralised procedure for acceptance as anti-discrimination association; a legitimate interest seems to be presumed when the membership requirement is met; the status has to be verified by the court in the particular case.[348] No relevant case-law on the type of proof was yet reported.

The initial draft of the AGG foresaw the possibility of representation of complainants in court proceedings. This regulation was changed due to last minute political compromise. The associations are therefore limited to counselling during court proceedings (Sec. 23.2 AGG). In this case, Sec. 90.2 Code of Civil Procedure (*Zivilprozessordnung*) regulates that the acts of the counsel are taken as acts of the party, if the latter does not contradict.[349] These rules apply to other court proceedings as well.
In contrast to the legal situation before July 2008,[350] anti-discrimination associations may now support plaintiffs in court proceedings even if representations through advocates are mandatory.[351]

The associations are allowed to conduct other legal matters for the plaintiff, Sec. 23.3 AGG, most importantly give legal advice.

The Work Council or a union represented in enterprises that are subject to the Work Constitution Act (*Betriebsverfassungsgesetz*), have, according to Sec. 17.2 AGG in conjunction with Sec. 23.3 Work Constitution Act (*Betriebsverfassungsgesetz*) the right to take court action against severe cases of discrimination.

b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?*

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[348] Cf. the explanatory report to the AGG, Bundestagsdrucksache 16/1780, 48.
[349] These acts encompass both factual declarations as to the matter of the case and procedural acts (recognisance etc.).
[350] According to the former version of Sec. 23.2 sentence 1 AGG, Anti-discrimination associations were entitled to support plaintiffs in court proceedings only if there were no mandatory representations through advocates. This provision was amended by Art. 19.10, 20 sentence 3 Law on reform of the Act on Legal Advice (*Gesetz zur Neuregelung des Rechtsberatungsgesetzes)*, 12.12.2007, BGBl. 2007, 2840 (2859).
[351] They are then able to act in support of the plaintiff in addition to an advocate. Advocates are mandatory in various constellation, in civil law e.g. for all cases pending before the *Landgericht* (Higher Regional Courts), Sec. 78.1 sentence 1 Law on Civil Proceedings (*Zivilprozessordnung*). The amendment of Sec. 23.2 AGG from 12.12.2007 (BGBl. I S. 2840) came into force on 1.7.2008. At the same time, Sec. 157 Law on Civil Proceedings (*Zivilprozessordnung*), which provided for another mechanism of exclusion of representatives (cf. Fn. 283 in the 2007-country report), has been amended, 12.12.2007 BGBl. I 2840, entry into force: 1.7.2008.

Cf. 6.2 a).

c) Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?

The AGG does not contain an explicit regulation in this respect. It is, however, generally held, that anti-discrimination associations always need the consent of the victim when acting on behalf or in support of the latter.[352] On advise during court proceedings, cf. above, 6.2. a).

In cases where obtaining formal authorization is problematic, the general rules of German civil law apply.

d) Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.

There is no special duty for associations to act in support of victims.

e) What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.

Sec. 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.[353]

f) What type of remedies may associations sek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify

As associations may only support plaintiffs in court-proceedings, there are no such differences.

g) Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?

There are no such provisions in the AGG.

h) Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (actio popularis)?

[352] Schlachter, *Erfurter Kommentar zum Arbeitsrecht*, 11th ed., 2011, § 23 AGG, para 1.
[353] Cf. Bundestagsdrucksache 16/1780, 26, 48.

Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.

In disability law, associations have legal standing as representative action is possible in this field. This concerns the duties of public bodies to provide an environment free of barriers as specified in various legal regulations and the anti-discrimination law for disabled persons.[354]

There are general regulations concerning standard form contracts (*Allgemeine Geschäftsbedingungen*).
A violation of the AGG can give rise to an action by associations, which have to be included in register for this purpose.[355] Similar possibilities exist as to consumer protection.[356]

*i) Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

There is no class action in German law – one cannot file suit with one or several named plaintiffs on behalf of a putative class.

