Büro zur Umsetzung von Gleichbehandlung e.V.

Proposals for strengthening of the Antidiscrimination Law

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Content

1. Proposals for strengthening of the Anti-discrimination Law

On the basis of the equality principle in Article 3 (3) of the German Basic Law, the right to equal treatment is guaranteed as a basic right.

With the General Act on Equal Treatment (AGG), which came into force more than ten years ago, the German government transposed four European Union equal treatment directives into national law.

The AGG provides legal protection for people who, either in the context of employment or other civil law contracts such as sales or rental contracts, experience unjustified unequal treatment on the grounds of their ethnicity, their gender, their religion, a disability, their age or their sexual identity. It establishes the possibility to claim damages or compensation for unequal treatment before courts.

However, discrimination does not occur only in the context of private law, which is covered by the AGG. In many parts, the AGG excludes many occurrences of discrimination from its scope. Other areas where discrimination can occur as well, such as governmental actions, are nevertheless not covered. This either complicates or prevents the enforcement of rights to equal treatment.

Since 2010, BUG has been gaining practical experience by supporting legal actions reliant upon the AGG, and has for the first time, published its "Proposal for a revision of the AGG" in March of 2014. Taking note of the "Evaluation of the AGG by the Federal Anti-Discrimination Agency" from October 2016 (in German) and in accordance with further analysis by BUG, we are hereby presenting more proposals which go beyond a revision of the AGG. In addition, we propose supplements for the protection against discrimination in other legal fields.

The present dossier is structured according to the following questions:

Where …

… does the AGG breach European legal standards?

… should the AGG be specified or adjusted?

… in the AGG should be made deletions?

… could further protective aspects be included in the AGG?

The strengths and weaknesses of the AGG are also plausibly laid down by Doris Liebscher in her Article (in German) "Recht als Türöffner für gleiche Freiheit? Eine Zwischenbilanz nach zehn Jahren AGG".

1.1. Where does the AGG breach European legal standards?

The AGG implements the following four equal treatment directives of the European Union:

- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

- Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services

In some areas, the AGG does not conform to the European legal standards or does not implement these adequately. This is where changes appear necessary in order to strengthen the protection against discrimination in accordance with the requirements of European Union law.

Through the following bold paragraphs, you may find further information on the conformity of the AGG with the directives:

GENERAL EQUAL TREATMENT ACT (AGG)

PART 1- GENERAL PROVISIONS

§ 1 Purpose

§ 2 Scope

§ 3 Definitions

(…)

Chapter 3. Employee Rights

§ 15 Compensation and Damages

§ 16 Prohibition of Victimisation

(…)

PART 3 – PROTECTION AGAINST DISCRIMINATION UNDER CIVIL LAW

§ 19 Prohibition of Discrimination Under Civil Law

§ 20 Permissible Differences of Treatment

§ 21 Enforcement

(…)

Where...

... should the AGG be specified or adjusted?

... in the AGG should be made deletions?

... could further protective aspects be included in the AGG?

1.1.1. § 1 Purpose

The AGG provides a legal basis to combat discrimination on certain grounds. These grounds are exhaustively enumerated in § 1 AGG. The protection against discrimination should be enhanced through linguistic specification. Additionally, a non-exhaustive enumeration of grounds for discrimination – as it is usual in international conventions- should be considered.

§ 1 AGG should further clarify that discrimination is also constituted where the discriminating person only assumes that a ground for discrimination exists. If a person is denied a hotel room because its hotelier assumes the guest to be homosexual and the hotelier has resentments against this group, while the assumption is not correct, the respective person (the guest) should be able to make legal claims. This principle is already applicable in the field of labour law in accordance with § 7 (1) AGG. Since such a form of discrimination also routinely occurs in other areas of civil law, the principle should be introduced to the general provisions of the AGG.

Regarding the individual grounds for discrimination, it is necessary to specify, adjust or extend these. Here you may find further proposals:

It should be refrained from the biologically affiliated term of "race" which should be instead replaced by the clarifying terminology of “racist reasons”.

§ 1 Purpose

The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or conviction, disability, age or sexual orientation.

The understanding of the term "ethnic origin" should also be extended to specify that all discrimination, whether directly or indirectly connected to the origin or appearance, can be sanctioned by the AGG.

The German term "Weltanschauung" should be replaced by the German term “Glaube”, since the latter is the more accurate translation of the word “belief” which is used in the Council Directive 2000/78/EC.

In regards to the term "Gender", the law should clarify that Inter* as well as Trans* persons fall under the protective scope of the AGG. An inclusion of the specified terminology of “gender identity”, “gender expression” and “gender features” should be considered.

Since the term "age" (in German “Alter”) evokes the -often negatively connotated- association with a high age, it is advisable to change it to the German term of “Lebensalter” (state of life), which would unequivocally imply a discrimination grounded on all ages.

The ground for discrimination "disability" should be based on the definition set out in the UN Convention on the Rights of Persons with Disabilities.

Furthermore, it should be clarified that chronic diseases are not to necessarily be subsumed under the term of “disability” but should rather be listed as an autonomous ground for discrimination in § 1 AGG.

Moreover, the introduction of the discrimination grounds of "language" and "Social status" should be considered.

Additionally, § 1 AGG should include an explicit prohibition of multiple discrimination.

1.1.1.1. Discrimination Category “Race“

There are no human “races”! What exists are categorisations of humans in accordance with their appearances (racialisation), accompanied by judging or depreciation thereof. However, biologistic interpretations of the term “race” are still present today. Some legal doctrines and parts of jurisprudence are still locked in with scientific approaches which classify people by allegedly essential group affiliations, instead of critically problematising discriminatory classifications.

Labelling an act of discrimination “racist” would therefore already grammatically clarify that the law does not address unequal treatments based on “race” but such that this occurs due to racism and the categorization into different races.

Recital 6 of the EU Anti-Racism Directive 2000/43/EC clarifies that “[t]he European Union rejects theories which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories.” This view is shared by the German legislator in its explanatory memorandum regarding the AGG (in German). In this, it is explained that the terminology of “on the ground of race” in § 1 AGG was chosen consciously to make clear that the law itself does not assume an existence of different races, but that the person acting racist underlies this assumption. Persons, who have experienced racism, however find this term unacceptable in light of the background of European colonialism and National Socialism, as well as of the prevalence of everyday racism.

For this reason, the BUG recommends that the term “race” in § 1 AGG be exchanged with “racist reasons”, “racist discrimination”, or “racist ascription” in order to shift the linguistic focus to the issue of racism unequivocally.

1.1.1.2. Discrimination Category “Ethnic Origin”

Social exclusion in the area of ethnic or racist discrimination often occurs based on the assumption that a person belongs to a different ethnic group or is from a different country. Whether the assumption aligns with reality is generally not verified prior to the discrimination. For this reason, it is especially important to also enshrine the supposed ethnic affiliation in the law, as has already been suggested elsewhere.

The category “ethnic origin” combines many different attributes such as color of skin, origin, ethnic affiliation, cultural practices, appearance, language, phenotypical characteristics etc. Whether a solidified ethnic group really exists is not relevant for the presence of discrimination.

Both, real and alleged groups are given negative attributions, which possibly leads to a disadvantageous treatment. This should find attention in § 1 AGG by clarifying that every disadvantageous treatment based on specific characteristics in connection to the “ethnic origin” fall under the AGG’s scope of protection.

