# Suggested Amendments for the General Equal Treatment Act

# (AGG)

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commissioned by the **Büro zur Umsetzung von Gleichbehandlung** e.V. (BUG)

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# Preface

Over the course of about two years, experts on the Equal Treatment Act (hereafter AGG) have applied their expertise and interest to this paper, which provides an overview of revisions, with the intention to expand from the current limitations of the AGG, to illuminate the grey areas of this law, and to strengthen protections against discrimination through amending the current law. The **Büro zur Umsetzung von Gleichbehandlung** e.V. (BUG) coordinated this work and would like to sincerely thank Doris Liebscher and Alexander Klose for authoring the text, and also thanks Claus Brandt and Monika Bergen for their support to this process.

During a consultation in the fall of 2013, we received a variety of helpful comments on a draft from various NGO's and associations which we, to the extent possible, have incorporated into this proposal. BUG would also like to sincerely thank these organizations.

BUG will be in contact with the parties represented in the Bundestag and the newly formed federal government from the end of 2013, in order to communicate both the alterations and amendments to the AGG (in the form of a background paper and in the appendix of the following document, which outlines recommended alterations to the law) and to recommend a federal anti-discrimination law which would sanction discriminatory state actions.

BUG is happy for every form of civil and political support that strengthens protections against discrimination in Germany.

Vera Egenberger — Director of BUG

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**Content**

## 1. An Overview of the Strengthening of the AGG

The General Equal Treatment Act (AGG) is **an important symbolic and legislative step** on the path to increasing equal participation of all citizens and creating a culture of respect and diversity. Six years after the adoption of the AGG, numerous opinions, complaints, extrajudicial settlements and judicial proceedings have proven that this law is incredibly important.

At the same time, there is still room for improvement. For example, the EU-compliant interpretation of individual regulations is called into question which could be clarified. Gaps and contradictory rules emerged in the scope of its application and justification, and judicial precedence has been established. The experiences of this judicial application in practice indicate numerous substantive and procedural hurdles for those affected by discrimination who, with the help of the AGG, want to assert their right of equal treatment and defend their dignity.

Based on these findings, this paper presents **concrete reform-proposals** regarding the AGG, for discussion. Concerning progressive anti-discrimination laws, we would like to contribute to the adaptation of the law to European law standards and to the establishment of a comprehensible, coherent and horizontal understanding of the reality of discrimination in Germany and Europe.

**Key findings:**

There are three reasons why reform is necessary. To begin with, there are persisting deficiencies in the implementation of the regulations of the European Equal Treatment Directives. Secondly, the clarification of several specific points of contention and the adaptation of the language of the AGG to the legal situation which, in the meantime, are clarified by the courts and jurisprudence are required. Finally, the social reality of discrimination in Germany necessitates regulations for the effective protection of rights that go beyond the European or constitutional requirements.

### 1.) Reforms for full implementation of EU - Equal Treatment Directives

Multiple regulations must be **harmonized with European law**. In part, this has already been clarified by the courts (for example, for discriminated against customers or the discrimination of associated third parties). The law maker must, however, exercise their own responsibility to implement European law in conformity with the respective directives and the Constitution and

cannot wait for judgements from the Court of Justice of the European Union or the Federal Constitutional Court. This applies to the right to reasonable accommodation for people with disabilities that affect their career, which must be recorded in the AGG, as well as an expansion of the prohibition of sexual harassment and the prohibition of regulations that apply beyond the field of work. It is urgent that European law standards concerning church and religious privileges in § 9 AGG are adapted. Ultimately, the gaps in the implementation of the anti-discrimination protection law on both the federal and state levels must be closed, especially when pertaining to interactions of citizens with the State (education and with authorities).

### 2.) Linguistic clarification and legal clarification of the current legal situation

The definitions used in anti-discrimination law send clear messages to the affected, to the legal profession, and to society as a whole, thereby creating legal certainty. Legislative regulations which clearly express anti-discriminatory language contribute significantly to the ability to speak about discrimination objectively without trivializing or moralizing. The term "race" for example should therefore be replaced with "racist discrimination." In correspondence with the terminology in the directives, the concept of "less favourable treatment" should be replaced with the internationally established term "discrimination." Above all, it should be clarified legally that damages and compensation are not dependent on the contractor's guilt and that discrimination against transgender and intersex persons is covered by the gender discrimination category.

### 3.) The need for reform in order to ensure effective and horizontal legal protection against discrimination

Substantively, it is important to consistently implement a **horizontal application** of the AGG. That means that **gaps** in regulations pertaining to discrimination within and outside the AGG must be closed. Here, above all, the scope of state action should be mentioned. Furthermore, the **hierarchy** of the different categories of discrimination in the AGG must be removed: Restricting the civil prohibition of discrimination in "bulk businesses" for all categories of discrimination beyond racial discrimination, as well as very different standards of justification, contradict the reality of life and make adequate legal protection difficult. In view of the grounds on which someone can be discriminated against, the catalogue should be updated and expanded, particularly the sections pertaining to ancestry, language, chronic disease and social status.

At the procedural level, there is inadequate time allotted to meet deadlines, untenable burdens of proof, and few opportunities for support from qualified organizations equipped with expertise, resources and counselling services. Qualified anti-discrimination organizations should be granted by law a **genuine collective-action right**, the possibility to make claims for the person affected by discrimination, as well as a right to information. Also required is a national **legal aid fund** so that the rights of those discriminated against are not predicated on individual financial capabilities.

Finally, to ensure that equal treatment and non-discrimination are successfully implemented, targeted measures necessitate more than just individual requirements, they need to also limit structural discrimination. The possibility of voluntary positive measures, as required by § 5 AGG, is insufficient. The implementation of a **proactive approach** is advisable. For example, this could include a commitment to diversity-mainstreaming, diversity-impact-assessments, an evaluation of the benefits of diversity in staff appraisals, coupled with the procurement of funding for those compliant with AGG standards.

Also, a strengthening of the position and competence of the **Federal Anti-Discrimination Agency** and a guarantee of a widely accessible **counselling service** is necessary.

## 2. Awareness of Discrimination

2.1 The obligation under Art. 5 EU Directive 2000/78/EC for companies to offer **reasonable accommodation** to make their workplace conditions accessible for people with disabilities requires implementation in part 1 of the AGG. "Reasonable accommodation" entails that the employer takes the appropriate and necessary steps to allow someone with a disability an opportunity for employment, promotion and participation in education and training, unless such measures disproportionately burden the employer. This burden is not considered disproportionate when it is sufficiently compensated by existing measures under the disability policy of the participating state. (Art. 5 EU Directive 2000/78/EC, Art. 2 UN-Disability's Rights Convention) The denial of reasonable accommodations is discriminatory under the UN-BRK (Art. 2 (3) as well as Art. 5 (3) Un-BRK). This should be clarified in part 1 of the AGG. In view of the requirements set forth by the UN-Disability's Rights Convention, the recommendation stemming from the EU-Commission for a 5th Anti-Discrimination Directive (2008/426/EC), which aims to combat discrimination, inter alia, of people with disabilities in the realm of civil law and to improve the living conditions of people with disabilities, the provision of reasonable accommodation (i.e. Sign Language or Braille) should be adopted immediately.

2.2 The prohibition of sexual harassment (§ 3 (4) AGG) and the prohibition of disciplinary actions (§ 16 AGG), which particularly forbids employers from disadvantaging employees who exercise their rights under the AGG, applies only to employment and not in the field of concluding contractual agreements. This prohibition should be expanded to the entire scope of application of the law. Essentially, the danger of sexual harassment and victimization exists in all forms of obligatory relationships, but also in education and social life. The restriction to labour law is also incompatible with in Art. 2 lit. d, of the Gender Directive 2004/113/EC and Art. 9 of the Anti-Racism Directive 2000/43/EC.

2.3 So far, the legal presence of **harassment** within the meaning of § 3 (3) AGG – as distinguished from cases of sexual harassment within the meaning of § 3 (4) AGG – requires a creation of a hostile environment in addition to the injury caused to the recipient's sense of dignity. In practice, this leads to the limitation of legal protection (for example, racist graffiti in the bathroom of a company is not classified as a hostile environment under the AGG).[1] The word "and," therefore, should be replaced by "in particular," like it is in the "Draft Law

[1] See Federal Labor Court, Decision from September 24, 2009, NZA 2010, 387-393.

Implementing European Anti-Discrimination Directives" from December 16, 2004[2], in order to clarify that priority is given to a specification of the severity of the harassment.

2.4 The AGG is an anti-discrimination law. The concept "less favourable treatment" should be replaced by the term "**discrimination**." This concept is used both in the EU-Anti-Discrimination Directives as well as in the implementation laws of the member states and in international legal texts. In contrast, the AGG includes "less favourable treatment":

> *"to clarify that not every form of different treatment that creates disadvantages has a discriminatory character. 'Discrimination,' in its general usage, is understood only as unlawful, socially objectionable unequal treatment. There are, however, also cases of admissible different treatment, demonstrated by §§ 5, 8 through 10 und 20."*[3]

However, the term in German indicates a much more limited understanding of discrimination. It is reduced to deliberate actions from individuals and is seen only partially as an obstacle to participation. Under this understanding of the concept, unintentional individual discrimination, as well as indirect and institutional discrimination, are not accounted for. Accusations of discrimination (such as racism or sexism) are therefore rejected resentfully. The use of the term "discrimination" in the text of the law can make a decisive contribution to establishing a different understanding in public discourse – namely, that of the EU- Anti-Discrimination Directives. Such a clarification would help support those affected from discrimination, the courts, companies and political actors in anti-discrimination work. Such a clarification would help support those affected by discrimination, the courts, companies and political actors in anti-discrimination work to detaboo a discussion about discrimination as a problem of the society as a whole and to objectify the discussion. Exceptions to this redefining of "discrimination" are §§ 5, 8 to 10, and 20, where the concept "less favourable treatment" is still acceptable.

2.5 According to § 7 (1) AGG, discrimination also exists when the person who discriminates does so only on the basis of an **assumption** of the victim's race, ethnicity, gender, etc., even if that assumption is incorrect. Such discriminations are also typically found in contractual agreements, such as upon the conclusion of a purchase or lease agreement. According to the prevailing legal view, even presumptive discrimination (when someone discriminates against someone because of an assumption of their identity, whether accurate or

[2] BT-Drucks. 15/4538, p. 5.

[3] BT-Drs. 16/1780, p. 30.

not) is sufficient because it cannot be demanded from the discriminated person that they provide certain information, such as their sexual identity. This clarification should therefore be included in the general section of § 3 AGG.

2.6 According to precedence set by the EU Court of Justice (ECJ), **associated discrimination** is also covered under the prohibition of discrimination. Cases of third party (associated) discrimination happen to people with close relationships to others who might experience discrimination, such as discrimination against caring for a disabled child[4] or partnership between a person of colour[5] and non-person of colour. The wording of the AGG should be expanded to be in accordance with ECJ case law regarding associated discrimination.

[4] ECJ, Decision from July 17, 2008, Rs. C-303/06 (Coleman).

[5] On the subject of racist language, see Arndt, Susan / Ofuatey-Alazard, Nadja (Hrg.), How Racism results from Words – (K)Erben des Rassismus im Wissensarchiv deutsche Sprache. A critical reference book, Münster 2011.

## 3. Forms of Discrimination - Categories

The list of categories of discrimination in § 1 AGG should be linguistically more precise and should better reflect the actual reality of discrimination in society. This list should be specified so that it can prevent from weakening protection from discrimination.

3.1. The term "**race**" should be replaced with the phrasing "racist reasoning."[6] The wording "racist," which is already in the legal text, provides a clear signal that there are no human "races." Thus, racism begins with the classification of race. This makes it clear that the intention of the law is the prevention and abolition of racial discrimination, which is predicated on facial features, hair style, in addition to skin colour. For many who have experienced racism, the term "race" is a painful reminder of the history of European colonialism and National Socialism, but also because of the widespread racism happening daily. Excluding the U.S., race is not typically conveyed as a self-descriptor. Its eugenicist implications characterize it still to this day. Sections of legal doctrines and jurisprudence are further tied to a pseudoscientific approach to race which assign particular "essential" characteristics to groups instead of problematizing such overarching group characterizations. The use of terms such as "race" in European and international legal texts are not exempted from this, as they too connote racist attributions. The European Parliament, the Federal Anti-Discrimination Agency, the German Institute for Human Rights and numerous anti-discrimination organizations have advocated for a replacement of the term so that it can be clarified in European and national legislation.[7]

3.2. The term "**ethnic origin**" should be supplemented with "ethnic attribution" (as in someone attributing a heritage to someone else). Discrimination based on "ethnic origin" is often about ethno-cultural attributions, for example, discrimination based on nationality, religion or language, regardless of whether the recipient of this discrimination identifies with

[6] To clarify that it revolves around the attributing of racist characteristics (racialization).