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

Sec. 22 AGG regulates the burden of proof. According to this norm, the complainant has to proof 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 for the protection against discrimination has occurred.

[354] See Section 13 Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*): right to action against violation of law. If individual is concerned as well, right is only existing if case has general importance; Section 63 Social Code IX (*Sozialgesetzbuch* IX) Right of Action by Organisations (*Klagerecht der Verbände*): organisation has legal standing in place of disabled person with her consent.
[355] Cf. for details the Law on Prohibitory Action (*Unterlassungsklagengesetz*).
[356] Cf. for details the Law on Unfair Competition (*Gesetz gegen unlauteren Wettbewerb*).

There is some debate, how such clause has to be interpreted. There is general agreement that one has to distinguish as elements the unequal treatment, the causality of the characteristic and the possible given objective reasons or justification for the unequal treatment. It is mostly argued that the plaintiff has to fully prove the unequal treatment. The plaintiff has to prove, in contrast, the preponderant probability of the causality of the characteristic for the unequal treatment. If this is achieved, the defendant has to fully prove the existence of objective or justifying reasons for the treatment.[357]

In public law proceedings inquisitorial principles are to be applied. Because of Sec. 24 AGG, Sec. 22 AGG is applicable to law suits arising under civil service law.

The regulation has implications modified according to the inquisitorial system.[358] Here, too, however, a preponderant probability for the causality of the characteristic is enough, whereas the unequal treatment and the existence of objective reasons or justification have to be proved to the full conviction of the court. In addition, it is relevant in *non liquet* situations.[359] The Directives foresee the possibility of the non-application of the burden of proof regulations in inquisitorial proceedings, Art. 8.5 Directive 2000/43/EC, 10.5 Directive 2000/78/EC.

It forms therefore not a deficit under European Law that the burden of proof regulation is not extended to all law suits under public law, especially as to social benefits, education and the provision of goods and services in the case of discriminations on the ground of race and ethnic origin, as these law suits are such inquisitorial proceedings.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint)

Sec. 16 AGG prohibits victimisation in employment relations. The employer is not allowed to disadvantage employees because of claiming rights flowing from the AGG or because of refusing to follow an order contrary to the AGG, Sec. 16.1 sentence 1 AGG.

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[357] Cf. e.g. Federal Labour Court (*Bundesarbeitsgericht*), 16. September 2008, 9 AZR 791/07; Bertzbach in Däubler/Bertzbach, AGG, § 22 for discussion, arguing himself, that on the level of the establishment of the unequal treatment, a preponderant probability suffices, para 15 et seq.

[358] Some state disability law contain such regulations for public law, see Section 3.2 [Berlin] Law on Promoting Equality between People with and without Disabilities (*Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung*); Section 3.3 Law on Equal Opportunities and against Discrimination of Disabled People in Saxony-Anhalt (*Gesetz für Chancengleichheit und gegen Diskriminierung behinderter Menschen im Land Sachsen-Anhalt*); Section 7.2 Thüringer Law on Promoting Equality and Improving the Integration of People with Disabilities (*Thüringer Gesetz zur Gleichstellung und Verbesserung der Integration von Menschen mit Behinderung*).

[359] Cf. Mahlmann, in Däubler/Bertzbach, AGG, § 24 para 77 et seq.

The same principle holds for persons supporting the employee or witnesses, Sec. 16.1 sentence 2 AGG. Sec. 16.2 AGG provides that the refusal or acquiescence of a discriminating act is not to be used as the base of a decision against the employee. Parallel provisions exist in Sec. 13 SoldGG.