It must be – for example - irrelevant whether the ascription “Ossi” (a term used to describe, or even judge people from Eastern Germany) actually exists as an ethnic group or not. The German “Ossi-case” from April 15th 2010 (Az. 17 Ca 8907/09) however was excluding the person. In this case, a woman living near Stuttgart sued a Swabian company because it refused to employ her. Although she had been living in Swabia for 22 years, her application documents were sent back to her with a note on the CV which said “(-) Ossi”. Nevertheless, her case was dismissed.

1.1.1.3. Discrimination Category „Weltanschauung“

The AGG presents religion and “Weltanschauung” as similar categories. The term “Weltanschauung” relates to the terminology used in Art. 4 (1) of the German Basic Law.

The Directive 2000/78/EC however uses the terms religion and belief. The English term belief would correspond to the German term “Glaube”, since the term “Weltanschauung” rather captures the political dimension than the spiritual one. But the Directive hereby focuses on the spiritual dimension.

The term “Weltanschauung” should therefore be replaced by the term “Glaube”.

In the judgement L 1 SV 1263/10 of May 8th 2014 the LSG Thüringen (a court with a competence in social law) ruled that the AGG is not applicable to political views.

The alleged disadvantageous treatment of the plaintiff based on his political views during a job interview is not captured by the discrimination prohibitions in the AGG. Political convictions cannot further be subsumed under the term “Weltanschauung” in accordance with § 19 a German Social Act IV.

1.1.1.4. Discrimination Category „Gender“

The term „gender“ is usually placed and interpreted within the gender binary of men and women. trans* and inter* people are not recognized within this categorisation. Both, jurisprudence and legal commentaries clearly reflect that all gender expressions are covered by the discrimination ground “gender”.

You can find the complete judgement of December 12th 2015 - 8 AZR 421/14 (in German) here.

For this reason, it is recommended that § 1 AGG be extended by including “it encompasses all forms of gender identity, gender expression and gender features” as to clarify the protection of trans* and inter* persons under the AGG.

In a judgement, the German Federal Labour Court ruled that transsexuality, although not mentioned as a basis of discrimination in § 1 AGG, can be taken into account within the ground of “gender” as well as “sexual identity”. Consequently, it is irrelevant that the German national legislator regards transsexuality as falling under “sexual identity” while the EU Directive regards it as falling under “gender”. Rather, an interpretation of § 1 AGG in conformity with EU law, leads to its consideration within both categories. According to the court, it suffices that a person who feels unfairly treated based on their transsexuality presents indicators that suggest, with a predominant degree of probability, in accordance with § 22 AGG, that the person was viewed as such and has thus faced disadvantageous treatment. The German Federal Labour Court thus set aside the initial judgement and referred the case back to the State Labour Court.

1.1.1.5. Discrimination Category „Age“

Both, the AGG and Art. 1 of Directive 2000/78/EC aim to protect all ages (regardless of young or old) against discrimination based on the former. Since the term “age” (in German “Alter”) is often understood as aiming at discrimination based on a high age, it is recommended that this

be changed to the term of “Lebensalter” (stages of life), which would unequivocally imply a discrimination grounded on all ages.

1.1.1.6. Discrimination Category „Disability“

Since Germany signed the Convention on the Rights of Persons with Disabilities in 2008, it has since then become an obligation under international public law to implement the Convention in all regards. In accordance with Art. 2 CRPD, such discrimination “means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable arrangements.” The Convention thereby provides a definition of discrimination based on disability, which goes beyond discrimination in the work field and has an extended application across civil law. This is further supported by the general obligation of contracting states in Art. 4 (1 e) CRPD “(…) to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;”.

The discrimination ground of “disability” in § 1 AGG should be extended with a clarifying definition in accordance with the definition given by the Convention, as to prevent diverging interpretations.

1.1.1.7. Discrimination Category „Chronic Diseases“

A chronic disease is a disease which can generally be treated with medication, but usually does not heal completely. A chronic disease does not necessarily lead to a restriction of social participation and has to meet certain exigencies to be categorized as a disability in accordance with the Sozialgesetzbuch IX. Buch (9th book in the Code of Social Law). However, some chronic diseases are stigmatized, leading to possible discrimination. The AGG does not specify whether it protects people with chronic diseases (without recognition of them as people with a disability).

It is accordingly recommended to add “chronic disease” as a ground for discrimination to the existing ground of “disability” in § 1 AGG.

1.1.1.8. Discrimination Category „Language“

Discrimination based on language (i.e. proficiency or accent) has so far been mostly reviewed by courts as a form of “ethnic origin”.

However, many international human rights instruments have created “language” as a separate category of discrimination in their articles of equal treatment (i.e. the Universal Declaration of Human Rights (Article 2), the Charter of the United Nations (Article 1) and the European Convention on Human Rights (Article 14)).

In the past, courts have already made multiple decisions on cases of unequal treatment based on language. Since this form of exclusion does not always occur in the context of ethnicity and the attributes ascribed to it, it is recommended that “language” should be incorporated as a reason listed in the catalogue of grounds of discrimination in § 1 AGG.

In the judgement from January 26th 2010 – 25 Ca 282/09 (in German), the Labor Court of Hamburg sentenced a postal company to pay for damages caused by indirect discrimination based on ethnic origin. The plaintiff, born in the Ivory Coast, had applied as a postman for a vacancy notice in which a command of the German language was required, both spoken and written. In the initial telephone call – which was typical for such applications – one of the defendant's employees had come to the conclusion that the plaintiff was unable to express himself clearly and attractively in German.

As a result, the plaintiff received a rejection. The Labour Court considered the approach taken by the company to be indirect discrimination based on ethnic origin.

In the opinion of the Court, the procedure was neither suitable nor necessary for determining the presumed knowledge of German for a postman. Firstly, a short telephone call is insufficient for determining the language skills of the applicant. Secondly, the Court determined that the language selection criterion (over the phone) used by the defendant for the intended activity was inappropriate and excessive. For an employment as a postman, only knowledge of the German language that is sufficient enough for communicating with customers, colleagues, and the employer is required.

1.1.1.9. Discrimination Category „Social Status"

Along with discrimination based on phenotypical observations, the threat of experiencing social exclusion also exists for socially disadvantaged groups. In a sociopolitical analysis, this is documented in areas pertaining to education, accessibility to housing, and employment.

Article 14 of the European Convention on Human Rights says, "the enjoyment of the rights and freedoms recognized by this convention shall be guaranteed (…) without discrimination based on gender, race, skin color, language, religion, politics or other convictions, national or social origin, the belonging to a minority group, property, birth or any other status.". Likewise, the Charter of Basic Rights of the EU includes "social status" in their catalogue of discriminatory practices. A contemporary anti-discrimination policy should respond to societal problem areas.

The first legally binding protection of human rights and fundamental freedoms was created in Europe by the European Convention on Human Rights, which is enforceable by anyone. The European Convention on Human Rights is thus, the most important human rights conventions in Europe.

Here you can find all the important information on the European Convention on Human Rights and the European Court of Human Rights

Other European countries have established "social status" as a ground to be protected from discrimination. § 4 of the Bulgarian law protecting against discrimination lists in its categories for discrimination "race," ethnicity, skin color, gender, language, religion, political alignment or other convictions, national or social origin, property, union membership, level of education, social status, marriage or other status of family, age, health status, disability, genetic conditions, gender identity or awareness, and sexual orientation.