[7] European Parliament, Resolution of the Commission on communication of racism, xenophobia, and anti-semitism, Erwägung K, Amtsblatt Nr. C 152 vom 27.05.1996, p. 57;

Opinion of the Anti-discrimination initiative from North Rhine – Westphalia on the draft law on the prevention of discrimination in Civil Law 12.10.01, Cologne, Duisburg 02.13.02;

der braune mob e.V., Letter to the German Federal Council, 03.02.2006;

Forum on Human Rights, Parallel report for the UN Anti-Racism Committee 16.–18. Report of the Federal Government of Germany pursuant of article 9 ICERD, 2008, p.10;

Cremer, „ ... und welcher Rasse gehören Sie an?", German Institute for Human Rights, 2009;

Federal Anti-Discrimination Agency, PM v. 4.13.2010; Klose, Draft for a Berlin Anti-Discrimination law (LADG), commissioned by LADS Berlin, 2011, p. 13.

these characterizations or not. The use of "race" and "ethnic heritage" in the AGG in practice leads to the phenomenon that courts avoid examining the ground of "racial" discrimination and examine "ethnic origin" instead. This often leads to essentialisation which is capable of reproducing racist or culturist stereotypes. The courts thus identify an individual with an ethnic group (regardless of how the individual personally identifies), causing them to also commit ethnification. Discrimination, however, which is encompassed by legal jurisprudence pertaining to "ethnic origin," is often actually a specific form of cultural/racial discrimination. For example, discrimination against Sinti or Roma, discrimination against Muslims (Islamophobia), and discrimination against Jews (anti-Semitism) fall under this category. Additionally, the term "origin" should be included so as to capture discrimination that is linked to actual or supposed regional or national origin. As a result, the current effects of discrimination in the former DDR (Soviet-controlled eastern portion of Germany) falls under the scope of the AGG

3.3. Discrimination of **language** has thus far been considered by the courts as indirect discrimination of "ethnic origin." This is usually not grounded in racist resentments, the likes of which typically hide behind excessive demands of German language capabilities. Rather, the courts disregard ethnicity in these cases or even create their own. That is why it is recommendable to add language as a category in what can be considered discrimination.

3.4. An amendment to the AGG must be based on the concept of "disability" as employed by the UN-Convention on the Rights of Persons with Disabilities. The explanatory memorandum has to clarify that **chronic diseases** are also protected from discrimination under the AGG.[8]

3.5. There are also gaps in discrimination based on **genetic disposition**. This is partly covered by the protections from discrimination under the Gene Diagnostic Act, which, concerning employment and insurance, refers to the AGG. However, this applies only in cases in which the disposition has not yet materialized. For example, gaps in regulations exist for people with little or no physical disability, but cannot be justifiably discriminated against by the insurer or the employer because of a diagnosis or pre-existing disease symptoms that could lead to a "recognized disability." There exists the danger of a difference in value between the different forms of discrimination, such as between disease, disability and others

[8] A claim by a HIV-positive man failed the first 2 times it was made, because HIV infection was not recognized as part of the chronic illness ground of discrimination

which are related to genetic characteristics. This can be resolved by either a clarification in the explanatory memorandum or by adding chronic disease and genetic dispositions to the catalogue in § 1 AGG.

3.6. **Social status** should also be incorporated into the catalogue of discriminatory categories. It identifies a particular position in society that is determined by employment or lack thereof, income, wealth, property, career and education and results in, in combination with other forms of discrimination, to social stigmatization and structural/individual disadvantages.

3.7. It needs to be clarified that forms of **gender** discrimination – in specification to the grounds of discrimination laid out by the AGG – also include gender identity, such as discrimination against trans- and intersexual people.

3.8. The grounds of discrimination covered under **"sexual identity"** listed in § 1 AGG should be expanded to include "sexual identity and way of living" so that the protection against discrimination can be as inclusive as possible.

3.9 The term **"age,"** typically negatively associated with older people in society, should be replaced with "stages of life" so that it can be made clear that discrimination can occur at any point in life.

3.10 The necessity for justification pertaining to "different treatment in cases of intersectionality" in § 4 AGG should be replaced with an explicit prohibition of **multidimensional discrimination** and should be integrated into § 1 AGG. Many people are often discriminated against on the basis of special attributions which cannot be covered by a single feature of discrimination or by the mere addition of different features. The overlap of genetic discrimination and different dimensions of disabilities and disease clearly indicates the urgency that intersectional discrimination[9] be made justiciable in "usual cases.". The same applies for cases of anti-Muslim racism and anti-Semitism, which cannot be accurately captured by either religion or ethnic origin and in which gender (e.g. when wearing a headscarf) plays a specific roll.

[9] Intersectional discrimination is present when – although influenced by context of the situation – a person is victim to discrimination based on the combined effect of multiple personal characteristics.

## 4. Areas of Life Vulnerable to Discrimination

4.1. The scope of application of the AGG, which, until now, has **only been partially implemented in German law**, must adjust to the requirements of the European Anti-Discrimination Directives. § 2 (1) AGG states that the scope of the law is independent and dependent employment, social protection, social advantages, education and access to and supply of goods and services available to the public. Beyond gainful employment, where § 24 AGG also orders the corresponding validity of the law for public service employment, the AGG prohibits discrimination only in civil law (§§ 19-21 AGG).[10] This does not cover public service grants from sovereign or public law contracts, which is customary in the field of education in Germany.[11] State institutions, i.e. police actions, are also uncovered. As a result, when the State acts under private law, it is (also) bound by the civil prohibition of discrimination under § 19 AGG and the associated regulations for its enforcement. In public law, however, it is solely adherent to Article 3 (3) Basic Law (unless exceptionally, European Union law is directly applicable). In reality, the scope of state actions is no less relevant to discrimination than are private actions. This is demonstrated by empirical investigations[12] as well as claims pertaining to administrative law. This is demonstrated not in the least by the German law enforcement's use of racial profiling. One of the complaints brought to the Higher Administrative Court of Rhineland-Palatinate ended with the Federal Police admitting that they unlawfully carried out racial profiling.[13]

By contrast, the four European Directives that should have been implemented into German law by the AGG apply equally for people in public and private sectors, including public office.[14] The directives contain a – largely consistent– instrument for the enforcement of the prohibition of discrimination[15] but differ in its applicability. In the case of Directive

[10] Further restrictions apply for discrimination based on gender, religion, disability, age, or sexual identity, in accordance with § 19 AGG (Existence of a „mass-market business" or private insurance). Discrimination based on conviction is not covered.

[11] Rudolf, in: Rudolf/Mahlmann (Hrsg.), Gleichbehandlungsrecht, 2007, S. 187, says the AGG, based on the incongruencies of its scope of application and its substantive provision, is a case of "deceptive packaging."

[12] See Rottleuthner/Mahlmann, Diskriminierung in Deutschland. Vermutungen und Fakten, 2011, p. 171f.

[13] Tischbirek/Wihl, Unconstitutionality of Racial Profiling, JZ 2013, p. 219-224. see also: www.bug-ev.org/aktivitaeten/aktuelle-klagen/diskriminierende-polizeikontrolle-in-koblenz.html.

[14] Art. 3 (1) Directive 2000/43/EC, Art. 3 (1) Directive 2000/78/EC, Art. 3 (1) Directive 2004/113/EC, Art. 3 (1) Directive 76/207/EEC in the version of the Directive 2002/73/EC.

[15] On the involvement of associations in legal protections (Art. 7 (2) Directive 2000/43/EC, Art. 9 (2) Directive 2000/78/EC, Art. 8 (3) Directive 2004/113/EC, Art. 17 (2) Directive 2006/54/EC), on the burden of proof (Art. 8 Directive 2000/43/EC, Art. 10 Directive 2000/78/EC, Art. 9 Directive 2004/113/EC, Art. 19 Directive 2006/54/EC), on precautions against victimisation (Art. 9 Directive 2000/43/EC, Art. 11 Directive 2000/78/EC, Art. 10 Directive 2004/113/EC, Art. 24 Directive 2006/54/EC, establishing deterring sanctions

2000/78/EC, the applicability is only pertaining to gainful employment, in Directive 2006/54/EC in addition to gainful employment, the operating system of social security is covered, in the case of Directive 2004/113/EC only the provision of (certain) goods and services and in the case of Directive 2000/43/EC all areas mentioned in § 2 (1) AGG are covered.

Since the scope of the AGG, for the reasons mentioned above, is restricted to private law, transactions outside of gainful employment, it should be noted that Directive 2000/43/EC and Directive 2004/113/EC were not fully implemented in the AGG in the public sector. An implementation through the federal government was not feasible given the lack of legislative competence. For example, in the scope of education it is also inapplicable, but is from Art. 23 (1) § 1 GG the principle of federal duty of the federal states.[16] A mere reference to the constitutional prohibition of discrimination is insufficient: Also, the requirements for the involvement of associations in protecting rights, the burden of proof, the taking of measures against victimization and the establishment of dissuasive sanctions should be implemented by the federal states.[17] It can be left open, to what extent a Directive-compliant interpretation or a direct applicability of the Directive due to an expiration of the implementation deadline can lead to an achievement of the guidelines, as these cases will anyway fail to meet the requirements of a complete, transparent and effective implementation. It is therefore essential that federal and state legislators take action. Differences in systems of law are conceivable: a complement of the numerous professional laws (i.e. education law, police law, social law) would have the advantage of being closer to the subject, but would compel numerous repetitions of general rules (i.e. the burden of proof and sanctions). Furthermore, a supplement to the AGG at the federal level is still conceivable. It is notable, however, that the law – which primarily prohibits discrimination between citizens and public service employment – is only applicable when it corresponds to § 24 AGG. While for private employers and providers of

(Art. 15 Directive 2000/43/EC, Art. 17 Directive 2000/78/EC, Art. 14 Directive 2004/113/EC, Art. 25 Directive 2006/54/E C). Only in Directive 2000/43/EC, 2004/113/EC and 2006/54/EC on the other hand, is the establishment of a body responsible for promoting equal treatment intended.

[16] The Federal Government can derive a legal competence for employment law, civil law, judicial procedures, legal-council, and public welfare out of article 74 (1) no. 1 and 12 GG. The realm of vocational training results from Federal jurisdiction, as outlined under article 74 (1) no. 11 GG. In relation to education in university, the Federal Government is only responsible for admission into higher education and university degrees (competing), in accordance with article 74 (1) no. 33 Basic Law. Whether the Federal Government could rely on article 74 (1) no 27 Basic Law (article 75 (1) sentence 1 no. 1 Basic Law older version) when regulating the legal relationships of civil servants and judges serving states and munipalities is disputed in literature. According to this view, the States would have insofar an entitlement and an obligation to do so. See Rudolf in: Rudolf/Mahlmann (Hrsg.), Gleichbehandlungsrecht, S. 194ff.

[17] Rust/Falke-Richter/Bittner, AGG, § 2 Rn. 165ff.

goods and services the prohibition of discrimination is the exception to the principle of "private autonomy," it is the State's duty in relation to its citizens to reinforce the general principle of equality in Art. 3 (1) GG. Since everyone is equal before the law, the State and those who represent it are only allowed to treat someone unequally when there is (at the very least) an objective reason for-so-doing. From this perspective, the prohibition of discrimination under Art. 3 (3) GG merely increases the requirements for justifying the difference in treatment on the grounds mentioned therein. This must have an impact on the conception of a public-directive anti-discrimination law in terms of a (broadened) scope, the (raising of) requirements of justification and a (lessening of) burden of proof. In addition to anti-discrimination law at the Federal level (LADG) the states must be reminded of their duty to implement Directive 2000/43/EC. A Federal Anti-Discrimination Act[18] (BADG) should therefore be used to help protect against discrimination from State organizations.[19] This law can and must go above and beyond the narrow limitations of European law to apply to the entire German state and the rights of the public, and must be supplemented through a concretization of the constitutional standard of article 3 (3) GG as a constitutionally required extension of protections against discrimination.