There are further prohibitions of victimisation in other legal norms.[360] There is no special prohibition in civil law as foreseen in Art. 9 RL 2000/43/EC which forms a deficit of implementation.[361] Apart from civil service law – through Sec. 24 AGG – and public employees directly covered by the AGG, there is no regulation of victimisation in other public law areas (e.g. social law, public education, provision of goods and services through public bodies). Given the authoritative standards of the rule of law, Art. 20.3 Basic Law (*Grundgesetz*), any victimisation is, however, illegal. It is thus tenable to assume that no breach of European law exists in this respect.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

Sec. 15 AGG provides a regulation of compensation. In case of discrimination, the victim is entitled to damages for material loss if the employer is liable for fault (wilful or negligent wrongdoing), Sec. 15.1 sentence 2 AGG. There is strict liability for damages for non-material loss, Sec. 15.2 sentence 1. If the employer applies collective agreements he is only liable in the case of gross negligence or intent, Sec. 15.3 AGG.
The Act does not establish a duty to contract, unless such duty is derived from other parts of the law, Sec. 15.6 AGG, e.g. tort law.

These norms are applied analogously according to civil service law, Sec. 24 AGG.[362]

In case of a violation of the prohibition of discrimination in general civil law, the victim has a claim of forbearance (omission of the discriminatory act) and removal of the disadvantage and can sue for an injunction, Sec. 21.1 AGG. The discriminator is liable to pay damages for material loss caused for fault (wilful or negligent wrongdoing), Sec. 21.2 sentence 2 AGG. There is strict liability for damages for non-material loss, Sec 21.2. Sentence 3 AGG.

[360] Cf. e.g. prohibition on reprimand and disciplinary action in cases where employees pursue their lawful enjoyment of rights in the Civil Code, Sec. 612a Civil Code (*Bürgerliches Gesetzbuch*); persons of confidence (persons representing the interests of the disabled employees) are specially protected in disability law so that they are not discriminated against because of their function, Section 96 Social Code IX (*Sozialgesetzbuch* IX).
[361] Cf. Armbrüster, in Rudolf/Mahlmann, GleichbehandlungsR, § 9 para 6.
[362] For details, cf. Mahlmann in Däubler, Bertzbach, AGG, § 24 para 66 et seq.

Given the case law of the CJUE[363] demanding strict liability in the case of awarded damages in civil law for discrimination, the regulations in 15.1 sentence 2 and Sec. 21.2 sentence 2 AGG are in breach of European Law.[364]

In addition, other norms of law can be the base of compensation, Sec. 15.5 AGG. Sec. 21.3 AGG mentions only tort law, though other claims are not excluded by the application of the AGG.[365]

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

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

In the case of immaterial damage in labour law, the amount of compensation has to be appropriate. If the discrimination was not a causal factor for the decision not to recruit an individual the compensation for non-material loss is limited to a maximum of three monthly salaries, Sec. 15.2 sentence 2 AGG.

The compensation in civil law for immaterial damage has equally to be appropriate, Sec. 21.2 sentence 3 AGG. It has been held that the damages of a discrimination do not encompass the difference between the salary of the previous employment and the lower, current salary till retirement.[366]

c) Is there any information available concerning:
the average amount of compensation available to victims
the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?

There is some experience with existing rules – apart from sex, not covered by this report – e.g. on disability discrimination.[367] It is, however, hard to extrapolate any average patterns from the case law. The norms of the AGG would, however, enable the Courts to apply sanctions that are effective, proportionate and dissuasive.