Beyond the other supplements listed elsewhere, it is recommended to include the discrimination category "social status" in § 1 AGG.

1.1.1.10. Multiple Discrimination

“Multidimensional discrimination” means unequal treatment that does not result from discrimination based on a single ground. § 4 AGG rules that “unequal treatment on several of the grounds” of § 1 AGG can only be justified if the justification extends to all the relevant reasons listed under § 1 AGG.

In a judicial dispute, this presupposes that the respective discriminations can be documented. Cases of multidimensional discrimination, in practice, are therefore typically reduced to the most obvious form of discrimination, leading to a lack of sufficient consideration of the complexity of multidimensional discrimination.

Moreover, the civil law protection of rights under the AGG does not apply equally for all categories of discrimination. § 19 AGG, for example, does not protect from every conceivable constellation of gender or religion related discrimination, but it does protect against racial discrimination. This can be problematic for those affected by multidimensional discrimination, as they must tactically weigh which grounds for discrimination they should choose in order to have a successful claim.

This imbalance could be resolved by replacing § 4 AGG with an explicit prohibition of multidimensional discrimination under § 1 AGG.

1.1.2. § 2 Scope

The four European Anti-Discrimination Directives implemented in the AGG contain a prohibition of discrimination in both the private and the public field. The AGG, on the other hand, is limited to only civil law. Incidents of discrimination pertaining to interaction with the State therefore cannot be penalized by the legal instruments from the AGG. The BUG suggests a development of protection from discriminatory practices in the public-law field.

Based on corresponding jurisprudence, it has been sufficiently clarified that the protection against dismissal must also be non-discriminatory. § 2 (4) AGG is misleading and should therefore be deleted.

1.1.2.1. Protection from Discrimination under Public Law

In accordance with § 2 (1) AGG, discrimination protection under AGG applies widely to employment and to access to public goods and services.

This norm corresponds only conditionally to the European guidelines, as not all the areas of life that are required by the directives are covered.

Since the AGG is applied only in relation to civil law (with the exceptions of Employment Law, which is also applicable under public services), it does not protect from discrimination by State actors such as the administration, the police, and State establishments for education insofar the actions of these are to be considered falling under public law. Such cases of discrimination can only be penalised by the principle of equality in accordance with article 3 (3) German Basic Law, whose implementation however, is extremely problematic from a procedural point of view.

In interaction with the government, whether Federal or State level, there are no less discriminatory actions as there are in the private sector. Therefore, it is recommended that an Anti-Discrimination Law applicable in the public legal sector pertaining to conduct with Federal agencies should be implemented. In areas of life that have tendencies towards being discriminatory, for which the State (Land) government has legislative power, the Federal government should encourage the State governments to adopt appropriate anti-discrimination measures. For example, this concerns schooling, the police, and administration. Alternatively, the respective special laws – such as the Federal Police Law, the State Police Laws, the State School and Higher Education Laws etc. – could also be supplemented by non-discriminatory norms.

1.1.2.2. Terminations in the AGG

In harmony with jurisprudence set by the European Court of Justice on November 6th 2008, the Federal Labour Court clarified in its decision from September 16th 2008 (in German) that the prohibition of discrimination under the AGG by way of interpreting the term "social illegality" (Sozialwidrigkeit) (§ 1 Kündigungsschutzgesetz – Employment Protection Act) should also be considered during terminations and may lead to their inadmissibility. The Court has thus taken into account the fact that the EU provisions do not allow dismissals to be excluded from discrimination protection, as § 2 (4) AGG indicates.

> Article 3 (1 c) EU Directive 2000/78/EG
>
> (1) Within the limits of the powers conferred on the Community, this Directive shall apply to all persons, with regards to both the public and private sectors, including public bodies, in relation to (…)
>
> c) the employment and working conditions, including the conditions of dismissal and pay; (...) ;

The EU Directive 2000/78/EC from November 27th 2000 establishes a general framework for equal treatment in employment, and provides in its Article 3 (1) lit. c that the conditions for dismissal shall not be discriminatory or disadvantageous. As such, the EU-guidelines do not allow dismissals to be excluded from discrimination protection.

For this reason, the regulation under § 2 (4) AGG – that only the provisions on general and special protection from dismissal are applicable to dismissals – must therefore be deleted without replacement.

1.1.3. § 3 Definitions

§ 3 AGG clarifies which forms of unequal treatment can be sanctioned by the AGG. Due to linguistic, substantial and deficiencies in European Union law, some changes, expansions, and deletions are required.

A linguistic alteration is necessary in the AGG for the term "disadvantaging" (Benachteiligung). It should be replaced by the term that the EU Anti-Discrimination Directive uses, "discrimination" (Diskriminierung). The definition of direct disadvantaging under § 3 (1) AGG should be built upon, so that it also covers cases of discrimination that lack an identifiable victim as well as cases of associated discrimination.

> § 3 Definitions
>
> (1) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to under § 1. (…)

Further, legal protection from harassment and sexual harassment should be improved by altering § 3 (3) and (4) AGG.

From a European Union law perspective, an expansion of § 3 AGG concerning the guarantee of accessibility is necessary. The refusal to take reasonable accommodation for people with disabilities should be added as an own individual form of discrimination under § 3.

From reasons given by EU Directives, the restriction to the employment field contained in § 3 (1) S. 2 AGG should be deleted.

1.1.3.1. Introduction of the term "Discrimination"

§ 1 AGG aims for the removal or prevention of certain forms of disadvantaging (Benachteiligung). However, the intention of the provisions implemented by the AGG is to remove "discrimination" (Diskriminierung) – which, in accordance with the European Court of Justice's jurisprudence, means unjustified, unequal treatment. The German legislator justifies the abdication of the term "discrimination" by stating that it is typically only used for unlawful, socially objectionable unequal treatment, while there are also cases of admissible unequal treatment which is not discriminatory. The shortened understanding of discrimination underlying this declaration reduces it to deliberate degrading acts by individuals and overlooks impairments to participation caused by indirect and unintentional discrimination.

The allowed justifications for unequal treatment, under §§ 5, 8 through 10 and 20 AGG, can easily be put next to "discrimination" in the legal text without issue. The goal of EU legislation that combats discrimination should be clearly stated in the AGG and that should strengthen the understanding of discrimination as well as removing taboos from the discussion and make it objective.

1.1.3.2. Victimless Discrimination

The concept of direct disadvantaging under § 3 (1) AGG should also include "victimless" discrimination.

Direct discrimination can – as judged also by the European Court of Justice – occur even when there are no identifiable victims. This is the case, for example, when a job advertisement explicitly seeks applicants from specific origins, or when a housing company no longer wants to offer housing to people belonging to specific religions. Such statements can dissuade potential applicants and can thus limit their possible participation. Although there are no individuals (yet) who can be identified as having been discriminated against, these cases still present violations of the ban on discrimination.

In its Feryn-decision, the European Court of Justice gave the opinion that public statements from employers that they would not hire applicants from a specific ethnicity are sufficient enough to raise a case pursuant to article 8 (1) Directive 2000/43/EC against direct discriminatory hiring policy. .

Such cases of "victimless" discrimination should be sanctionable through the AGG. Since there are no plaintiffs who have had their rights infringed upon, it follows that anti-discrimination organizations should be allowed to conduct lawsuits as well. For this, however, a right to take a collective action should be implemented.