4.2. The **horizontal approach** of the AGG should be consistently maintained: In addition to the provisions of EU law, German Legislators have in part decided unanimously for a discrimination protection clause outside of gainful employment. However, the AGG still contains numerous hierarchies which hinder or make impossible the application of the law and a uniform protection from discrimination and, therefore, requires review. This affects the scope of protections under the law and also the standards of justification. For example, the civil prohibition of discrimination under § 19 applies unrestrictedly only to racial discrimination and discrimination based on attributions of ethnicity. While discrimination on the ground of conviction goes un-prohibited, discrimination on the other grounds laid out in § 1 AGG should only be inadmissible in the context of mass transactions, similar transactions, and also private insurance.[20] This far-reaching restriction of the application of this law is

[18] BUG has worked on creating a separate legal draft for this purpose which is available on their website

[19] Among other things that should be clarified belong the above mentioned prohibitions of so called "racial or ethnic profiling" – meaning, the practice of categorizing people according to race or the attribution of an ethnicity and, in so doing, aim to strengthen control and other safety measures for such people, without any further initial suspicions. In State structures, this is done by security authorities (such as police), and by detective agencies in the private sector.

[20] Rudolf, in: Rudolf/Mahlmann (Hrsg.), Gleichbehandlungsrecht, 2007, S. 193, considers this to be a violation of the Constitutional requirement of the justice system. For the scope of the constitutional ban on discrimination on the grounds of political belief, see the German Federal Supreme Court's (Bundesgerichtshof) decision from March 9, 2012 (V ZR 115/11).

unconvincing. As in the field of employment, the differentiation that may be required can be taken into account at the level of justification.

The difficulties inherent in such a hierarchical protection of rights become especially clear in cases of multi-dimensional discrimination. A woman who wears a hijab or niqab who is excluded from a contract with a business that is not considered a mass-market business (for example, the signing of a lease with a landlord/lady who rents out less than 50 apartments) must carefully consider which grounds of discrimination she wishes to invoke to protect her rights. If their legal representation or the court bases the discrimination on the characteristic of religion or gender, it is not covered by the AGG since it is not dealing with a mass-market business. Proof of racial discrimination (because of an assumption that she is a Muslim), on the other hand, opens up the scope of protections. To do so, the plaintiff would have to provide evidence of "discrimination on the basis of race or ethnic origin".

4.3. According to § 2 (4) AGG, the provisions for general and special dismissal apply solely to termination. This provision should be deleted and not replaced. In harmony with the precedence set by the European Court of Justice on November 6, 2008, the Federal Employment Court clarified that the prohibition of discrimination under the AGG by way of interpreting the term "social adversity" (§1 KSchG)[21] must also be taken into account in the **case of dismissal** and may lead to its inadmissibility. In so doing, the court has accounted for the provisions of EU law that do not allow the termination of protections from discrimination to be excluded, as § 2 (4) AGG seems to require. Additionally, it is notable that the protections from discrimination must also apply to dismissals which are not subject to the Employment Protection Act.

[21] The Federal Agency for the Transportation of Goods (BAG) from November 6, 2008, NZA 2008, 1285; ECJ, Rs. C 13/05, NZA 2006, 839 (Navas).

## 5. Affirmative Action and Proactive Anti-Discrimination Laws

The experiences[22] with **§ 5 AGG** in the past few years have demonstrated that a law, which **only allowed** the execution of affirmative action, may be completely suitable for providing the necessary legal certainty with regard to possible violations of prohibition of discrimination. However, it does not do enough to create sustainable action that dismantles systemic discrimination or in creating greater equality. Still to this day, there is a lack of a **binding framework** for the complete and effective implementation of equal rights beyond the promotion of women or people with disabilities in public service. The expansion of the scope of application of the AGG pertaining to deals with the State should therefore be accompanied by the **mandatory anchoring** of **proactive measures and commitments** laid out below. The effectiveness of the policies that are adopted should be subject to sensible monitoring and be regularly made public.[23]

5.1. In promoting a culture of appreciation of diversity, the public administration will be a role model.[24] **Diversity-Mainstreaming**[25] serves this goal and is a part of the process of administrative reform. Diversity-Mainstreaming is not only a proactive instrument against discrimination, but it aims to alter social structures, institutions, and processes in order to secure structural equality. The aim here is to strengthen the competence of the administration in their dealings with diverse businesses and clients. For this purpose, stereotypical norms, structures, and power relations that have led to the underrepresentation of certain groups – particularly in leadership positions – and the unequal opportunities experienced by certain groups must be accounted for. Only in this way can structural and institutional discrimination be thoroughly prevented. Addressees of this measure are therefore not "discriminators" and "discriminated," but instead people who are in fact able to influence the structures due to their positions.

Especially, the orientation towards supposed "average citizens" leads to the fact that the realities of life of people who are not part of this "norm" do become sufficiently reflected in political, normative, and administrative measures. To counteract this, Gender- and Diversity-

[22] See Klose/Merx, Affirmative Action for Disability or for the Equalization of Existing Disadvantages in Accordance with § 5 AGG, Expertise as commissioned by the Federal Anti-Disrimination Agency, 2010, S 71f.

[23] Heinrich Böll Foundation (Hrsg.): Ethnic Monitoring – Datenerhebung mit der über Minderheiten, 2009.

[24] For this and the following: Klose, Draft of a Berlin Provincial Anti-Discrimination Law (LADG), Expertise as commissioned by the State Agency for Equal Treatment – against discrimination, Berlin, 2011.

[25] The concept of Diversity-Mainstreaming looks at discrimination in all of its (horizontal and intersectional) overlaps and how they can be addressed.

Mainstreaming (already a few years in progress) should continue to be built upon and expanded – without losing group-specific approaches.

5.2. Therefore, the elimination of existing disadvantages (discriminations) due to the reasons outlined in § 1 AGG and the promotion of actual enforcement of equal treatment should become the consistent guiding principle of the Federal Administration. Also, all forms of political, normative and administrative measures deployed should take a **Diversity-Impact-Assessment**[26] (or a positive commitment) into account. Experiences with gender-mainstreaming have shown that the processes of creating change in the administration are particularly dependent on the support of service personnel in leadership functions. The implementation of positive commitments should therefore be the responsibility of employees in leadership or managerial positions and should take into account the definition of performance criteria and their performance appraisal. A concrete designation of diversity-objectives must be made and a regular analysis and publication of action plans should be mandatory for the administration (such as hospitals, pension companies, health departments, tax and financial authorities, employment offices and other comparable structures) and also for companies of reasonable size. In the case of a refusal to implement measures or to publish the corresponding reports, the ADS should apply appropriate sanctions in accordance with those in chapter 9.

5.3. Empirical studies have shown how important it is to integrate the promotion of **diversity- and gender-competence** in education. Therefore, not only should appropriate training and qualifications be required, but also competences in these fields should be a qualifying factor. Diversity-expertise is a relevant expertise in every aspect of public service, presenting concrete requirements that need to be finely tuned in accordance with their field of work.[27]

5.4. Through **public procurement** and the **granting of state benefits**, the objectives of the AGG can also be enforced in the private sector. For contracts and services that exceed a

[26] A diversity impact assessment comes to existence ideally out of the following steps: 1. A description of the intentions and goals of the content of the planned action to the extent of the measures planned, 2. Identifying a target group, 3. Implemenation of the plan, 4. An evaluation of the measures by comparing them to the objectives of the plan, 5. Further development of the action plan.

[27] As a social capacity, diversity-competence (Diversity-Kompetenz) includes, inter alia, the ability to deal with ambiguities, the ability to endure uncertainty and strangeness, the capacity to change perspective and flexibility, insight into the necessity of reflexive action, the ability to think in context and a pronounced analytical capability, and a sensitivity to discrimination, prejudices and stereotypes. From a technical point of view, diversity-competence encompasses: Knowledge of legal prohibitions of discrimination and the imstruments for their implementation, knowledge of socially evolved discrimination patterns and structures, and experience with diversity policies and strategies.

certain threshold, the contractor or beneficiary would not only have the obligation to respect the applicable equal treatment law and to enforce[28] the obligation against third parties with whom they cooperate, but also the obligation to carry out measures to eliminate existing disadvantages on the grounds outlined in § 1 AGG. Only benefits that are not legal entitlements, such as grants, subsidies, guarantees, and loans are restricted. A multiplicity of target group-specific and intersectional measures are conceivable, the precise content of which should be specified legally by the federal government; the control of the implementation of these measures, the consequences of the failure to fulfil these obligations and the companies concerned.

[28] In addition, it must be examined whether applicants or offerers, who have in the past 3 years been convicted of discrimination in accordance with the AGG or a comparable Law, can be excluded from proceedings.

## 6. Permissible Forms of Unequal Treatment

6.1. **§ 9 (1) AGG** created a legal basis for special justifications for a difference in treatment by virtue of religion or conviction in employment by religious communities and bodies assigned to them in relation to § 8 AGG (justification of unequal treatment because of job requirements). According to this legal permission, the membership to a certain religious community or a certain conviction can be required, "if this requirement is justified because of the self-understanding of the religious community in the light of its right of self-determination or because of the nature of the job." This contradicts one of the exception rules in the Employment Directive 2000/78/EC. § 9 is also not constitutionally required, since collisions between (collective) religious freedoms and other basic rights have to be balanced out by means of practical concordance.[29]

An exception to the prohibition of discrimination pertaining to religious characteristics that goes above and beyond § 8 (1) AGG is not necessary to account for the right of self-determination of religious communities. The right of self-determination already confines itself to the right guaranteed in Art. 140 GG in conjunction with Art. 137 (3) sentence 1 **Weimarer Reichsverfassung (Constitution of the Weimar Republic)**, the right that "internal affairs" can be rightfully shaped to fit the guiding principles of their religious self-determination and the right to an independent organization and administration.[30] This applies in particular to teaching and worship (meaning the design of holy service, spiritual welfare practices, and religious education) as well as, in a narrower sense, charitable actions.[31] Only in this regard are employment relationships tied to the right of self-determination of religious or belief communities. Those employed in this field are aware of this by virtue of their own convictions and education. By the very nature of this, it follows that employees who internally and externally impart the teachings of a religious community have to belong to this religious community.

The work of all other employees of religious communities and their facilities is completely separate from the teaching of scripture. This is particularly applicable to employees of religious institutions typically referred to as "charitable," such as day care centres, schools, education and training facilities, hospitals and care centres, because they typically receive

[29] Federal Constitution Court, jurisprudence, see the Federal Constitution Court decision from May 16, 1995, NJW 1995, 2477-2483.

[30] Decision of the Federal Constitution Court 66, 1, 19.

[31] State Labor Court (LAG) Hamm on permissibility of work disputes in church institutions, decision from January 13, 2011, AZ. 8 Sa 788/10 (juris).

large scale government funds. Similar to the workers of all other forms of employment, they provide their contractual services in the framework of general labour law. Generally, this also applies to management positions in religious institutions, with the exception of employees in particular prominent positions that are comparable to preaching positions.

It is only necessary and appropriate that the general prohibition of discrimination is limited to those employed in the field of preaching. In this regard, religious affiliation is an "essential and decisive occupational requirement," within the meaning of § 8 (1) AGG. An additional special provision is not required, because this requirement is constitutive for employees of religious institutions and is therefore undisputed in case-law and teaching. § 9 (1) AGG should therefore be deleted.

A deletion of § 9 (1) AGG would also be consistent with Art. 4 (2) of Directive 2000/78/EC. This provision is permissible under the heading "Occupational Requirements," where it writes: "According to which, a difference in treatment because of the religion or conviction of someone does not constitute discrimination if the religion or convictions of this person constitutes, according to the nature of those activities or the circumstances created by their exercise, a material, legitimate, and justified professional requirement in the face of the ethos of that organization." The focus, clearly, is on the professional activity. By contrast, § 9 (1) AGG alternatively refers to the right of self-determination or occupational activity, thereby restricting the scope of protection in contradiction to the provisions of European law.

6.2. The privileging of religious communities in **§ 9 (2) AGG**, which goes above and beyond the general principles of employment law developed by precedence, is also unnecessary. Belonging to these principles are, inter alia, a "blind loyalty" to the employer. Additionally, employees are dependent in varying degrees on the function and position in their company. Already under these principles of general labour law, personnel active in disseminating religious teachings are subject more strongly to the doctrines of their religious community than those who are employed in non-religious activities, such as a bookkeeper, gardener or nurse, or even an organist.[32] However, hospital workers who, from reason of their religiosity, refuse to carry out abortions can often violate imposed restraint bans by garnering large scale media attention. For this reason, § 9 (2) AGG can and should be also deleted.

[32] See the decision of the European Court of Human Rights from November 23, 2010, appeal number 1620/03, EuGRZ 2010, 560, in the case of a catholic organist.

6.3. The special provision in **§ 10 AGG**, that allows unequal treatment predicated on older age, does not appropriately correspond to the horizontality of the AGG. The prerequisites for this difference in treatment are found in the first sentence of § 10 AGG, based on the multiplicity of life issues that age can bring. Legally, the prerequisites are only loosely defined: The discrepancy must be "objective and appropriate, and justified by legitimate intentions," and the means chosen for it – according to sentence 2– must be appropriate and required for the achievement of this goal. In this regard it is urgent to align the measures of justification with the prerequisites of § 8 AGG, in which the peculiarities of age discrimination manifestations are checked.