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[363] Cf ECJ, ECR 1997, I-2195, *Draehmpaehl*, para 37.
[364] It may be argued that the same extends to Sec. 15.3 AGG as to collective agreements.
[365] For comments on civil law, cf. Armbrüster, in Rudolf/Mahlmann, GleichbehandlungsR, § 7 para 199 et seq.
[366] Cf. Wiesbaden Labour Court (*Arbeitsgericht Wiesbaden*), 18. December, 2008, 5 Ca 46/08 (the parties settled in the next instance, Hesse *Land* Labour Court (*Landesarbeitsgericht Hessen*), 12 SA 68/09 and 12 Sa 94/09).
[367] Berlin Labour Court (*Arbeitsgericht Berlin*), 10 October, 2003, Az: 91 Ca 17871/03 held that as a general minimum for cases in which a disabled applicant possibly would have been employed is the equivalent of three months' salary; Berlin Labour Court (*Arbeitsgericht Berlin*), 13. July, 2005, Az: 86 Ca 24618/04: immaterial damages: 3 monthly salaries, finally (after decision by Federal Labour Court (*Bundesarbeitsgericht*)) confirmed by Regional Labour Court Berlin (*Landesarbeitsgericht Berlin*), 31.01.2008, 5 Sa 1755/07. Frankfurt am Main Labour Court (*Arbeitsgericht Frankfurt am Main*), 19. February 2003, Az: 17 Ca 8469/02: 1.5 months' salary as compensation for mere failure to give reasons for the rejection of a disabled applicant, cf. Düwell, jurisPR-ArbR 1/2004 Anm. 6.

7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?(Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so.)

According to Sec. 25 AGG a Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*) has been created in August 2006 in Berlin. There are in addition various agencies concerned with some of the tasks, most notably the federal and Land Commissioners for Migration, Refugees and Integration/Foreigners and the Commissioner for National Minorities and Immigrants of German Ethnicity, for the Concerns of Disabled Persons, or the German Institute for Human Rights on the federal and regional level which do advisory work for the government and other public bodies, publish (extensive) reports and give to a limited degree individual advice to victims of discrimination.

b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.

The Federal Anti-Discrimination Agency is organisationally associated with the Ministry of Family, Senior Citizens, Women and Youth, Sec. 26 AGG. The head of the agency is appointed by the Minister of Family, Senior Citizens, Women and Youth after a proposal by the Government. He or she is independent and only subject to the law. The tenure of the head of the agency is the same as the legislative period of the *Bundestag*. These latter regulations might raise concerns as to the independence of the head of the body. Given the tenure, the head will always be appointed by the respective government. This is a source of possible informal influence on the policies of the Agency by the government. As, however, the head is by explicit regulation legally independent and can only be removed in exceptional circumstances of breach of official duties, this Agency can still be regarded as independent in the sense of the Directives. Funding is provided through the Ministry of Family, the financial means (about 3 Mio Euro), however, are to be administered independently by the Agency.

c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.

The agency has the task of supporting persons to protect their rights against discrimination on all grounds regulated by the AGG (race, ethnic origin, sex, religion, belief, disability, age, sexual identity), notwithstanding, however, the competencies of specialised governmental agencies dealing with related subject matters.

According to Sec. 27 AGG this encompasses specially to inform complainants about the legal means against discrimination, to arrange legal advice by other agencies, to mediate between the parties, to provide information to the public in general, take action for the prevention of discrimination, produce scientific studies, and – every four years – a report on the issue of discrimination, together with the Commissioners dealing with related matters, Sec. 27.4 AGG (e.g. Commissioners for Integration). The agencies can give recommendations and can commission together scientific studies. The agency can demand a statement of position in case of discrimination from the alleged discriminator, if the alleged victim of discrimination agrees, Sec. 28.1 AGG. Other public agencies have to support the agency in their work, Sec. 28.2 AGG. The agency is to co-operate with NGOs and other associations, Sec. 29 AGG. An advisory body for the Agency has been created, including stake holders and some experts.[368] From January till December 2010 the Agency had 1441 contacts concerning the AGG, since August 2006 7875 contacts, including 366 on multiple discrimination.[369] The agency has organised conferences, distributed information about matters of discrimination and published numerous studies (e.g. about "discrimination on the ground of age" or "indirect discrimination and the AGG"). An English translation of the AGG is available on its website as well as short manuals on the AGG ("*AGG-Wegweiser*") in German, English, French, Spanish and Turkish, among other languages.[370]

d) Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?