1.1.3.3. Associated Discrimination

Associated discrimination is discrimination against individuals who experience unequal treatment because of their close relationship to someone who might experience discrimination based on one of the protected grounds under § 1 AGG. Such a case might happen to someone who cares for a child with disabilities or to a bicultural family who gets refused housing. Following the jurisprudence of the European Court of Justice, the definition and understanding of discrimination under the AGG should be expanded with "associated discrimination".

On July 17th 2008 Resolution C-303/06 was decided upon by the European Court of Justice in response to a preliminary ruling of the Employment Tribunal London South, where it decided that Directive 2000/78/EC is to be interpreted as meaning that the prohibition of direct discrimination and harassment, provided for therein, is not to be limited to people who are themselves disabled. The principle of equal treatment does not apply solely to the distinct categories listed, but instead applies in relation to the categories listed under Article 1 of the Directive.

1.1.3.4. Harassment and Sexual Harassment

Harassment, as it is defined in § 3 (3) AGG, is contingent on a violation to the dignity of the affected person and also the existence of a "hostile environment". In practice, this limits legal protection, as not every case of workplace harassment is accompanied by a "hostile environment". The prohibition of sexual harassment under § 3 (4) AGG only applies to Labour Law. It is imperative that this scope of application extends to cover every area of the law. This is important because the danger of sexual harassment also exists, for example, in the accessibility to goods and services. If Ms. M. is sexually harassed by another customer at a kiosk, for example, it would not be covered by the AGG.

This danger exists equally in the field of education, where the State (Land) government has legislative power, the legislators should create laws to protect from sexual harassment. Therefore, it is recommended that the word "and" in § 3 (3) AGG gets replaced by "particularly". This would clarify that a hostile environment is not a necessary condition for harassment to be present, although it can certainly influence its severity.

1.1.3.5. Reasonable Accommodation

Article 5 of the EU Employment Directive 2000/78/EC obliges corporations to take reasonable accommodation to make the access to the workplace, occupational education and professional advancement possible for people with disabilities. An exception to this obligation is only allowed when the necessary measures that the employer would have to take would cause a disproportionate burden for the employer. This burden is not disproportionate if it is sufficiently offset

Article 5 of the EU Employment Directive 2000/78/EC

Reasonable accommodation for disabled persons

"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that (…)"

by existing measures and support from national disability organisations. If the reasonable accommodation is denied, this is, in addition, a case of discrimination with regard to the Convention of Disability Rights of the UN. Regarding the guidelines of the Convention of Disability Rights of the UN and the recommendation from the EU Commission for an additional horizontal Anti-Discrimination Directive which aims to combat discrimination against persons with disabilities in civil aw relationships, the denial of reasonable accommodation should be added to § 3 AGG and thus, become a prohibited form of discrimination.

This form of prohibited discrimination should then cover the entire scope of the AGG.

1.1.3.6. Limitations Pertaining to Employment

The norm under § 3 (1) S. 2 AGG limits the legal protection from direct gender disadvantaging based on pregnancy or maternity in the realm of labour law. Upon the completion of a civil law contract (i.e. sales contract), claims of discrimination based on either pregnancy or maternity cannot be made. This stands in contradiction to Article 4 (1) lit. a of EU Directive 2004/113/EC. Therefore, the limitations pertaining to employment (§ 3 (1) S. 2 AGG) should be deleted without replacement.

§ 3 Definitions

(1) … Direct discrimination on grounds of sex shall also be taken to occur in relation to § 2 (1) Nos 1 to 4 in the event of the less favourable treatment of a woman on account of pregnancy or maternity.

1.1.4. § 5 Positive Action

§ 5 AGG allows the application of so called “positive action”. These are measures in which disadvantaged groups are given preference where there is evidence of an actual inequality, i.e. where there are disadvantaged or underrepresented groups from existing or previous discriminatory practices.sind.

An analysis of the AGG (in German) has shown that regulations which (only) permit the implementation of affirmative action is capable of creating the necessary protection of rights regarding possible infringements on the prohibition of discrimination. Unfortunately, it is insufficient to deconstruct systematic discrimination in order to achieve equality. Recommendations from BUG for a supplement of § 5 can be found here.

§ 5 Positive Action

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.

Similar to positive action, are so-called public sector duties (Gleichbehandlungsverpflichtungen) which attempt to prevent discrimination. So far, they have not been anticipated by the AGG. Suggestions for the elaboration of public sector duty legislation can be found here.

1.1.4.1. Positive Action

The following dossier may offer you information about the so-called Positive Action, which is a method of combating unequal treatment.

The dossier elaborates how Positive Action is defined and implemented. You may find examples and information about the legal situation regarding Positive Action in Germany and in other countries.

You may find further information and links here.

We would like to thank all editors involved in the preparation and revision of this dossier.

You can download the print version of this dossier here.

1.1.4.2. Public Sector Duties

Starting points for equal treatment obligations of State institutions (Public Sector Duties) are well-developed concepts in North Ireland and the UK, which are seen as a further conceptual development of affirmative action.

Public Sector Duties legally bind State institutions to practise equal treatment while fulfilling their tasks. They must take equal treatment appropriately into account during all of their activities (i.e. providing services, decision making or when taking any action).

Public Sector Duties should compensate for disadvantages by forcing State institutions to give preferential treatment to people affected by discrimination in order to create an equal opportunity with those not affected by discrimination.

Public sector duties in the UK oblige State institutions that they must thoroughly analyze how their decisions and measures implemented will influence the lives of citizens affected by discrimination. In so doing, they intend for the institutions to take into account discrimination and the needs of the disadvantaged party in their everyday work processes, and, by doing so, give higher priority to diversity.

Affirmative action commitments do not focus on sanctioning the behavior of individual cases of discrimination, but instead on removing and preventing structural and institutional causes of discrimination. This way, inequality shall be addressed as such and everyone's quality of life shall be improved

Due to the orientation on civil law, State actors are only conditionally subject to the AGG. Within the framework of interaction with the State, the principle of the equal treatment in article 3 (3) German Basic Law is applicable in general. Concrete actions to make this regulation effective in practice are, however, completely absent. Therefore, a legal framework should be formed that binds State institutions and private enterprises to a certain extent.

Definition:

Public Sector Duties are legal obligations imposed on public authorities to consider the impact of their decisions or actions on people who experience discrimination. From "What's the public sector equality duty?" on the British website Citizen's Advice.

The introduction of public sector duties should be accompanied by continued monitoring and by evaluation on a regular basis, so that an assessment of whether the desired results are reached

or not is possible. To have an actual and sustainable effect on structures that create disadvantages, regular analysis and the publicizing of action plans are required. In the event of failure to comply with public sector duties, it should be possible to impose sanctions. This is the only way to create an environment of equal treatment that is not dependent on the good will of individual actors.

Proper implementation of obligatory public sector duties requires a structure or an institution that has the mandate to monitor, support, and control.

1.2. Where should the AGG be specified or adjusted?

Some sections of the present version of the AGG are incapable of guaranteeing effective and accessible legal protection from discrimination.