6.4. The provision under **§ 19 (3) AGG** has led to an increase in discrimination based on racism upon signing rental contracts.[33] Paragraph 17 of the closing remarks of the Concluding Observations from the CERD-Committee from March 12, 2010 reiterates their previous recommendation to modify § 19 (3) AGG, because it is not in compliance with Article 5 e) iii of the International Convention on the Elimination of all Forms of Racial Discrimination. However, in light of the requirements of Directive 2000/43/EG, such a modification can exist to give only the character of affirmative action to the provision. However, in view of the already existing § 5 AGG, this is not necessary, because § 19 (3) AGG should be deleted.

6.5. Up to now, **§ 20 (1) S. 1 AGG** makes the admissibility of an unequal treatment based on religion, disability, age, sexual identity or gender dependent solely on the existence of a substantive reason. The prerequisites of the grounds for justification are adapted to the requirements of Directive 2004/113/EC and on the system of the AGG. It should be clarified that to achieve this goal, the means to reach them must be appropriate and necessary. Justification must be accompanied by a stronger proportionality test to be sufficient.

6.6. Since the ECJ declared a differentiation of insurance premiums and services predicated on gender to be unacceptable and installed a unisex-pricing system on December 21, 2012,[34] the admissibility of a difference in treatment in the realm of private insurance should be limited to the grounds of a disability and age in accordance with **§ 20 (2) AGG**. The desire for a differentiation based on religion or sexual identity is not apparent. Rather, there exists the danger that the "cloak" of religious discrimination is actually based on racism

[33] See the supplimentary report of the Forum on Human Rights (Forum Menschenrechte) on the 16th-18th State Report of the Federal Republic of Germany to the Committee on the Elimination of Racial Discrimination (CERD), Berlin 2008.

[34] ECJ, v. 3.1.2011, Rs. C-236/09 (Test-Achats).

or because of ethnicizing. There is also the fear among many in the gay community that biases regarding the possibility of HIV-infection influence insurance premiums and service-charges.

In the future, the stronger requirement of § 20 (2) S. 1 AGG for a difference in treatment based on disability[35] or age should therefore be applied. Thus, there is no reason to justify a difference in treatment based on disability or age, if the risk-assessment is not founded on relevant and accurate insurance-calculations and statistics (yet, so far the case in § 20 (2) S. 2 AGG). Above and beyond, it should be evaluated whether the grounds for justification should be limited to succinct insurance contracts and differences in treatment i.e. in property and legal protection insurance should thus be prohibited in general.

[35] See also the obligations of Germany under international law arising from article 2 s. 2 CRPD

## 7. Effectively Defending against Discrimination

7.1. In light of specific weaknesses in the enforcement of anti-discrimination laws (lack of information, barriers to entry, power disparities), legislators may deviate from the principle of the protection of individual rights to establish a collective protection of rights. In addition to the already existing form of assistance by NGOs under § 23 AGG, the protection of rights by associations should be expanded for one, by legislating an opportunity for an anti-discrimination association to litigate for the right of a discriminated person in their own name (gesetzliche Prozessstandschaft). In this scenario, plaintiffs would not be the discriminated against person, but would be the association itself, which would also assume the risks of the trial. An essential condition of this, of course, is that the effected person agrees to the assertion of their right to the association.

Additionally, a comprehensive **collective action right** should be introduced. Through this, an association could help a violation of anti-discrimination law be determined by the court – independent from any individual affected. The limitations placed on the declaratory action are necessary to assure that it does not interfere in legal relationships of third parties. For the same reason, collective actions should be limited to cases of public interest. Only in cases of so called "victimless discrimination" is such an alternative action applicable – namely, cases where there is no one who raises a claim. Associations can also implement effective anti-discrimination protection in these cases, as shown by the Feryn case brought to the ECJ.[36]

In both cases, the position of the legal standing of the association should be dependent on the registration of a list, administrated by the Federal Bureau of Justice. The alternative, whereof the legal standing is individually decided by the courts, contains at first glance only minor formal hurdles, but it does not offer effective protection against an abusive exercise of rights. Additionally, the prerequisites for the registration should go beyond the requirements of § 23 AGG as follows: The association must have a legal capacity, it should have existed for at least two years and it should guarantee a proper performance, in view of their past activities. The fulfilment of the latter written prerequisite can be assumed, when the association is publicly funded. When there are reasonable doubts as to the implementation of the prerequisites, the Federal Anti-Discrimination Agency should be required to make an evaluation. A **public legal-aid fund** should be established for the support of collective actions. This should be

[36] ECJ decision from July 10, 2008 – Rs. C-54/07. The claim was brought forth by the Belgian Center for Equal Opportunity and Opposition to Racism against NV firm Feryn. The judgment of the court emphasizes that the publicizing of an employer that they will not employ people based on their race or ethnic origin is a form of direct discrimination. The certain existence of an affected person is not necessary for a judicial assertion.

incorporated into the realm of the Federal Anti-Discrimination Agency. Resources from the fund can be applied for by the listed associations.

7.2. The **two month deadline** listed § 15 (4) AGG for the assertion of a claim does not correspond to the realities of life of discriminated against persons. Even taking into account the legitimate interests for legal security of the employers as well as of providers of goods and services, the deadline should be extended to twelve months. It should be clarified that the deadline is counted from the moment the claimant becomes aware that he or she is being discriminated against by the discriminator.

7.3. **§ 17 (2) AGG** provides work councils and unions the opportunity to take proceedings against employers who have committed a "gross violation" of the AGG's regulations that protect employees from discrimination. Claims of prejudiced treatment are not allowed to be asserted here. The provision is rarely used, which is also due to the fact that the requirements of a "gross violation," which should only be present for objectively significant and obviously serious cases of discrimination. Therefore, looking forward, every violation committed by employers of the AGG should be sufficient to trigger the rights of the work councils and unions.

7.4. The corresponding requirements to prove a case of discrimination (under **§ 22 AGG**) make it largely impossible for plaintiffs to take their claim to be taken before the court. Lawyers point out that it is possible to camouflage discriminatory behaviour and make it relatively easy to keep evidence hidden. For discrimination by public authorities, therefore, there should be an applicable burden of proof, which would suffice in substantiating and concluding claims of discrimination. The state service against which the claim is made should bear the burden of proof to show that no violation of the prohibition of discrimination was made. For discrimination in the private sector, regulations on the burden of proof should be clarified and supplemented with the right to claim this information, which would provide sufficient evidence within the meaning of § 22 AGG in the form of statistics and results of testing-procedures.[37]

7.5. Under § 23 (1) S. 1 AGG, **Anti-discrimination associations** must not attend to the interests of the discriminated against person/group commercially. In the interest of a professional support, it should be reconsidered if a commercial activity can be allowed under

[37] Federal Labor Court (BAG) from July 22, 2010, 8 AZR 1012/08 (juris).

the prerequisite of the association proving corresponding liability insurance. Likewise, the requirements of § 23 (1) S. 2 AGG, which states that the powers regulated in the AGG should only apply to organizations with seventy-five or more members or form a group of at least seven associates, should be reconsidered. These purely quantitative requirements, which are based on the Disability Equality Act, are not per se suitable for securing high quality assistance. Qualitative standards that are looked over and established by a Federal agency can be applied as a compliment.

## 8. Effective, Appropriate, and Dissuasive Sanctions

8.1. Contrary to European law, § 15 (1) S. 2 AGG and § 21 (1) S. 2 AGG make the claims for compensation dependent on the counterparty's accountability for the discrimination. This **fault requirement** should be deleted. The same applies for the collective agreement privilege under § 15 (3) AGG.

8.2. The **upper limit** of § 15 (2) S. 2 AGG, where compensation cannot be fixed above a three-month salary if the employee would not have been chosen through a selection process conducted without discrimination. This is also problematic from the perspective of European law. This "capping" of claims contradicts the requirements of the Anti-Discrimination Directive, which outlines "effective, proportionate, and dissuasive" sanctions. In practice, these limitations essentially lead to the limiting of all claims to be capped at a three-month salary level.

8.3. The outlined requirements of the regulations for **sanctions** ("effective, proportionate, and dissuasive") should be clarified in the text of §§ 15 and 21 AGG. At the very least, a concretization of these terms should follow in the explanatory memorandum. Thereafter, the following factors should be taken into account when calculating compensation: Size/turnover of the discriminatory company, preconceived prejudicial judgments, intentionality of behaviours, and the number of those affected (especially of those affected by indirect discrimination).

8.4. Finally, by ridding of § 15 (6) AGG, legislators should clarify that the violation of the prohibition of discrimination under employment/civil law may result in the availability of a claim for the conclusion of the contract – a so called **contractual claim**. The requirements for making such a claim need to be, by any standard, clarified and, if need be, made concrete in court.

## 9. Strong and Independent: The Federal Anti-Discrimination Agency

The **independence** of the Federal Anti-Discrimination Agency (ADS) should be strengthened to mirror the Paris Principles of the UN[38] and the position of the Federal Data Protection Administration. In particular, this affects the structure and resources of the agency.

9.1. § 25 (2) S. 1 AGG should be altered so that the ADS is not only furnished with the "essential," but also the **"necessary" personal- and material resources**, so that they can properly fulfil their duty. A judicial help fund should be established by the ADS for the support of groups pursuing collective-actions (see above).

9.2. The **management position** of the ADS should be upon public recruitment. The selection is to be made exclusively on suitability, aptitude, and professionalism. The Federal government should recommend the three most qualified candidates to the House of Representatives (Bundestag) and they, with a simple majority, select the candidate for the management of the ADS for a term of five years. Subsequent re-election is only available once. The appointment will be confirmed through the Federal President (Bundespräsident).

9.3. The tasks of the ADS should be complemented with the guarantee, to the further development and the guidance of an efficient, need-based, and low-threshold **infrastructure** for the attainment of information and **self-help** in the field of non-discrimination and equal treatment. Individual counselling by the ADS should not be forbidden, but limited to cases where there are no other professional or local counselling options.

9.4. The transfer of **further tasks** to the ADS should be reviewed: First and foremost, this involves sensitization and qualifying of employees in Federal public service. Furthermore, this involves the development and allocation of "Diversity-Certificates" for companies, organizations, and other establishments. Likewise, the tasks of monitoring and, possibly, the correcting of companies' payment-practices and the monitoring of diversity-mainstreaming should be carried out by the ADS. Equally, the ADS should take over the observational and advisory roles of positive obligations (of companies/organizations) and also possibly the assignment of sanctions, if these are otherwise to be denied. Moreover, the agency should have the task of reviewing the above mentioned points of equal-treatment in combination with

[38] The „Paris Principles" were adopted during the first international workshop of the National Institution for the Support and Protection of Human Rights (Nationalen Institutionen zur Förderung und Schutz der Menschenrechte) from October 7 through 9, 1991, in Paris. This was adopted by the Human Rights Commission of the UN through Resolution 1992/54 from 1992 and through the UN General Assembly in their resolution 48/134 from 1993.

the allocation of public contracts and Federal resources. In any case, an expansion of tasks must be reflected in the resources and in the budget of the agency.

9.5. Furthermore, the authority of the Federal Anti-Discrimination Agency should be supplemented as follows:

The duty of all Federal public agencies to support and provide information to the ADS, as outlined under § 28 (2) AGG, should be complemented by an explicit right to **access the relevant file**, as long as it does not affect the protection of the information of an individual.

The ADS should be allowed the **right to challenge**: If it detects a violation of the AGG by a public Federal public sector entity, it can object to the violation and challenge the entity to make a statement on this issue within a certain deadline. Recommendations for the removal of shortcomings and for a better implementation of the Anti-Discrimination Law can be made in combination with the objection. The statement should also present measures that have been taken due to the objection.

Finally, the ADS should be entitled to participate in the procedure of making all laws, prescriptions, and otherwise important intentions by forwarding the results of the Diversity and Gender Impact Assessment (see above) to the respective Federal administrators in due time before the decision is taken by the Parliament. The ADS should have the right to comment.

The above recommendations should work towards the strengthening of protections against discrimination in Germany. To reach this end, non-discrimination organizations must make efforts to convince politicians of the urgency of reform.