As indicated, Cf. 7 c), the Agency enjoys these competencies.

e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

The agency has no such competencies.[371]

f) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions) Is the independence of the body / bodies stipulated in the law? If not, can the body/bodies be considered to be independent ? Please explain why.

[368] http://www.antidiskriminierungsstelle.de/
[369] Cf. Antidiskriminierungsstelle des Bundes, Kumulierte Statistik 2010.
[370] http://www.antidiskriminierungsstelle.de/ADS/downloads.html.
[371] Cf. Hühn in Rudolf/Mahlmann, GleichbehandlungsR, § 10 para 27.

As mentioned above, Sec. 27.2 sentence 2 No. 3 states that the agency endeavours to achieve an out-of-court settlement between the involved parties.

According to Sec. 28.1 AGG, in that case, the agency can demand a statement of position in case of discrimination from the alleged discriminator, if the alleged victim of discrimination agrees. However, there is no legal duty for submission of such statements.[372] Other public agencies have a duty to collaborate with the Agency, Sec. 28.2 AGG. The Agency cannot issue binding decisions and does not possess the power to impose any sanctions against the parties. In consequence, it cannot be regarded as a quasi-judicial institution.

On the independence of the Agency, cf. above, 7 b).

g) Are the tasks undertaken by the body / bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports)

As indicated above, the work is conducted independently, cf. 7 b).

h) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.

The body has not developed any special programme as to Sinti and Roma in Germany. A representative of the Sinti and Roma community is, however, part of the advisory body.

[372] Ernst, Däubler/Bertzbach, AGG, § 28 para 1.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Agency has produced information material and has conducted conferences on this matter.[373] Other programs do not focus on the legal framework of the AGG but rather on social issues of inclusion and equality.

b) 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) and

There are various initiatives against discrimination in Germany, most importantly in the case of discrimination on the ground of race and ethnic origin including (institutionalised) dialogue with NGOs and social partners.[374] Legislative consultations processes are routinely including a wide range of NGOs.

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

The Anti-Discrimination Agency e.g. has tried to communicate the value of anti-discrimination policies for an efficient economy through a conference on the matter and respective publications.

d) to specifically address the situation of Roma and Travellers

As mentioned above (cf. 7 h), there is no special programme of the Agency concerning Sinti and Roma. A member of the representation of the Sinti and Roma of Germany is member of the advisory committee of the Agency.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations,

[373] On activities of the Agency, cf.: http://www.antidiskriminierungsstelle.de/

[374] An example is the *Bündnis für Demokratie und Toleranz* (Alliance for Democracy and Tolerance) founded in 2000, which unites with active support of the German state currently about 534 initiatives working among others against racism and xenophobia, http://www.buendnis-toleranz.de/cms/ziel/423616/DE/. The legislative process of implementation was accompanied by several consultations and parliamentary hearings.

professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

Sec. 7.2 AGG provides that (individual or collective) agreements contrary to the prohibition of discrimination in labour law are void. According to Sec. 21.4. AGG, the discriminating person can not rely on a discriminating agreement in civil law matters. Sec. 134 Civil Code (*Bürgerliches Gesetzbuch*) is applicable, that makes such acts void, in civil law only for unilateral juristic acts and agreements with discriminatory effects on third parties.[375] The common rules to solve collisions of legal rules apply.

b) Are any laws, regulations or rules that are contrary to the principle of equality still in force?

As explained, certain laws can be considered to be in breach of the Directives, Cf. 0.2. There has been no systematic survey by public authorities whether or not norms exist that are contrary to the Directives.

[375] Cf. Bundestagsdrucksache 16/1780, p. 47; Armbrüster, in Rudolf/Mahlmann, GleichbehandlungsR, § 9 para 202 et seq.

9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report? Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

There is no body which has centralised authority in this regard. The authorities concerned with issues of discrimination are Federal Ministries, the Federal Anti-Discrimination Agency, the Commissioners for Integration/Foreigners, and the committees of the German Parliament, to name just a few.