Therefore, BUG recommends that the following paragraphs are specified and/or altered (in bold):

General Equal Treatment Act (AGG)

PART 1 – GENERAL PROVISIONS

§ 1 Purpose

(…)

§ 3 Definitions

(…)

§ 5 Positive Action

PART 2 – PROTECTION OF EMPLOYEES AGAINST DISCRIMINATION

Chapter 1. Prohibition of Discrimination

(…)

§ 10 Permissible Differences of Treatment on Grounds of Age

Chapter 2. Employer Obligations

§ 11 Advertisement of Vacancies

(…)

Chapter 3. Employee Rights

(…)

(…)

§ 15 Compensation and Damages

§ 16 Prohibition of Victimisation

Chapter 4. Supplementary Regulations

§ 17 Social Responsibility of Involved Parties

(…)

PART 3 – PROTECTION AGAINST DISCRIMINATION UNDER CIVIL LAW

(…)

§ 20 Permissible Differences in Treatment

§ 21 Enforcement

PART 4 – DEFENSE OF RIGHTS

§ 22 Burden of Proof

(…)

PART 6 – ANTI-DISCRIINATION AGENCY

§ 25 Federal Anti-Discrimination Agency

(…)

§ 27 Tasks

§ 28 Authority

(…)

1.2.1. § 6 Persons Covered

§ 6 AGG regulates which individuals are protected from disadvantaging in the employment field. This paragraph exhibits clear gaps in protection in the realm of self-employment. BUG recommends that these gaps should be closed and protection should be built for those employed in subcontracted employment. This suggestion is equally supported by an evaluation of the AGG by the Federal Anti-Discrimination Agency.

Additionally, the protection guaranteed by § 6 (2) S. 2 AGG is indeed extended to be applicable to subcontracted workers as well.

§ 6 Persons Covered

(1) For the purposes of this Act, "employee" shall refer to

1. persons in dependent employment (salaried employees, workers);

2. persons employed for the purposes of their vocational training;

3. persons of similar status on account of their dependent economic status,
(…)

Discrimination, however, occurs not only to subcontracted workers employed in a foreign company. Multiple constellations of discrimination are conceivable – for example, when workers are employed by a subcontractor or when a self-employed person is working for a company with an own contract for specific work or a contract

of employment. Accordingly, the scope of application of the AGG should be expanded to these points.

Therefore, the scope of § 6 should also be extended to workers of subcontractors and to self-employed workers with their own work or employment contract.

1.2.2. § 9 Permissible of Treament on Grounds of Religion or Belief

In accordance with article 4 (2) Directive 2000/78/EC, religion or belief can be used as a decisive criterion when "by reason of the nature of these activities or of the context in which they are carried out" (...) they constitute "a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos."

This suggests that, when invoking this exceptional rule, a distinction must be made as to the relationship of the position to its "preaching" role. "Preaching" are activities that convey the doctrine of the religion internally and externally, such as the worship services or pastoral care. Alternatively, non-preaching activities relate to employees of the administration or the building cleaning staff, but also employees of "charitable" institutions of religious communities, such as schools and hospitals.

§ 9 Permissible Differences of Treatment on Grounds of Religion or Belief

(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) 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.

In accordance with § 9 (1) AGG, confessional employers are, under certain conditions, allowed to make use of this exceptional rule on the recruitment of staff based on religious affiliation. Employers, such as charitable organizations or church-sponsored agencies can, in relation to this exception to the rule, use religious affiliation or conviction to a belief as a criterion for hiring or refusal to hire of an applicant. It is common in Germany that these employers prefer employees with a religious affiliation to a respective church throughout all positions.

In so doing, the German legislator is significantly expanding the narrow European benchmarks for the permissibility of exceptions of this rule. Confessional organizations are the second largest employer in Germany after the public sector. Many people are therefore affected by this unjustifiable expansion of permissible exceptions to this rule. Additionally, confessional employers may demand loyalty and sincerity from their employees in light of their respective self-determination, according to § 9 (2) AGG.

In 2015, the Anti-Racism Committee of the United Nations indicated in their Concluding Remarks on the German Government's Report that this norm should be altered or supplemented because it does not presently conform to the obligations of the Anti-Racism Convention.

To the extent that religious affiliation is an essential and deciding occupational requirement – i.e. the hiring of a female pastor – the exception of § 8 (1) AGG applies anyway. Furthermore, the principles of labour law developed by judicial proceedings already allow a strict loyalty

commitment based on the proximity to preaching nature of the activity. This is also undisputed in case law and literature. Therefore, a special regulation is not necessary.

For these reasons, BUG encourages § 9 (1) and (2) AGG to be completely deleted.

§ 10 Permissible Differences of Treatment on Grounds of Age

§ 10 AGG stipulates that a difference of treatment on grounds of age (stage of life) is permissible "if it is objectively and reasonably justified by a legitimate aim" in which the means used to achieve this aim must be "appropriate and necessary". The requirements for unequal treatment based on age are less strict than those which, in accordance with § 8 AGG, apply to all other grounds of discrimination. This goes against the AGG's horizontal approach. It is necessary to adjust these benchmarks of justification to the stronger prerequisites of § 8 AGG. Furthermore, the legitimate aims of unequal treatment based on age (stage of life) should be regulated by law. This suggestion is also supported in the Evaluation of the AGG by the Federal Anti-Discrimination Agency.

> § 10 Permissible Difference of Treatment on Grounds of Age
>
> 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. (…)

1.2.3. § 11 Advertisement of Vacancies

§ 11 AGG prohibits job advertisements that violate the prohibition of disadvantaging treatment of § 7 (1) AGG. This, norm then again states that employees may not be disadvantaged because of one of the protected grounds in § 1 AGG. For this reason, the law should be equipped with the power to sanction.

An effective option for sanctioning discriminatory job advertisements can be achieved by creating a penalised administrative offence in the AGG.

In addition, cases of discrimination in job advertisements could be covered in a better way if the so called victimless discrimination would be introduced as its own category of § 3 AGG and could be punished by a collective action right.

> § 11 Advertisement of Vacancies
>
> A vacancy shall not be advertised in violation of § 7 (1).
>
> § 7 Prohibition of disadvantaging treatment
>
> (1) Employees shall not be permitted to suffer discrimination on any of the grounds referred to under § 1; (...)

1.2.3.1. Discriminatory Job Vacancy as an Administrative Offence

§ 11 AGG rules that a vacancy may not be advertised in a way that violates the prohibition of discrimination. This norm is not provided with a sanction. A discriminatory job vacancy advertisement can be brought forth as evidence for a claimant if the rejected applicant sues for compensation. This right to bring forth action may already encourage employers not to advertise vacancies in a way that violates the prohibition of discrimination.

Violations of the ban on discriminatory job vacancy advertisements should be able to be charged as an administrative offence under the AGG.

The creation of a fine would have the advantage of enabling a specified authority to take action. By virtue of the principles of official investigation, the authority would be responsible for investigating the facts, not leaving this duty to the affected persons. While making discretionary decisions, the authority could issue a caution for minor violations and decree a fine for repeated violations.

The Austrian Equal Treatment Act (GIBG) provides so called administrative penalties for discriminatory job advertisements, which essentially corresponds to the concept of administrative offences in German law. According to § 10 (1) and § 24 (1) GIBG, employment agencies can be fined up to 360 Euros for violating the act upon request. Should an employer advertise discriminatorily, they shall first be warned and, upon further violations, be fined up to/or 360 Euro, in accordance with §§ 10 (3) and 24 (3) GIBG. § 37 GIBG also allows the same fine to be imposed on discriminatory housing listings.