## Appendix 1

# Synopsis of the Proposed Modifications to the AGG

March 2014

By Doris Liebscher und Alexander Klose

Commissioned by **Büros zur Umsetzung von Gleichbehandlung** e.V. (BUG)

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
|---|---|---|
| § 1 | **§ 1 Purpose**<br><br>The purpose of this Act is to prevent or to stop discrimination on the grounds of racist reasoning or ascription to an ethnicity, origin, language, religion or belief, gender, sexual identity, disability, chronic disease or genetic disposition, stage of life, social status as well as multidimensional discrimination. | **§ 1 Purpose**<br><br>The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. |
| § 2 | **§ 2 Scope**<br><br>~~(4) Only the provisions governing the protection against unlawful dismissal in general and specific cases shall apply to dismissals.~~ | **§ 2 Scope**<br><br>(4) Only the provisions governing the protection against unlawful dismissal in general and specific cases shall apply to dismissals. |
| § 3 | **§ 3 Definitions** | **§ 3 Definitions** |

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
|---|---|---|
| | (1) Direct **discrimination** shall be taken to occur where one person is treated unfavourably than another is, has been or would be treated in a comparable situation **on one or more of the grounds referred to under § 1**. Direct **discrimination** on grounds of **gender shall also be taken to occur in relation to § 2 (1) Nos 1 to 4 in the event of the unfavourable treatment of a woman on account of pregnancy or maternity**. **A discrimination shall be taken to occur also in the case that the one who discriminates only assumes the presence of one or more of the grounds referred to under § 1.** | (1) Direct unfavourable treatment shall be taken to occur where one person is treated unfavourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to under § 1. Direct unfavourable treatment on grounds of sex shall also be taken to occur in relation to § 2 (1) Nos 1 to 4 in the event of the unfavourable treatment of a woman on account of pregnancy or maternity. |
| | (2) Indirect **discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on **one or more of the grounds referred to under § 1**, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. | (2) Indirect unfavourable treatment shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on any of the grounds referred to under § 1, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. |
| | (3) Harassment shall be deemed to be **discrimination** when an unwanted conduct in connection with **one or more of the grounds referred to under § 1** takes place with the purpose or effect of violating the dignity of the person concerned, **in particular by** creating an intimidating, hostile, degrading, humiliating or offensive environment. | (3) Harassment shall be deemed to be unfavourable treatment when an unwanted conduct in connection with any of the grounds referred to under § 1 takes place with the purpose or effect of violating the dignity of the person concerned and of creating an intimidating, hostile, degrading, humiliating or offensive environment. |
| | (4) Sexual harassment shall be deemed to be **discrimination** in relation to § 2 (1) Nos 1 to 4, when an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or | (4) Sexual harassment shall be deemed to be unfavourable treatment in relation to § 2 (1) Nos 1 to 4, when an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition |

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
|---|---|---|
| | public exhibition of pornographic images, takes place with the purpose or effect of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.<br><br>(5) An instruction to **discriminate against a person on one or more of the grounds referred to under § 1 shall be deemed to be discrimination.** Such an instruction shall in particular be taken to occur in relation to § 2 (1) Nos 1 to 4 where a person instructs an employee to conduct which discriminates or can discriminate against another employee on **one or more of the grounds referred to under § 1.**<br><br>**(6) Denying reasonable accommodation to persons with disabilities according to § 5 (2) in a concrete case shall be deemed to be discrimination.**<br><br>**(7) Treating someone unfavourably based on their close relationship to a person who is protected under § 1 shall be deemed to be discrimination.**<br><br>**(8) The unfavourable treatment of someone who has invoked this law to protect their rights or has refused to carry out instructions to violate this law is a form of discrimination. The same applies for persons who are treated unfavourably for testifying as a witness or supporting a person that is covered under sentence 1.**<br><br>**(9) Public announcement of discrimination shall be deemed to be discrimination.** | of pornographic images, takes place with the purpose or effect of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.<br><br>(5) An instruction to treat a person unfavourably on any of the grounds referred to under § 1 shall be deemed as disadvantaging. Such an instruction shall in particular be taken to occur in relation to § 2 (1) Nos 1 to 4 where a person instructs an employee to conduct which discriminates or can discriminate against another employee on one of the grounds referred to under § 1. |
| **§ 4** | **§ 4 Multidimensional discrimination** | **§ 4 Unequal Treatment on Several Grounds** |

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
|---|---|---|
| | Multidimensional discrimination is discrimination based on multiple grounds either prejudiced against cumulatively or intersectionally. A multidimensional difference of treatment can only be justified by §§ 8 through 10 and 20, if the justification extends to all of these grounds or a specific effect from a combination of multiple grounds which were the basis for the different treatment. | Where unequal treatment occurs on several of the grounds referred to under § 1, this unequal treatment may only be justified under §§ 8 to 10 and 20 when the justification extends to all those grounds for which the equal treatment occurred. |
| **§ 5** | **§ 5 Positive Action and Reasonable Accommodation**<br><br>(1) Notwithstanding the grounds referred to under §§ 8 through 10 and 20, unequal treatment shall only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on **one or more of the grounds referred to under § 1.**<br><br>**(2) To guarantee the application of the equal treatment principle to persons with disabilities, appropriate and, in concrete cases, necessary actions should be taken to enable them access to employment, ability to practice a profession, promotion in that profession and participation in educational and professional courses. This also applies for an effective protection from discrimination in social protection, of social benefits, health services and education as well as to access to goods and services that are available to the general public, including housing and transportation. These measures shall not impose a disproportionate burden and require fundamental alterations to social protection, social benefits, health services and education or make goods and services obligatory or require the offering of appropriate alternatives.** | **§ 5 Positive Action**<br><br>Notwithstanding the grounds referred to under §§ 8 to 10 and 20, unequal treatment shall only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on any of the grounds referred to under § 1. |

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
|---|---|---|
| | **For the purposes of assessing whether measures necessary to comply with sentence 1 would impose a disproportionate burden, account shall be taken of, in particular, the size and resources of the organization, the type of the organization, the estimated cost, the cycle of the goods and services and the possible benefits of increased access for persons with disabilities. The burden is not disproportionate when it is weighed out sufficiently by measures taken by the public sector from the realm of equal treatment policies.**<br><br>**(3) Employers who generally employ 250 or more employees are obligated to present a diversity plan every four years. The diversity plan must describe the situation of the employees in view of the grounds in § 1 and assess the previous measures taken to remove existing discrimination outlined under § 1 and must evaluate measures that do establish equal opportunity. In particular, in order to eliminate existing disadvantages, measures must be developed to implement necessary personnel and organizational improvements within the framework of specific targets and a planned timetable. If the objectives of the diversity plan are not implemented, the reasons must be presented in the next diversity plan. The work councils must get involved at an early stage. The member of the Federal Government responsible for anti-discrimination is authorized to regulate the content requirements of the diversity plan.** | |
| **§ 7** | **§ 7 Prohibition of Discrimination**<br><br>1) Employees shall not be permitted to suffer **discrimination** on **one or more of the grounds** referred to under § 1; this shall also | **§ 7 Prohibition of Discrimination**<br><br>(1) Employees shall not be permitted to suffer unfavourable treatment on any of the grounds referred to under § 1; this shall also |

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
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| | apply where the person committing the act of **discrimination** only assumes the existence of **one or more of the grounds** referred to under § 1.<br><br>(2) Any provisions of an agreement which violate the prohibition of **discrimination** under Subsection (1) shall be ineffective.<br><br>(3) Any **discrimination** within the meaning of Subsection (1) by an employer or employee shall be deemed a violation of their contractual obligations. | apply where the person committing the act of unfavourable treatment only assumes the existence of any of the grounds referred to under § 1.<br><br>(2) Any provisions of an agreement which violate the prohibition of unfavourable treatment under Subsection (1) shall be ineffective.<br><br>(3) Any unfavourable treatment within the meaning of Subsection (1) by an employer or employee shall be deemed a violation of their contractual obligations. |
| **§ 9** | **~~§ 9 Permissible Difference of Treatment on Grounds of Religion or Belief~~**<br><br>~~(1) Notwithstanding § 8, a difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity.~~<br><br>~~(2) 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 § 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~~ | **§ 9 Permissible Difference of Treatment on Grounds of Religion or Belief**<br><br>(1) Notwithstanding § 8, a difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity.<br><br>(2) 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 § 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 |

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| | ~~to the ethos of the organisation.~~ | the ethos of the organisation. |
| **§ 10** | § 10 Permissible Difference of Treatment on Grounds of **Stage of Life, Language** and **Social Status**<br><br>Notwithstanding § 8, a difference of treatment on grounds of **stage of life, language and social status** shall likewise not constitute discrimination if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment **based on grounds of stage of life** may include, among others:<br>1. the setting of special conditions for access to employment and vocational training, as well as particular employment and working conditions, including remuneration and dismissal conditions, to ensure the vocational integration of young people, older workers and persons with caring responsibilities and to ensure their protection;<br>2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;<br>3. the fixing of a maximum age for recruitment which is based on specific training requirements of the post in question or the need for a reasonable period of employment before retirement;<br>4. the fixing of upper age limits in company social security systems as a precondition for membership of or the drawing of an old-age pension or for invalidity benefits, including fixing different age limits within the context of these systems for certain employees or categories of employees and the use of criteria regarding age within the context of these systems for the purposes of actuarial calculations;<br>5. agreements providing for the termination of the employment | **§ 10 Permissible Difference of Treatment on Grounds of Age**<br><br>Notwithstanding § 8, a difference of treatment on grounds of age shall likewise not constitute discrimination if it is 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:<br>1. the setting of special conditions for access to employment and vocational training, as well as particular employment and working conditions, including remuneration and dismissal conditions, to ensure the vocational integration of young people, older workers and persons with caring responsibilities and to ensure their protection;<br>2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;<br>3. the fixing of a maximum age for recruitment which is based on specific training requirements of the post in question or the need for a reasonable period of employment before retirement;<br>4. the fixing of upper age limits in company social security systems as a precondition for membership of or the drawing of an old-age pension or for invalidity benefits, including fixing different age limits within the context of these systems for certain employees or categories of employees and the use of criteria regarding age within the context of these systems for the purposes of actuarial calculations;<br>5. agreements providing for the termination of the employment relationship without dismissal at a point in time when the employee may apply for payment of an old-age pension; § 41 Social Code, |

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| | relationship without dismissal at a point in time when the employee may apply for payment of an old-age pension; § 41 Social Code, Book VI shall remain unaffected;<br>6. differentiating between social benefits within the meaning of the Works Constitution Act (Betriebsverfassungsgesetz), where the parties have created a regulation governing compensation based on age or length of service whereby the employee's chances on the labour market (which are decisively dependent on his or her age) have recognisably been taken into consideration by means of emphasising age relatively strongly, or employees who are economically secure are excluded from social benefits because they may be eligible to draw an old-age pension after drawing unemployment benefit. | Book VI shall remain unaffected;<br>6. differentiating between social benefits within the meaning of the Works Constitution Act (Betriebsverfassungsgesetz), where the parties have created a regulation governing compensation based on age or length of service whereby the employee's chances on the labour market (which are decisively dependent on his or her age) have recognisably been taken into consideration by means of emphasising age relatively strongly, or employees who are economically secure are excluded from social benefits because they may be eligible to draw an old-age pension after drawing unemployment benefit. |
| **§ 15** | **§ 15 Compensation and Damages**<br><br>(1) In the event of a violation of the prohibition of **discrimination**, the employer shall be under the obligation to compensate the damage arising therefrom. ~~This shall not apply where the employer is not responsible for the breach of duty.~~<br><br>(2) Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. ~~This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment.~~<br><br>~~(3) The employer shall only be under the obligation to pay compensation where collective bargaining agreements have been~~ | **§ 15 Compensation and Damages**<br><br>(1) In the event of a violation of the prohibition of less favourable treatment, the employer shall be under the obligation to compensate the damage arising therefrom. This shall not apply where the employer is not responsible for the breach of duty.<br><br>(2) Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment.<br><br>(3) The employer shall only be under the obligation to pay compensation where collective bargaining agreements have been |