In 2008, the Federal German Government adopted a National Action Plan against racism, xenophobia, anti-Semitism and related intolerances (*Nationaler Aktionsplan der Bundesrepublik Deutschland zur Bekämpfung von Rassismus, Fremdenfeindlichkeit, Antisemitismus und darauf bezogene Intoleranz*).[376] It claims to be aimed at preventing violence and discrimination by emphasising that neither society nor politics are willing to tolerate such phenomena, at integrating minorities and at promoting a "politics of recognition" of diversity. However, the plan was criticised for mainly containing descriptions of already existing political and legal measures to combat racism, xenophobia and anti-Semitism.[377]

[376]http://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/Politik_Gesellschaft/Zivilgesellschaft/Nationaler_Aktionsplan_gegen_Rassismus.html?nn=271448.
[377] Follmar-Otto/Cremer, Der Nationale Aktionsplan der Bundesrepublik Deutschland gegen Rassismus. Stellungnahme und Empfehlungen, *Deutsches Institut für Menschenrechte*, Policy Paper No. 12, January 2009.

ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Germany Date: 1 January 2011

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.		Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Basic Law (*Grundgesetz*), Article 3 Section 3 sentence 1	23 May 1949[378]	05/1949	Sex, parentage, race, language, homeland, origin, faith, religious or political views	Constitutional law	Public authorities, indirect horizontal effect between private parties	Prohibition of discrimination

[378] Last amendment 21 July 2010, BGBl. I, 944.

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
Ibid., Article 3 Section 3 sentence 2	27 October 1994	11/1994	Disability	Constitutional law	Public authorities, indirect horizontal effect between private parties	Prohibition of discrimination
Ibid., Article 33 Section 3	23 May 1949	05/1949	Religious faith, belief (*Weltanschauung*)	Constitutional law	Public Service	Prohibition of discrimination
Ibid., Article 140, in conjunction with German Constitution from 11.08.1919 (Weimar Constitution), Article 136	23 May 1949	05/1949	Religious faith	Constitutional law	Public authorities	Equal access to employment in public service irrespective of the applicant's religion
General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz-AGG*)	14 August 2006[379]	08/2006	Race or ethnic origin, sex, religion or belief (*Weltanschauung*), disability, age, sexual identity	Esp. labour law (public and private), partially private contract law (not belief)	Relationship between public and private employers employees, incl. civil servants and judges; partially	Prohibition direct and indirect discrimination regarding employment, including access to employment and career

[379] Bundesgesetzblatt I 2006, 1897, last amendment: 5.2.2009, BGBl I 2009, 160.

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
					contractual relationship between private parties	advancement, regarding conditions of employment incl. wages, membership in associations, social protection and advantages, education, provision of goods and services. Prohibition of harassment and instructions to discriminate. Further content: Duties of employer, right to complaint, material and immaterial damage compensation,

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
						victimisation, burden of proof, creation of independent supervisory body
Law on Equal Treatment of Soldiers, (*Gesetz über die Gleichbehandlung der Soldatinnen und Soldaten*)	14 August 2006[380]	08/2006	Race, ethnic origin, religion, belief, sexual identity	Public law	Soldiers	Prohibition of discrimination (cf. AGG)
Federal Law on Civil Servants (*Bundesbeamtengesetz*), Section 9	5 February 2009[381]	02/2009	Sex, parentage, race or ethnic origin, disability, religion or belief (*Weltanschauung*), political opinion, origin, relations, or sexual identity	Public labour law / administrative law	Federal Public Service (for civil servants of the *Länder*, there is a new provision with the same wording)[382]	Prohibition of discrimination in civil service

[380] Bundesgesetzblatt I 2006, 1897, 1904, amended 31.07.2008, BGBl I 2008, 1629.
[381] BGBl I 2009, 160 (entirely revised and newly published), amended 19.11.2010, BGBl. I 2010, 1552.
[382] Sec. 9 Law on the Status of Civil Servants of the *Länder* (*Beamtenstatusgesetz*), 17.6.2008 (BGBl. I, 1010), last amendment: 5.2.2009 (BGBl. I, 160). The provision replaces numerous provisions on the issue in *Land* laws, for example Sec. 8 Lower Saxony Law on the Civil Service (*Niedersächsisches Beamtengesetz*), which was abrogated in 2009.