This task could be handed over to the Federal Anti-Discrimination Agency when it occurs in the Federal Republic of Germany (see § 27 Tasks).

1.2.4. § 15 Compensation and Damages

The EU directives that were decisive in implementing the AGG stipulate that violations of the prohibition of discrimination are punishable by "effective, proportionate, and dissuasive" sanctions. It is up to the Member States to decide the drafting of these sanctions. The German legislator decided to introduce the ability to make claims for compensation and damages in §§ 15 and 21 AGG under civil law as a central form of sanctioning.

BUG recommends the installation of a more effective mechanism for sanctioning and, above all, the introduction of a mechanism for sanctioning under Public Law.

§ 15 Compensation and Damages.

(1) In the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate for damages arising there from. This shall not apply where the employer is not responsible for the breach of duty. (…)

Additionally, there is need to alter and delete existing options for sanctioning in the light of European Union law as well as regarding the content.

§ 15 (1) AGG regulates the right to compensation for material damages suffered in the workplace as a result of discrimination. This includes, for example, the cost of travel to an interview, where the applicant is denied hire based on discrimination. Here, the liability of the employer is dependent on whether he or she (or someone who was instructed to) is to be blamed for the discrimination. This is contrary to European Union law in two aspects and should therefore be deleted. Read more.

§ 15 (2) AGG regulates claims for compensation that a discriminated against person can demand for damages of personal rights. The factors that determine the amount of the compensation should be altered because they are not objective and may be in contradiction to the principle of equality of article 3 (1) German Basic Law. Read more.

Additionally, the two-month assertion deadline of § 15 (4) AGG should be extended to at least a period of twelve months. In practice, the sanctions attached to the AGG are not as "dissuasive" as EU legislation demands it to be. This needs to be supplemented in the AGG.

Furthermore, the legal norm should also be extended to include the right to information. Most often, discriminated against persons have very few indications that their denial to employment arose from one of the discriminatory grounds covered by § 1 AGG. This creates a situation where there is lack of evidence which can hardly be resolved otherwise than by means of a right to information.

A further improvement of the protection from discrimination in employment can also be achieved by making third parties who discriminate liable as well. For example, this would affect authorised superiors, colleagues, customers and business partners. Unfortunately, the AGG does not explicitly arrange liabilities of external third parties.

1.2.4.1. Introducing a Public-Law Mechanism for Sanctioning

By the end of 2015, Lower Saxony and Bremen were the only Federal states to make changes to their legislation governing catering services. In cases of discrimination, regulatory agencies can now assign a fine.

The fact that the AGG has so far only provided for civil law forms of sanctioning for compensation and indemnity has the disadvantage that discriminatory actions can only be sanctioned, if the affected person makes the claim. Legal protection from discrimination could be done more effectively if the AGG was supplemented with a public law sanctioning mechanism. Should discrimination in individual fields be classified as administrative offence and fined i.e. in cases of discriminatory vacancy advertisements, the advantage would then be that, in cases of discrimination, it would no longer be the private individual who would have to investigate the facts, but would become the task of a competent authority and, depending on the case, the authority could issue a fine or warning. For the affected person, the difficulty of making a claim would be eliminated and it would be ensured that a greater percentage of cases of actual discrimination would be punished.

Outside of the AGG, the Federal states, such as Lower Saxony and Bremen, should enshrine in their own respective catering legislation and, where appropriate, beyond that prohibitory measures against discrimination.

1.2.4.1.1. Fines for Discrimination in Eateries

Time and time again, people are denied entrance to clubs because of racist stereotypes. Such cases have occurred frequently in the recent past and have become known to the general public. These cases also came before multiple courts. The Federal States Lower Saxony and Bremen have reacted and introduced fines to those who violate the prohibition of discrimination in clubs and eateries. In accordance with § 11 (1) no. 14 of the Lower Saxony Catering Act, anyone who, as the operator of "a catering service, discriminates against someone on the grounds of ethnic origin or religion when deciding whether to admit them into a club or serve them, is in breach of regulations." This entails a fine up to 10,000 Euro.

According to this regulation, the prohibition only extends to the scope of nightclub business and is confined to the categories of ethnic origin and religion.

In Bremen, the norm of § 12 (1) No. 15 Bremen Catering Act(in German) is wider in scope of application. According to this Act, not only are the categories of ethnic origin and religion protected, but beyond that, discrimination based on disability, sexual or gender identity or ideology is prohibited. Not only are nightclubs covered, but all forms of catering business.

As such, it is also forbidden to discriminate against persons in restaurants, bars and pubs on the basis of the aforementioned characteristics.

The catering law falls within the legislative competence of the Federal States (Länder). Therefore, the BUG advices the Federal States that have already enacted their own catering law, to include the corresponding regulations in their catalogues of administrative offences. Since the Federal Catering Act continues to apply to those Federal States that have not yet enacted their own catering law, this should be done at the federal level as well. Here the administrative offences are regulated in § 28of the Catering Act(in German). They should be supplemented with the prohibition of discrimination.

The advantage of such a regulation entails that an authority, and no longer a private person, can file suit for discrimination. For instance, this would be the case when the authority would learn about a discriminatory practice due to a tip off, the media or while exercising their supervisory duties.

In the process, other characteristics such as disability and sexual and gender identity could be included since discrimination on these grounds can also occur in eateries.

1.2.4.2. Violation of European Law in § 15 (1) and (3) und § 21 (2) s. 2 AGG

The EU directives implemented in the AGG do not make sanctioning a violation of the prohibition of discrimination dependent on fault.

Therefore, the fault requirement of § 15 (1) and (3) AGG violates the European directives upon which the AGG is based. The same applies to the civil law part of the AGG for the fault requirement in § 21 (2) s. 2 AGG.

As a principle, the European directives entail the prohibition of reducing a certain level of protection already afforded in the national legislation of the Member State to the detriment of discriminated persons. Prior to the implementation of the AGG in 2006, the employer's liability for disadvantages due to severe disability or gender did not have a fault requirement.

Furthermore, the time limit for bringing action of § 611 a BGB (German Civil Code), in its old version concerning unequal treatment of women, was reduced through the AGG from six months to two months. Hereby the legislator has shortened the time limit for bringing an action for this category of discrimination which is not permissible under European law.

§ 611 a BGB (German Civil Code - old version)

(4)... The length of the period shall be determined by a preclusive period for the assertion of claims for damages in the employment relationship sought; it shall be at least two months. If such a period is not specified for the intended employment relationship, the period shall be six months. (translated from German).

Therefore, the fault requirement in § 15 (1) and (3) and § 21 (2) s. 2 AGG should be removed. Moreover, the time limit for bringing action for all discrimination grounds should be increased to a minimum of six months (as it was regulated before in § 611 a BGB (German Civil Code)).

1.2.4.3. Criticism of § 15 (2) AGG

§ 15 (2) AGG specifies that the immaterial damage, that means the violation of personality caused by discrimination in employment, is to be compensated in monetary form. The amount of compensation depends on the respective income and can be determined by the court on an individual case basis.

In the case of discriminatory non-employment, the amount of compensation may not exceed three months' salary. It must also be clear that the employee would not have been hired even if he or she had been selected without discrimination.