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| | ~~entered into when he or she acted with intent or with gross negligence.~~ | entered into when he or she acted with intent or with gross negligence. |
| | (4) Any claim resulting from Subsection (1) or (2) must be asserted in writing within a period of **twelve** months, unless the parties to a collective bargaining agreement have agreed otherwise. In the case of an application or promotion, the time limit shall commence ~~on the date on which the rejection is received; in other cases of discrimination the time limit shall commence~~ on the date on which the employee learns of the discrimination. | (4) Any claim resulting from Subsection (1) or (2) must be asserted in writing within a period of two months, unless the parties to a collective bargaining agreement have agreed otherwise. In the case of an application or promotion, the time limit shall commence on the date on which the rejection is received; in other cases of discrimination the time limit shall commence on the date on which the employee learns of the discrimination. |
| | (5) This shall be without prejudice to other claims against the employer resulting from other legal provisions. | (5) This shall be without prejudice to other claims against the employer resulting from other legal provisions. |
| | ~~(6) Any violation on the part of the employer of the prohibition of discrimination under § 7 (1) shall not justify a claim to the establishment of an employment relationship, a vocational training relationship or to promotion, unless such a relationship or promotion results from another legal ground.~~ | (6) Any violation on the part of the employer of the prohibition of discrimination under § 7 (1) shall not justify a claim to the establishment of an employment relationship, a vocational training relationship or to promotion, unless such a relationship or promotion results from another legal ground. |
| **§ 16** | **§ 16 Prohibition of Victimization** | **§ 16 Prohibition of Victimization** |
| | ~~(1) The employer shall not be permitted to discriminate against employees who assert their rights under Part 2 or on account of their refusal to carry out instructions that constitute a violation of the provisions of Part 2. The same shall apply to persons who support the employee in this or who testify as a witness.~~ | (1) The employer shall not be permitted to discriminate against employees who assert their rights under Part 2 or on account of their refusal to carry out instructions that constitute a violation of the provisions of Part 2. The same shall apply to persons who support the employee in this or who testify as a witness. |
| | (**1**) The rejection or toleration of discriminatory conduct by an affected employee shall not be used as the basis for a decision | (2) The rejection or toleration of discriminatory conduct by an affected employee may not be used as the basis for a decision |

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| | affecting that employee. **The same applies for persons who support the affected employee or testify as witnesses.**<br><br>(**2**) § 22 shall apply mutatis mutandis. | affecting that employee. Subsection (1) second sentence shall apply mutatis mutandis.<br><br>(3) § 22 shall apply mutatis mutandis. |
| **§ 17** | **§ 17 Social Responsibility of the Involved Parties**<br><br>(1) The parities to collective bargaining agreements, employers, employees and their representatives shall be required to become actively involved in achieving the goal set out in § 1 within the context of their duties and scope of action.<br><br>(2) Where the employer commits **a** violation of **either** the provisions of Part 2 **or the duty to draw up a diversity plan meeting the requirements of § 5 (3),** in an enterprise in which the conditions pursuant to § 1 (1) first sentence of the Works Constitution Act are present, the Works Council or a trade union represented in the enterprise may also assert before a court the rights set out in § 23 (3) first sentence Works Constitution Act if the preconditions therein are present; § 23 (3) second to fifth sentences of the Works Constitution Act shall apply mutatis mutandis. No claims of the person suffering discrimination shall be asserted in the application. | **§ 17 Social Responsibility of the Involved Parties**<br><br>(1) The parities to collective bargaining agreements, employers, employees and their representatives shall be required to become actively involved in achieving the goal set out in § 1 within the context of their duties and scope of action.<br><br>(2) Where the employer commits a gross violation of the provisions of Part 2 in an enterprise in which the conditions pursuant to § 1 (1) first sentence of the Works Constitution Act are present, the Works Council or a trade union represented in the enterprise may also assert before a court the rights set out in § 23 (3) first sentence Works Constitution Act if the preconditions therein are present; § 23 (3) second to fifth sentences of the Works Constitution Act shall apply mutatis mutandis. No claims of the person suffering discrimination shall be asserted in the application. |
| **§ 19** | **§ 19 Prohibition of Discrimination Under Civil Law**<br><br>1) Any **discrimination on one or more of the grounds referred to under § 1** ~~the grounds of race or ethnic origin, sex, religion, disability, age or sexual orientation~~ shall be illegal when founding, executing or terminating civil-law obligations **within the meaning of § 2 (5) No. 5 through 8.** ~~which~~ | **§ 19 Prohibition of Discrimination Under Civil Law**<br><br>(1) Any unfavourable treatment on the grounds of race or ethnic origin, sex, religion, disability, age or sexual orientation shall be illegal when founding, executing or terminating civil-law obligations which<br>1. typically arise without regard of person in a large number of cases |

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| | ~~1. typically arise without regard of person in a large number of cases under comparable conditions (bulk business) or where the regard of person is of subordinate significance on account of the obligation and the comparable conditions arise in a large number of cases ; or which~~<br>~~2. have as their object a private-law insurance.~~ | under comparable conditions (bulk business) or where the regard of person is of subordinate significance on account of the obligation and the comparable conditions arise in a large number of cases ; or which<br>2. have as their object a private-law insurance. |
| | ~~(2) Any discrimination on the grounds of race or ethnic origin shall furthermore be illegal within the meaning of § 2 (1) Nos 5 to 8 when founding, executing or terminating other civil-law obligations.~~ | (2) Any discrimination on the grounds of race or ethnic origin shall furthermore be illegal within the meaning of § 2 (1) Nos 5 to 8 when founding, executing or terminating other civil-law obligations. |
| | ~~(3) In the case of rental of housing, a difference of treatment shall not be deemed to be discrimination where they serve to create and maintain stable social structures regarding inhabitants and balanced settlement structures, as well as balanced economic, social and cultural conditions.~~ | (3) In the case of rental of housing, a difference of treatment shall not be deemed to be discrimination where they serve to create and maintain stable social structures regarding inhabitants and balanced settlement structures, as well as balanced economic, social and cultural conditions. |
| | (**2**) The provisions set out in Part 3 shall not apply to obligations **affecting the privacy or family life of the parties involved.** ~~resulting from family law and the law of succession.~~ | (4) The provisions set out in Part 3 shall not apply to obligations resulting from family law and the law of succession. |
| | (~~5) The provisions set out in Part 3 shall not apply to civil-law obligations where the parties or their relatives are closely related or a relationship of trust exists. As regards tenancy, this may in particular be the case where the parties or their relatives use housing situated on the same plot of land. The rental of housing for not only temporary use shall generally not constitute business within the~~ | (5) The provisions set out in Part 3 shall not apply to civil-law obligations where the parties or their relatives are closely related or a relationship of trust exists. As regards tenancy, this may in particular be the case where the parties or their relatives use housing situated on the same plot of land. The rental of housing for not only temporary use shall generally not constitute business within the meaning of Subsection (1) No 1 where the lessor does not let out more than 50 apartments in total. |
| **§ 20** | **§ 20 Permissible Difference of Treatment** | **§ 20 Permissible Difference of Treatment** |

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| | 1) **Differences of treatment on one of the grounds referred to under § 1 shall not be deemed to be a violation of the prohibition of discrimination if they are objectively and reasonably justified by a legitimate aim. The mains of achieving that aim must be appropriate and necessary.** Such differences of treatment may include, among others, where the difference of treatment<br>1. serves the avoidance of threats, the prevention of damage or another purpose of a comparable nature;<br>2. satisfies the requirement of protection of privacy or personal safety;<br>3. grants special advantages and there is no interest in enforcing equal treatment;<br>4. is based on the concerned person's religion and is justified with regard to the exercise of the right to freedom of religion or the right to self-determination of religious communities, facilities affiliated to them (regardless of their legal form) and organisations which have undertaken conjointly to practice a religion or belief, given their respective ethos.<br><br>(2) Differences of treatment on the ground of sex shall only be permitted in case of the application of § 19 (1) No 2 with reference to premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. Costs arising from pregnancy and maternity may on no account lead to the payment of different premiums and benefits. Differences of treatment on the ground of ~~religion,~~ disability, **genetic disposition or stage of life o**~~r sexual orientation~~ in the case **of contracts concerning** | (1) Differences of treatment on grounds of religion, disability, age, sexual orientation or sex shall not be deemed to be a violation of the prohibition of discrimination if they are based on objective grounds. Such differences of treatment may include, among others, where the difference of treatment<br>1. serves the avoidance of threats, the prevention of damage or another purpose of a comparable nature;<br>2. satisfies the requirement of protection of privacy or personal safety;<br>3. grants special advantages and there is no interest in enforcing equal treatment;<br>4. is based on the concerned person's religion and is justified with regard to the exercise of the right to freedom of religion or the right to self-determination of religious communities, facilities affiliated to them (regardless of their legal form) and organisations which have undertaken conjointly to practice a religion or belief, given their respective ethos.<br><br>(2) Differences of treatment on the ground of sex shall only be permitted in case of the application of § 19 (1) No 2 with reference to premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. Costs arising from pregnancy and maternity may on no account lead to the payment of different premiums and benefits. Differences of treatment on the ground of religion, disability, age or sexual orientation in the case of application of § 19 (1) No 2 shall be permissible only where these are based on recognised principles of risk-adequate calculations, in |

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| | **private-law insurance** shall be permissible only **where relevant and accurate insurance calculations and statistics that are accessible to the general public are a determining factor in the risk assessment.** | particular on an assessment of risk based on actuarial calculations which are in turn based on statistical surveys. |
| **§ 21** | **§ 21 Enforcement**<br><br>(1) Where a breach of the prohibition of discrimination occurs, the disadvantaged person may, regardless of further claims being asserted, demand that the discriminatory conduct be stopped. Where other discrimination is to be feared, he or she may sue for an injunction.<br><br>(2) Where a violation of the prohibition of discrimination occurs, the person responsible for committing the discrimination shall be obligated to compensate for any damage arising therefrom. ~~This shall not apply where the person committing the discrimination is not responsible for the breach of duty.~~ The person suffering discrimination may demand appropriate compensation in money for the damage, however not for economic loss.<br><br>(3) Claims in tort shall remain unaffected.<br><br>(4) The person responsible for committing the discrimination shall not be permitted to refer to an agreement which derogates from the prohibition of discrimination.<br><br>(5) Any claims arising from Subsections (1) and (2) must be asserted within a period of **twelve** months. After the expiry of the time limit the claim may only be asserted when the disadvantaged person was prevented from meeting the deadline | **§ 21 Enforcement**<br><br>(1) Where a breach of the prohibition of discrimination occurs, the disadvantaged person may, regardless of further claims being asserted, demand that the discriminatory conduct be stopped. Where other discrimination is to be feared, he or she may sue for an injunction.<br><br>(2) Where a violation of the prohibition of discrimination occurs, the person responsible for committing the discrimination shall be obligated to compensate for any damage arising therefrom. This shall not apply where the person committing the discrimination is not responsible for the breach of duty. The person suffering discrimination may demand appropriate compensation in money for the damage, however not for economic loss.<br><br>(3) Claims in tort shall remain unaffected.<br><br>(4) The person responsible for committing the discrimination shall not be permitted to refer to an agreement which derogates from the prohibition of discrimination.<br><br>(5) Any claims arising from Subsections (1) and (2) must be asserted within a period of two months. After the expiry of the time limit the claim may only be asserted when the disadvantaged person was prevented from meeting the deadline through no fault of their own. |

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| | through no fault of their own. | |
| **§ 22** | **§ 22 Burden of Proof**<br><br>(**1**) Where, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in § 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.<br><br>**(2) If the submission of a qualified anti-discrimination organization (§ 23a) makes the claim of discrimination appear credible, it has a claim against the other party for information as to whether, and if so, of which reasons another person has received better treatment in a comparable situation. If the other party refuses to provide information, this shall be deemed evidence under Subsection (1).** | **§ 22 Burden of Proof**<br><br>Where, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in § 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination. |
| **§ 23** | **§ 23 Support from Anti-Discrimination Organisations**<br><br>(1) "Anti-discrimination organisation" shall refer to any association of persons which attends to the particular interests of persons or groups of persons discriminated against within the meaning of § 1; in accordance with their statutes these organisations must operate **not only on a profit** and non-temporary basis. The powers set out in Subsections (2) to (4) shall be granted to such organisations with at least 75 members or an association comprising at least seven organizations or **certified anti-discrimination organizations by the Federal Anti-Discrimination Agency.** | **§ 23 Support from Anti-Discrimination Organisations**<br><br>(1) "Anti-discrimination organisation" shall refer to any association of persons which attends to the particular interests of persons or groups of persons discriminated against within the meaning of § 1; in accordance with their statutes these organisations must operate on a non-profit and non-temporary basis. The powers set out in Subsections (2) to (4) shall be granted to such organisations with at least 75 members or an association comprising at least seven organisations. |