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
Work Constitution Act (*Betriebsverfassungsgesetz*), Section 75	15 January 1972[383]	01/1972	Race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitudes, sex or sexual identity	Collective labour law	Private employment	Prohibition of discrimination
Federal Employee Representation Law (*Bundespersonalvertretungs-gesetz*), Sections 67, 105	15 March 1974[384]	04/1974	Race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitudes, sex, or sexual identity (respective provisions of the	Public employment (federal authorities)	Prohibition of discrimination	

[383] BGBl I 1972, 13; newly published: Bundesgesetzblatt I 2001, 2518, last amendment: 29.07.2009, BGBl. I, 2424.
[384] Bundesgesetzblatt I 1974, 693, last amendment: 5.2.2009, BGBl I 2009, 160.

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
			Länder may name sexual identity or sexual orientation[385])			
Law on Promoting the Equality of the Disabled (*Behindertengleichstellungsgesetz*)	27 April 2002[386]	05/2002	Disability	Administrative law	Public actors, access to services	Prohibition of discrimination, obligation to provide hindrance-free access (public buildings, public transport, public streets, means of communication / right to use sign language / Braille);

[385] Hamburg: Hamburg Employee Representation Law (*Hamburgisches Personalvertretungsgesetz*), Date: 16.01.1979, new wording: Hamburgisches Gesetz- und Verordnungsblatt 1997, 444 (27.08.1997), last amendment: 08.06.2010, Hamburgisches Gesetz- und Verordnungsblatt 2010, 431, Section 77; Lower Saxony: Lower Saxony Employee Representation Law (*Niedersächsisches Personalvertretungsgesetz*) Date: 22.01.1998, Niedersächsisches Gesetz- und Verordnungsblatt 1998, 19, 581, last amendment: 21.01.2010, Nds. GVBl. 2010, 16, Section 59; Saarland: Saarland Employee Representation Law (*Saarländisches Personalvertretungsgesetz*), Date: 09.05.1978, Amtsblatt 1989, 413, last amendment: 19.11.2008, Amtsblatt 2008, 1944, Section 70.2; Saxony-Anhalt: Saxony-Anhalt *Land* Employee Representation Law (*Landespersonalvertretungsgesetz Sachsen-Anhalt*), Date: 16.04.2004, Gesetz- und Verordnungsblatt Land Sachsen Anhalt 2004, 205, last amendment: 20.07.2010, GVBl. LSA, 477 (amendment after cut-off date 08.02.2011, GVBl. LSA, 68, 129), Sec. 58.1.

[386] Bundesgesetzblatt I 2002, 1467, 1468, last amendment: 19.12.2007, Bundesgesetzblatt I 2007,3024.

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
						specialized body to promote and coordinate equalization development: Federal Government Disability Commissioner (Beauftragter für die Belange behinderter Menschen)
Law on Protection against Dismissal (*Kündigungsschutzgesetz*), Section 1.3	25 August 1969[387]	09/1969 amendment 10/1996 (age) amendment 01/2004	Age, disability (severe disability)	Labour law	Public and private employment	Preferential treatment of older employees in case of dismissals (age has to be taken into account within social choice); same for severe disability

[387] Bundesgesetzblatt I 1969, 1317, last amendment: 26.03.2008, Bundesgesetzblatt I 2008, 444.