The urge to reform this regulation becomes apparent when its practical consequences are considered: Since the amount of the compensation is linked to the amount of the monthly salary set for the job, the discrimination or discriminatory non-employment of an executive is "more expensive" for the employer than that of a simple employee. The intensity of a personality violation suffered cannot be assessed and graded on the basis of a person's salary and therefore, not on the basis of his or her choice of profession and level of education.

The evaluation of the AGG by the Federal Anti-discrimination Agency (ADA) finds it to be systematically flawed to use a substantial criterion, such as a certain monthly salary, as a basis for calculating an intangible damage such as a violation of personality. The linking of the claim for compensation to a hypothetical discrimination-free selection decision is also inappropriate.

> § 15 Compensation and Damages
>
> (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 and if the selection had been made without unequal treatment

According to the evaluation of the ADA, the fact that the compensation, depending on the remuneration of the advertised post, can vary to a great extent, could even reach the limit of Article 3 (1) GG (Basic Law): "All people are equal before the law".

§ 15 (2) s. 2 AGG should therefore be replaced with a provision which measures the maximum liability limit on the basis of appropriate criteria or should be deleted altogether, by the legislator.

1.2.4.4. Necessary Deadline Extensions in § 15 (4) and § 21 (5) AGG

§ 15 (4) AGG and § 21 (5) AGG stipulate that a claim for damages or compensation on the basis of experienced discrimination must be asserted within two months. This time period is too short and does not display the living reality of discriminated persons. Since the persons concerned often have no knowledge of their claims under the AGG, the short deadlines mean that discrimination cannot be sanctioned (any longer). In order to fight discrimination effectively, the BUG therefore recommends extending the enforcement period to 12 months. In addition, in all cases, the time limit should only begin when the discriminated person becomes aware of the discrimination.

> § 15 Compensation and Damages
>
> (4) Any claim resulting from Subsection (1) or (2) must be asserted in writing within a period of two months (…)
>
> §21 Enforcement
>
> (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

1.2.4.5. Assessment of "Dissuasive" Sanctions

There are doubts whether the sanctions imposed in practice by § 15 and § 21 AGG meet the requirement of European law to be "effective, proportionate" and "dissuasive".

It is recommended to include the requirements "effective, proportionate and dissuasive" in the wording of §§ 15 and 21 AGG and to develop a guideline which helps the courts to impose sufficient dissuasive sanction payments. Factors to be taken into account in the calculation could include the size and revenue of the discriminating company, previous convictions due to discrimination, multiple discrimination, intentional behavior and, in the case of indirect discrimination, the number of persons affected. In the labour law provision of the AGG (§ 15 AGG), the severity of a violation of personality as such, and not the income, should be the focus for determining the amount of compensation.

> Good to know:
>
> One reason why in practice only small amounts of compensation are often awarded for personality violations could be that from the outset, only small sanction payments are applied for to increase the chances of success of a lawsuit. The higher the amount of compensation applied for, the higher the probability that the court will award only a smaller amount in the end.

1.2.4.6. Introduction of a Right to Information in Labour Law

Persons affected by discrimination often lack sufficient evidence to proof that they e.g. have not been hired for one of the reasons listed in § 1 AGG. Furthermore, they have no right to get to know the motives behind a non-employment or the employment of another person. This leads to a lack of evidence which can only be overcome with a claim to information.

§ 28 (2) AGG already grants the ADA a limited right to information. Accordingly, federal authorities and public bodies of the Federation are obliged to support the ADA in their tasks, in

particular to provide the necessary information (in compliance with the data protection regulations for the protection of personal data). However, this limited right to information is not suitable for use in court.

For this reason, the obligation of all public bodies in the federal area to support the ADA and to provide information (§ 28 (2) AGG) should be extended to an explicit right to information concerning all relevant areas of the AGG.

1.2.4.7. Triangular Constellation

As the AGG in general only applies to contracting parties, it is advisable to strengthen protection against discrimination where third parties such as colleagues, business partners or customers cause unequal treatment. This would also ensure that third party discrimination can be held liable. So far, the AGG does not provide explicit regulations to ensure this.

In its Part 2, the AGG should formulate which obligations employers have to protect their employees from discrimination – even in triangular constellations. In cases of violation, the affected should have a claim to compensation under the AGG. The same should also be anchored in the AGG outside labour law, e.g. in tenancy agreements with other tenants, brokers or property managers.

1.2.5. § 16 Prohibition of Victimisation

The prohibition of victimisation under § 16 AGG, which prohibits employers to discriminate against employees because of the claim of rights under the AGG, applies only in labour law and not when concluding contracts under the law of obligations.

> § 16 Prohibition of Victimisation
>
> (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 danger of victimisation however exists with all contractual relationships. In the area of education and social affairs as well as in access to goods and services, it is important to protect those affected by discrimination and who have complained or initiated proceedings to enforce their rights from discrimination in this respect.

The prohibition should therefore be extended to the full scope of the law. The European law even prescribes this for the categories of racial discrimination, ethnic origin and gender (Art. 9 of the Council Directive 2000/43/EC and Art. 10 of the Council Directive 2004/113/EC). The absence of a civil law prohibition of victimisation violates European Union law.

1.2.6. § 17 Social Responsibility of Involved Parties

§ 17 (2) AGG allows works councils and trade unions to sue employers before labour courts in the event of a "gross violation" of the provisions of the AGG to protect employees from discrimination. However, claims of the disadvantaged persons must not be asserted. Here, the law should be amended insofar as to only speak of a "violation".

So far, this provision has only rarely been used, which may also be due to the high hurdle of "gross violation". This is only satisfied in the case of objectively significant and obviously serious breaches of duty. Therefore, in the future, any violation of the AGG by employers should be sufficient to trigger the right of works council and trade union to sue.

§ 17 Soziale Verantwortung der Beteiligten

(…)

(2) In Betrieben, in denen die Voraussetzungen des § 1 Abs. 1 Satz 1 des Betriebsverfassungsgesetzes vorliegen, können bei einem groben Verstoß des Arbeitgebers gegen Vorschriften aus diesem Abschnitt der Betriebsrat oder eine im Betrieb vertretene Gewerkschaft unter der Voraussetzung des § 23 Abs. 3 Satz 1 des Betriebsverfassungsgesetzes die dort genannten Rechte gerichtlich geltend machen;

1.3. Where should Detentions be made in the AGG?

The AGG contains provisions that violate European law, run counter to effective protection against discrimination or are simply not necessary or expedient.

The BUG therefore calls for the complete or partial deletion of the following paragraphs (in bold):

General Equal Treatment Act (AGG)

PART 1- GENERAL PROVISIONS

(…)

§ 2 Scope

§ 3 Definitions

(…)

PART 2 – PROTECTION OF EMPLOYEES AGAINST DISCRIMINATION

Chapter 1: Prohibition of Discrimination

(…)

§ 9 Permissible Difference of Treatment on the Grounds of Religion or Belief

(…)

Chapter 3: Employee Rights

§ 23 Abs. 3 Satz 2 bis 5 des Betriebsverfassungsgesetzes gilt entsprechend. Mit dem Antrag dürfen nicht Ansprüche des Benachteiligten geltend gemacht werden.

(…)

§ 15 Compensation and Damages

(…)

PART 3 - PROTECTION AGAINST DISCRIMINATION UNDER CIVIL LAW

§ 19 Prohibition of Discrimination Under Civil Law

(…)

1.3.1. § 19 Prohibition of Discrimination Under Civil Law

§ 19 AGG regulates on which areas of civil law the protection against discrimination of the AGG applies. This includes, for instance, the conclusion of insurance, purchase or rental contracts.