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| | (2) Anti-discrimination organisations shall be authorised, under the terms of their statutes to act as legal advisor to a disadvantaged person in the court hearings. Otherwise, the provisions set out in the rules of procedure, in particular those according to which legal advisors may be barred from being heard, shall remain unaffected.<br><br>(3) Anti-discrimination organisations shall be permitted to be entrusted with the legal affairs of disadvantaged persons under the terms of their statutes.<br><br>(4) The special rights of action and powers of representation of associations for the benefit of disabled persons shall remain unaffected. | (2) Anti-discrimination organisations shall be authorised, under the terms of their statutes to act as legal advisor to a disadvantaged person in the court hearings. Otherwise, the provisions set out in the rules of procedure, in particular those according to which legal advisors may be barred from being heard, shall remain unaffected.<br><br>(3) Anti-discrimination organisations shall be permitted to be entrusted with the legal affairs of disadvantaged persons under the terms of their statutes.<br><br>(4) The special rights of action and powers of representation of associations for the benefit of disabled persons shall remain unaffected. |
| **§ 23a** | **§ 23a Qualified Anti-discrimination Organisations**<br><br>(1) The Federal Agency for Justice must maintain a list of qualified anti-discrimination organisations. This list shall be published in the Federal Gazette on January 1st of every year.<br><br>(2) Upon request, anti-discrimination organisations, within the meaning of § 23 (1), shall be registered on the list if they are based in Germany, have been existing for at least one year, and, based on their previous activities, offer a guarantee of proper performance of their duties. It is to be presumed that organisations that receive monetary support from the federal or state government already fulfil these requirements. Enrolment on this list happens upon the stating of name, address, court of registration, registration number and statutory purpose of the registration. Going forward, it shall be revoked if: | |

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| | 1. the organisation makes this request, or<br>2. if the requirements for registration have not been fulfilled or have ceased to apply.<br><br>(3) Decisions on the enrolment process shall happen through a notification which is to be served to the applicant. Upon request, the Federal Agency for Justice shall grant the organization a certificate of their registration on the list. Upon request of third parties with a legal interest, it shall certify that the enrolment of an organisation on the list has been cancelled.<br><br>(4) If, in the course of a legal dispute, well-founded doubts arise as to whether the requirements of paragraph 2 have been met by a registered organisation, the court may request the Federal Agency for Justice to review the registration and suspend the hearing until the latter has reached a decision.<br><br>(5) Through the regulations of the registration procedure, the Federal Ministry for Justice is authorized, in particular, to regulate the review of the required questions of the enrolment requirements as well as the details of the maintenance of the list. | |
| **§ 23b** | **§ 23b Protection of Rights by Organisations**<br><br>(1) Should someone be discriminated against, a qualified anti-discrimination organisation, which is not a party of the proceedings itself, may apply for legal protection instead of the discriminated person with their consent.<br><br>(2) All procedural requirements must be met, as if the discriminated person themself would have requested legal | |

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| | protection. | |
| **§ 23c** | **§ 23c Collective Action Right**<br><br>(1) A qualified anti-discrimination organisation can make a declaratory claim that the prohibition of discrimination has been violated, without having to demonstrate the infringement of its own rights.<br><br>(2) To the extent that an affected person can or could personally raise a claim, the organisation is only allowed to take collective action if it claims that the case is of general interest. This is the case, in particular, when a large number of similar cases exists.<br><br>(3) Collective action is impermissible if the action was taken based on a judicial decision. | |
| **§ 25** | **§ 25 Federal Anti-Discrimination Agency**<br><br>(1) The federal agency for the protection against **discrimination** on any of the grounds referred to in § 1 (Federal Anti-Discrimination Agency) shall be established within the Federal Ministry responsible for anti-discrimination ~~for Family Affairs, Senior Citizens, Women and Youth~~, regardless of the competence of any Parliamentary Commissioners of the German Bundestag or Federal Government Commissioners.<br><br>(2) The Federal Anti-Discrimination Agency shall be provided with the personnel and materials which is **necessary** to fulfil its tasks. It shall be identified as a separate chapter in the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth's individual plan. | **§ 25 Federal Anti-Discrimination Agency**<br><br>(1) The federal agency for the protection against less favourable treatment on any of the grounds referred to in § 1 (Federal Anti-Discrimination Agency) shall be established within the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, regardless of the competence of any Parliamentary Commissioners of the German Bundestag or Federal Government Commissioners.<br><br>(2) The Federal Anti-Discrimination Agency shall be provided with the personnel and materials which is essential to fulfil its tasks. It shall be identified as a separate chapter in the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth's individual plan. |

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| **§ 26** | **§ 26 Head of the Federal Anti-Discrimination Agency**<br><br>**(1) The German Bundestag elects the head of the Federal Anti-Discrimination Agency from a group of candidates proposed by the Federal Government with a simple majority of its members. The Federal Government shall propose at least three candidates who have been selected upon public recruitment in view of their suitability, aptitude and professionalism.**<br><br>(2) The elected candidate shall be appointed by the Federal President (Bundespräsident). The head-elect of the Federal Anti-Discrimination Agency shall take the following oath before the member of the Federal Government responsible for anti-discrimination:<br>**"I swear to devote my strength to the welfare of the German people, increase its benefits, steer it away from harm, uphold and defend the Constitution and the laws of the Federation, conscientiously carry out my duties and exercise justice for all. (So help me God.)"**<br>**The oath can be administered with or without religious affirmation.**<br><br>**(3) The length of the term shall last five years. Re-election is only permissible once.** | **§ 26 Legal Status of the Head of the Federal Anti-Discrimination Agency**<br><br>(1) The Federal Minister for Family Affairs, Senior Citizens, Women and Youth shall appoint a person to head the Federal Anti-Discrimination Agency, based on a suggestion put forward by the Federal Government. In accordance with this Act, the relationship between the Agency and the Federal Administration shall be that of an official public-law relationship (öffentlich-rechtliches Amtsverhältnis). The Agency shall be independent in the execution of its duties and only subject to the law.<br><br>(2) The official relationship under public law shall commence upon the handing over of the certificate of appointment by the Federal Minister for Family Affairs, Senior Citizens, Women and Youth.<br><br>(3) The official relationship under public law shall end, unless by death,<br>1. with the assembly of a new Bundestag;<br>2. with the end of the period of office upon the incumbent reaching the age limit set out in § 51 para 1 and 2 of the Federal Civil |

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| | | Servants Act, (Bundesbeamtengesetz);<br>3. upon the incumbent being discharged. The Federal Minister for Family Affairs, Senior Citizens, Women and Youth shall discharge the head of the Federal Anti-Discrimination Agency upon his or her request or when grounds arise which, in the case of a judge appointed for life, would give rise to discharge from duty. In the event of the termination of the official relationship under public law, the head of the Federal Anti-Discrimination Agency shall receive a certificate executed by the Federal Minister for Family Affairs, Senior Citizens, Women and Youth. The discharge shall become effective upon the handing over of the certificate. |
| | **(4) In accordance with this Act, the official relationship of the head of the Federal Anti-Discrimination Agency to the Federation shall be under public law. He or she shall be independent in the performance of his or her duties and only subject to the law.** | (4) The legal relationship between the head of the Federal Anti-Discrimination Agency and the Federal Administration shall be regulated by contract with the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth. The contract shall require the consent of the Federal Government. |
| | **(5) The head of this office shall not, in addition to this office, hold any other salaried position, trade or profession and may be neither in the executive, supervisory or administratory board of any for-profit corporation nor in the government or legislative body of the Federal Government or of any Federal State. He or she may not give extrajudicial opinions in return for payment.** | |
| | **(6) The official relationship begins with the handing over of the document of appointment by the member of the Federal Government responsible for anti-discrimination.** | |

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| | **(7) Excluding death, the relationship to the office ends**<br>**1. with the expiry of the term,**<br>**2. with the dismissal from the position.**<br>**The Federal President dismisses the head of the office upon his or her request or upon recommendation from the Federal Government when there are reasons that would justify a dismissal of lifetime appointed judges. In cases of termination of the relationship to the office, the head of the office shall receive a notice executed by the Federal President. A dismissal becomes effective upon the exchange of this notice. Upon request by the member of the Federal Government responsible for anti-discrimination, the head of the office is obligated to continue the office until the appointment of a successor.**<br><br>**(8) The legal relationship between the head of the Federal Anti-Discrimination Agency and the Federation shall be regulated by a contract with the Federal Ministry responsible for anti-discrimination. The contract must be approved by the Federal Government.**<br><br>(**9**) Where a federal civil servant is appointed head of the Federal Anti-Discrimination Agency, he or she shall retire from his or her previous office at the same time as the official relationship under public law commences. For the period of the official relationship under public law, the rights and duties associated with being a civil servant shall be suspended, with the exception of the duty to official secrecy and the prohibition of accepting rewards or gifts. Where civil servants are injured in an accident, their legal right to claim treatment and compensation shall | (5) Where a federal civil servant is appointed head of the Federal Anti-Discrimination Agency, he or she shall retire from his or her previous office at the same time as the official relationship under public law commences. For the period of the official relationship under public law, the rights and duties associated with being a civil servant shall be suspended, with the exception of the duty to official secrecy and the prohibition of accepting rewards or gifts. Where civil servants are injured in an accident, their legal right to claim treatment and compensation shall remain unaffected. |

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
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| | remain unaffected. | |
| **§ 27** | **§ 27 Tasks**<br><br>(1) Any person who believes to have been discriminated against on any of the grounds referred to in § 1 may take their case to the Federal Anti-Discrimination Agency. **This shall also apply to employees in public office and other public bodies, without it being necessary to follow official channels.**<br><br>(2) The Federal Anti-Discrimination Agency shall give independent assistance to persons addressing themselves to the Agency in accordance with Subsection (1) in asserting their rights to protection against discrimination. Such assistance may, among other things, involve<br>1. providing information concerning claims and possible legal action based on legal provisions providing protection against discrimination;<br>2. arranging for advice to be provided by another authority;<br>3. endeavouring to achieve an out-of-court settlement between the involved parties. Where responsibility lies either with a Parliamentary Commissioner of the German Bundestag or a Federal Government Commissioner, the Federal Anti-Discrimination Agency shall immediately pass on the matters of the person referred to in Subsection (1), with their prior approval.<br><br>(3) The Federal Anti-Discrimination Agency shall take on and independently carry out the following tasks, insofar as no Parliamentary Commissioner of the Bundestag or Federal Government Commissioner is competent in the matter:<br>1. **information** and publicity work | **§ 27 Tasks**<br><br>(1) Any person who believes he or she has been discriminated against on any of the grounds referred to in § 1 may take their case to the Federal Anti-Discrimination Agency.<br><br>(2) The Federal Anti-Discrimination Agency shall give independent assistance to persons addressing themselves to the Agency in accordance with Subsection (1) in asserting their rights to protection against discrimination. Such assistance may, among other things, involve<br>1. providing information concerning claims and possible legal action based on legal provisions providing protection against discrimination;<br>2. arranging for advice to be provided by another authority;<br>3. endeavouring to achieve an out-of-court settlement between the involved parties. Where responsibility lies either with a Parliamentary Commissioner of the German Bundestag or a Federal Government Commissioner, the Federal Anti-Discrimination Agency shall immediately pass on the matters of the person referred to in Subsection (1), with their prior approval.<br><br>(3) The Federal Anti-Discrimination Agency shall take on and independently carry out the following tasks, insofar as no Parliamentary Commissioner of the Bundestag or Federal Government Commissioner is competent in the matter:<br>1. publicity work |

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
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| | 2. measures **to raise awareness of** and prevent **discrimination**<br>**3. locating and eliminating structural discrimination**<br>**4. guarantee, developing and guidance of an efficient, need-based, low-threshold infrastructure for self-help and counselling**<br>**5. conduct of scientific studies on discrimination, its causes and its effects.**<br><br>**(4) To implement these tasks, the Federal Anti-Discrimination Agency shall develop corresponding concepts, strategies and measures and can encourage measures vis-à-vis other Federal Ministries.**<br><br>**(5) The Federal Anti-Discrimination Agency is responsible to guarantee the constitutionally required equal pay of men and women. It has the right to information and to sanction the failure to implement the Equal Pay Act.**<br><br>(**6**) The Federal Anti-Discrimination Agency and the competent Federal Government Commissioner and Parliamentary Commissioner of the German Bundestag shall jointly submit reports to the German Bundestag every four years concerning cases of discrimination on any of the grounds referred to in § 1 and shall make recommendations regarding the elimination and the prevention of such discrimination. They may jointly carry out academic studies into such discrimination. | 2. measures to prevent less favourable treatments on any of the grounds referred to in Section 1;<br>3. academic studies into such discrimination.<br><br>(4) The Federal Anti-Discrimination Agency and the competent Federal Government Commissioner and Parliamentary Commissioner of the German Bundestag shall jointly submit reports to the German Bundestag every four years concerning cases of discrimination on any of the grounds referred to in § 1 and shall make recommendations regarding the elimination and the prevention of such discrimination. They may jointly carry out academic studies into such discrimination. |