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
		(severe disability)				
Social Code VI (*Sozialgesetzbuch* VI), Section 41	18 December 1989[388]	01/1992	Age	Labour law	Public and private employment	Restrictions of dismissals because of age and restriction of age limit agreements
Social Code IX (*Sozialgesetzbuch* IX)	19 June 2001[389]	07/2001	Disability (severe disability)	Labour law / social law	Public and private employment	General legal protection of (severely) disabled persons, including prescribed general employment quota 5%; financial assistance for integration into

[388] Bundesgesetzblatt I 1989, 2261, Bundesgesetzblatt I 1990, 1337, newly published Bundesgesetzblatt I 2002, 754, 1404, 3384, last amendment 19.12.2010, BGBl. I, 1885.
[389] Bundesgesetzblatt I 2001, 1046, last amendment: 05.08.2010, Bundesgesetzblatt I 2010, 1127.

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
						working life, equipment, transportation etc.; prescription of suitable employment accommodation, working times etc. for the disabled; duty to employ disabled persons and to check if there are qualified disabled persons registered as "unemployed"; duty to create integration agreements; special dismissal provisions; specialised body (*Schwerbehinderte nvertretung*) in every company

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
						with 5 or more severely disabled employees; promotion of common education of disabled and not disabled children
Civil Code (*Bürgerliches Gesetzbuch*), Sec. 554a	19 June 2001[390]	09/2001	Disability	Civil law	Housing (public and private landlords)	Right to convert rented space into hindrance-free space
Licensing Law (*Gaststättengesetz*), Sec. 4.1 sentence 1 No. 2a	27 April 2002[391]	05/2002	Disability	Administrative law	Private actors, access to services	Barrier-free access to restaurants

[390] BGBl I, 2001, 1141; Bundesgesetzblatt I, 2002, 42 and 2909 (corr.), Bundesgesetzblatt I 2003, 738, last amendment (to BGB): 28.09.2009, BGBl. I, 2009, 3161 (amendment after cut-off date: 17.01.2011, BGBl. I, 2011, 34).
[391] BGBl. I, 2002, 1467; Gaststättengesetz: date: 05.05.1970, Bundesgesetzblatt I 1970, 465, 1298, newly published Bundesgesetzblatt I 1998, 3418, last amendment: .07.09.2007, Bundesgesetzblatt I 2007, 2399.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Germany Date: 1 January 2011

Instrument	Date of signature (if not signed please indicate))	Date of ratification (if not ratified please indicate)	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)	4 April 1950	5 December 1952	None	Yes	As statutory law[392]
Protocol 12, ECHR	4 November 2000	Not ratified			
Revised European Social Charter	29 June 2007	Not ratified		Not ratified collective complaints protocol	
International Covenant on Civil and Political Rights	9 October 1968	17 December 1973	None[393]; declaration under article 41.		As statutory law
Framework Convention for the Protection of	11 May 1995	10 September 1997	None		As statutory law

[392] See Federal Constitutional Court (*Bundesverfassungsgericht*), 14 October 2004, Az: 2 BvR 1481/04.
[393] Derogations do not concern equality and non-discrimination but see Article 2 (1), 14 (3)(d), 14 (5), 15 (1), 19, 21 and 22.

Instrument	Date of signature (if not signed please indicate))	Date of ratification (if not ratified please indicate)	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?
National Minorities					
International Convention on Economic, Social and Cultural Rights	9 October 1968	17 December 1973	None		As statutory law
Convention on the Elimination of All Forms of Racial Discrimination	10 February 1967	16 May 1969	None	Yes	As statutory law
Convention on the Elimination of Discrimination Against Women	17 July 1980	10 July 1985	None (withdrawn on 10 December 2001)	Yes	As statutory law
ILO Convention No. 111 on Discrimination	signed	15 June 1961	None		As statutory law
Convention on the Rights of the Child	26 January 1990	6 March 1992	None		As statutory law
Convention on the Rights of Persons	30 March 2007	24 February 2009	None	Yes	As statutory law

Instrument	Date of signature (if not signed please indicate))	Date of ratification (if not ratified please indicate)	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?
with Disabilities					