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
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| | (**7**) The Federal Anti-Discrimination Agency and the competent Federal Government Commissioner and Parliamentary Commissioner of the German Bundestag shall co-operate in cases of discrimination on several of the grounds referred to in § 1. | (5) The Federal Anti-Discrimination Agency and the competent Federal Government Commissioner and Parliamentary Commissioner of the German Bundestag shall co-operate in cases of discrimination on several of the grounds referred to in § 1. |
| **§ 28** | **§ 28 Authority**<br><br>(1) In cases in accordance with § 27 (2) second sentence, No 3, the Federal Anti-Discrimination Agency may request the involved parties to make submissions, insofar as the person who has turned to the Agency in accordance with § 27 (1) has consented thereto.<br><br>(2) All federal authorities and other federal public offices shall be under the obligation to assist the Federal Anti-Discrimination Agency in carrying out its tasks, in particular to supply the necessary information **and to guarantee access to the relevant file.** The provisions regarding the protection of personal data shall remain unaffected.<br><br>**(3) In order to perform the tasks under § 27, the Federal Ministries shall involve the Federal Anti-Discrimination Agency in all legislative, regulatory and other important processes by submitting the results of the diversity impact assessment (§ 6 (1) Federal Anti-Discrimination Act – BADG) punctually before the decision is made. In this scenario, the head of the office is given the opportunity to give an opinion on the behalf of the Federal Ministry responsible for anti-discrimination.** | **§ 28 Authority**<br><br>(1) In cases in accordance with § 27 (2) second sentence, No 3, the Federal Anti-Discrimination Agency may request the involved parties to make submissions, insofar as the person who has turned to the Agency in accordance with § 27 (1) has consented thereto.<br><br>(2) All federal authorities and other federal public offices shall be under the obligation to assist the Federal Anti-Discrimination Agency in carrying out its tasks, in particular to supply the necessary information. The provisions regarding the protection of personal data shall remain unaffected. |

| §§ | Recommended Alterations | Allgemeines Gleichbehandlungsgesetz (AGG) |
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| | **(4) If the Federal Anti-Discrimination Agency detects violations of the provisions of this law or of the BADG, it may lodge a complaint**<br>**1. with the authorities or other Federal agencies against them to the responsible Federal Minister, otherwise before the President of the Bundestag, the President of the Federal Court of Audit or the Federal Data Protection Commissioner,**<br>**2. with authorities or other public agencies connected to the State Government against the respective State Government,**<br>**3. with the corporations, institutions or foundations under public law as well as with associations of such corporations, institutions or foundations against the board of directors or the otherwise authorized personnel and requests the release of their statement within a set distinct deadline.**<br>**Recommendations for the removal of these deficiencies and for the improved implementation of the prohibition of discrimination can be accompanied by this complaint. The statement shall also contain a demonstration of the measures that were taken due to the complaint.** | |

**Appendix 2**

# Recommendation for a Federal Anti-Discrimination Act (BADG)

By Doris Liebscher and Alexander Klose

Commissioned by **das Büro zur Umsetzung von Gleichbehandlung** e.V. (BUG)

March 2014

# Part 1: General Provisions

## § 1 Purpose and Principle of This Act

(1) The purpose of this Act is to prevent or to stop discrimination on the grounds of racist reasoning or ascription to an ethnicity, origin, language, religion or belief, gender, sexual identity, disability, chronic disease or genetic disposition, stage of life, social status as well as multidimensional discrimination.

(2) Within the scope of this Act, any discrimination by any public authority based on one or more of the grounds referred to under paragraph 1 shall be prohibited.

(3) Above and beyond, the State shall work towards the elimination of existing disadvantages that are based on the reasons referred to under paragraph 1 and shall support the actual implementation of equal opportunity.

(4) The applicability of other prohibitions of discrimination or provisions of equal treatment shall remain unaffected by this Act. This also applies for provisions under public law which serve to protect particular groups.

## § 2 Scope

(1) This Act applies to the Federal Administration; public-law bodies, institutions and foundations; Federal Courts; the President of the Bundestag; the Federal Court of Audit and the Federal Commissioner of Data Protection and Freedom of Information.

(2) To the extent that the Federal Government directly or indirectly holds or acquires majority of shares in legal entities under private law or partnerships, it shall ensure that the provisions of this Act are also applied accordingly by these entities. Details shall be regulated within the framework of the respective legal basis upon this Act entering into force.

(3) To the extent that the Federal Government does not directly or indirectly hold or acquire a majority of shares in legal entities under private law or partnerships, it shall ensure that measures in accordance with the provisions of this Act are also applied to legal entities under private law and partnerships.

(4) Should the Federal Government alter parts of the Federal Administration; a public law corporation, institution or another establishment that is subject to this Act; into a legal entity under private law or partnership; or establish an entity under private law or partnership, the conversion or establishment Acts and the relevant legal bases shall specify and ensure that the regulations of this Act are also applicable going forward.

(5) In the event of a partial or complete disposition of a legal entity or partnership, the purchasers shall be obligated to guarantee the application of the corresponding regulations of this Act and to impose a corresponding obligation on subsequent purchasers in the event of further disposition.

# Part 2: Prohibition of Discrimination

## § 3 Forms of Discrimination

(1) Direct discrimination shall be taken to occur where one person is treated unfavourably than another is, has been or would be treated in a comparable situation on one or more of the grounds referred to under § 1 (1). Direct discrimination on grounds of gender shall also be taken to occur in the event of the unfavourable treatment of a woman on account of pregnancy or maternity. A discrimination shall be taken to occur also in the case that the one who discriminates only assumes the presence of one or more of the grounds referred to under § 1 (1).

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

(3) Harassment shall be deemed to be discrimination when an unwanted conduct in connection with one or more of the grounds referred to under § 1 (1) takes place with the purpose or effect of violating the dignity of the person concerned, in particular by creating an intimidating, hostile, degrading, humiliating or offensive environment.

(4) Sexual harassment shall be deemed to be discrimination when an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images, takes place with the purpose or effect of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.

(5) An instruction to discriminate against a person on one or more of the grounds referred to under § 1 (1) shall be deemed to be discrimination.

(6) Denying reasonable accommodation to persons with disabilities in a concrete case shall be deemed to be discrimination. Reasonable accommodation are necessary and appropriate modifications and adaptations, which do not create a disproportionate or unreasonable burden and which shall be taken, if they are required in a concrete case, in order to guarantee that people with disabilities are able to enjoy and exercise their basic rights equally.

(7) Treating someone unfavourably based on their close relationship to a person who is protected under § 1 (1) shall be deemed to be discrimination.

(8) The unfavourable treatment of someone who has invoked this Act to protect their rights or has refused to carry out instructions to violate this law is a form of discrimination. The same applies for persons who are supporting a person that is covered under sentence 1 or testifying as a witness.

## § 4 Permissible Difference of Treatment

(1) Difference of treatment based on one or more of the grounds referred to under §1 (1) is permissible if it pursues an overridingly important public interest and the means to achieve this aim are suitable, appropriate and necessary. An overridingly important public interest, in particular, is the removal of disadvantages based on the grounds referred to under §1 (1).

(2) Difference of treatments on the grounds of stage of life and social status are permissible when they are justified by a legitimate aim and the means to achieve this aim are suitable, appropriate and necessary.

(3) Multidimensional discrimination is discrimination based on multiple grounds of discrimination either prejudiced against cumulatively or intersectionally. A multidimensional difference of treatment, in accordance with Subsections 1 and 2, can only be justified if the justification extends to all of these grounds or to the specific effect from the combination of the grounds which were the basis for the different treatment.

## § 5 Prohibition of Victimisation

(1) The unfavourable treatment of someone who has invoked this Act to protect their rights or has refused to carry out instructions to violate this Act is prohibited. The same applies for persons who are supporting a person that is covered under sentence 1 or testifying as a witness.

(2) The rejection or toleration of discriminatory conduct by an affected person shall not be used as the basis for a decision affecting that person. Subsection 1 sentence 2 applies accordingly.

(3) § 10 shall apply mutatis mutandis.

# Part 3: Affirmative Action

## § 6 Diversity Mainstreaming

(1) The elimination of existing disadvantages based on the grounds referred to under § 1 (1) and the support of an actual implementation of equal opportunity shall be the guiding principle and shall be taken into account in all political, regulatory and administrative measures of the Federal Administration (Diversity Impact-Assessment).

(2) The fulfilling of these obligations is particularly the task of employees with leadership and management functions. It must be incorporated in the respective contractual agreements as a performance criterion and considered in the assessment of their performance.

(3) The establishment of and further training in diversity-professionalism must be ensured for all employees through training courses and qualifying actions. Diversity-professionalism shall be taken into account when assessing suitability, aptitude and professional performance in recruitment and promotion processes of employees.

(4) Subsections 1 through 3 apply to the legal entities and partnerships within the meaning of § 2 (2) through (4) accordingly.

## § 7 Awarding of Public Contracts

(1) When concluding public contracts with an estimated value of at least 25,000 Euro or for construction contracts with an estimated value of at least 200,000 Euro, the obligation of the contractors to comply with equal treatment laws while fulfilling the contract and also to enforce it vis-à-vis third parties who participate in the performance of the contract shall be stipulated in the respective contracts.

(2) Whoever accepts a contract must provide evidence of concrete actions which shall eliminate existing inequalities due to the grounds referred to under § 1 (1) and shall achieve actual equal opportunity. The actions shall be implemented throughout the entire duration of the contract.

(3) Subsections 1 and 2 do not apply to contractors who generally employ ten or fewer employees, excluding those engaged in occupational training.

(4) The Federal Administration shall be authorized to regulate, in particular, the content of the measures referred to in Subsection 2, the monitoring of its implementation, the consequences of non-compliance and the group of corporations concerned.

## § 8 Granting of Public Benefits

(1) The granting of public benefits for which there is no legal entitlement shall be made dependent on the recipient’s commitment to carry out measures which serve to eliminate existing inequalities due to the grounds referred to under § 1 (1) and to promote the implementation of actual equal opportunity. This applies to public resources with a value of at least 25.000 Euro.

(2) Subsection 1 does not apply to benefit recipients who generally employ ten or fewer employees, excluding those in occupational training.

(3) The notification of granting shall be accompanied by corresponding conditions.

(4) § 7 (4) applies accordingly.

## § 9 Diversity Plan

(1) The diversity plan is an essential instrument of personnel planning, particularly for the personnel development and complements the equality plan. Its implementation is a particular obligation of the personnel administration as well as of each function holder and superior with management position.

(2) The diversity plan must describe the situation of the employees in view of the grounds referred to under § 1 (1) and assess the previously measures taken to eliminate existing inequalities referred to under § 1 (1) and measures that implement actual equal opportunity. In particular, in order to eliminate existing inequalities, measures must be developed to implement necessary personnel and organizational improvements within the framework of specific targets and a planned timetable.

(3) The diversity plan shall be drawn up by the office every four years. After two years, it must be adapted to current developments. This adjustment shall include, in particular, the reasons and supplementary measures if it is apparent that the objectives of the diversity plan cannot otherwise be achieved at all or not within the planned period.

(4) The diversity plan and its updates shall be published in the office. It must be made available separately to the management.

(5) If the targets of the diversity plan were not implemented, the reasons must be laid out in the next diversity plan and additionally communicated to the superior office and the Federal Anti-Discrimination Agency.

(6) As long as the diversity plan is not drawn up, adapted or updated or an existing one is not implemented, any recruitment or promotion in an area in which there are inequalities due to the grounds referred to under §1 (1) shall require the approval of the superior office. The Federal Anti-Discrimination Agency shall be informed about reasons for the approval.

# Part 4: Legal Protection

## § 10 Sanctions

(1) In the case of a violation of § 1 (2) and § 5 (1) and (2), the corporation for whom the discriminating employee works is obligated to compensate the discriminated person for damages caused. If the discriminating person acted on behalf of the authority of another corporation, the other corporation shall be liable for compensation.

(2) Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. The entitlement shall be assessed in a way that the

discrimination is effectively, dissuasively, and proportionately sanctioned. In particular, the seriousness of the infringement and the consequences for the discriminated person shall be taken into account.

(3) An agreement that deviates from the prohibition of discrimination cannot be invoked by the discriminator.

(4) Claims pursuant of Subsections 1 and 2 shall be limited to three years after the discriminated against person becomes aware of their discrimination and the obligor of compensation, regardless of such knowledge, 30 years after the discriminating action occurs.

(5) Claims that result from other legal provisions remain unaffected.

(6) Claims seeking compensation from damages shall be taken before the civil courts.

## § 11 Burden of Proof

If it is disputable whether someone was discriminated against based on grounds referred to under §1 (1), the accused party bears the burden to prove that no violation of this Act occurred.