The norm should be altered since it violates in some parts - regarding different categories of discrimination - the European legal provisions, offers a gateway for racist unequal treatment, as well as permits protection for the different categories of discrimination to a varying degree.

Firstly, the scope of application of § 19 AGG is - contrary to European law - too narrow. Thereby, many cases in which discrimination may occur are not covered by the prohibition of discrimination in the AGG.

Further, § 19 (3) and (5) AGG stipulate that in different areas, for example when renting houses, exceptions to the prohibition of discrimination are possible. The European law is violated and the possibility of unsanctionable racist discrimination becomes possible here as well. Read more…

There is a fundamental need for improvement with regard to the different levels of protection against discrimination based on various grounds of § 1 AGG. Under § 19 (2) AGG, the prohibition of discrimination in civil legal relations applies only to racial discrimination and discrimination based on ethnic ascription. While discrimination based on ideology is not prohibited here, discrimination based on the other grounds mentioned in § 1 AGG shall only be inadmissible within the scope of bulk businesses, transactions similar to them as well as private insurances. This is a hierarchisation that makes uniform legal protection and secure application of the law more difficult or impossible and therefore appears to need revision.

The difficulties of such hierarchical legal protection are particularly evident in multidimensional discrimination cases. A hijab or niqab wearing woman who is denied the finalisation of a business transaction that is not considered a bulk business, e.g. the conclusion of a rental agreement with a landlord who does not rent more than 50 apartments, must carefully consider the ground of discrimination she invokes in order to obtain legal protection.

1.3.1.1. Scope of Application of § 19 (1) AGG

§ 19 (1) AGG stipulates that discrimination in so-called "bulk businesses" and in the conclusion of insurance contracts is inadmissible. According to § 19 (1) no. 1 AGG, "bulk businesses" are contracts that are concluded "without regard to the person and under comparable conditions in a large number of cases". This includes most everyday businesses, e.g. the purchase of food and admission tickets as well as a visit to the hairdresser or a taxi ride.

§ 19 Prohibition of Discrimination Under Civil Law

(1) Any discrimination 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 (…)

The EU Directive 2004/113/EC, which regulates gender equality in civil law, refers to transactions that are made available to the public "without regard for the person". The AGG restricts the scope of application of the prohibition of discrimination by the additional requirements of "comparable conditions" and "multitude of cases", i.e. for the discrimination category "gender" in violation of European law and should be amended accordingly.

Furthermore, § 19 (5) s.3 AGG excludes a "bulk business" in the case of the renting of housing if the landlord does not rent more than 50 apartments. Persons who do not rent out flats on a large scale are therefore exempt from the prohibitions of discrimination contained in the AGG. This exception is also not compatible with the Gender Directive.

Although § 19 (2) AGG formulates a prohibition of racial discrimination for all areas of civil law covered by the AGG (§ 2 (1) no. 5 to 8 AGG), this is partially revoked by § 19 (3) and (5) AGG.

1.3.1.2. Exceptions of § 19 (3) and (5) AGG

§ 19 (3) AGG permits unequal treatment during rental of housing in favor of "socially stable resident structures", "balanced settlement structures" and "balanced economic, social and cultural conditions".

This regulation makes it possible that racially motivated unequal treatment cannot necessarily be sanctioned in the conclusion of tenancy agreements.

This is why, the BUG suggests the removal § 19 (3) AGG.

§ 19 (5) s. 1 AGG permits exceptions to the prohibition of discrimination in civil law transactions if a transaction establishes a "close relationship or a relationship of trust" between the parties or their relatives. With tenancies, this particularly concerns housing situated on the same plot of land (§ 19 (5) s.2 AGG).

Since a close relationship between tenants and relatives of the landlord is hardly conceivable, the reference to the relatives should be withdrawn.

Sentence 3 also extends the exemption to landlords with up to 50 flats. However, it does not specify whether these 50 apartments must be located on a property, in a district or in a municipality. The extension of this derogation covers a substantial part of the flats for rent, which unjustifiably limits the protection against discrimination. The third sentence should therefore be deleted.

§ 19 Prohibition of Discrimination Under Civil Law

(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.

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. With regards to a 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.

1.3.2. § 20 Permissible Differences of Treatment

§ 20 (1) s. 1 of the AGG stipulates that unequal treatment in civil legal relations on grounds of religion, disability, age, sexual orientation or gender may be permissible if there is an objective ground for it. Here, there is a need for both a change and a deletion.

This norm expresses a hierarchisation of the discrimination grounds in § 1 AGG, which should be reconsidered. With regard to the ground gender, this norm also violates the European legal requirements of the Gender Directive 2004/113/EC.

As in other parts of the AGG, a complete proportionality test should be specified for the admissibility of unequal treatment or an exception such as the above mentioned. This means that unequal treatment or exception should only be justified if the means chosen to achieve the objective are proportionate and necessary. The present wording does not appear sufficiently precise.

§ 20 Permissible Differences of Treatment

(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. (…)

(…)

In addition, the admissibility of different treatment within the framework of private insurance law under § 20 (2) AGG should be limited to the discrimination grounds of disability and age. A need for an exception on the grounds of religion or sexual identity seems inappropriate and not expedient. These grounds should therefore be deleted.

In the future, stricter requirements should apply to unequal treatment on grounds of disability and stage of life. For example, risk assessment must be based on relevant and accurate actuarial and statistical data in order to justify unequal treatment. The data must be reliable, regularly updated and available in full transparency. In addition, it should be examined whether the justification should be limited to certain insurance contracts and whether unequal treatment, e.g. in property and legal costs insurance, should be prohibited in general.

1.3.3. § 21 Enforcement

The EU directives relevant to the AGG stipulate that violations of the prohibition of discrimination must be punishable by "effective, proportionate and dissuasive" sanctions. The concrete implementation of these sanctions is up to the Member States. The German legislator has decided to introduce a civil law claim for damages and compensation as a central form of sanction in §§ 15 and 21 AGG.

Regarding the claims, there is a need for change from of European law and a substantial point of view.

§ 21 (1) and (2) AGG regulate claims for damages and compensation arising from a person that suffered discrimination in civil legal relations. Similar deficits to the claims under labour law under § 15 AGG are observable here. The fault requirement in the context of a claim for damages violates European legal provisions (internal link: 1.2.5.2 Violation of European Law in § 15 (1) and (3) and § 21 (2) s. 2 AGG). The deadline for assertion of claims of only two months, is too short. In addition, the requirements for the assessment of sanctions should be adapted to European legal standards. § 21 (1) AGG also provides for a right to abolishment or forbearance of discrimination. For example, an operator of a nightclub can be sentenced to refrain from refusing entry to persons solely on the basis of their (alleged) ethnic affiliation.

> § 21 Enforcement
>
> (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 (…)

The judicially obtained conclusion of a contract, the so-called obligation to contract can be considered as a form of abolishment. In most cases, the disadvantage can only be abolished if the initially refused contract is concluded and the service is granted. This would be appropriate, for example, in the case of an insurance contract or an application for membership of a sports studio.

1.3.3.1. Explicit Obligation to Contract in § 21 (1) AGG

A form of abolishment of an infringement caused by discrimination can also be the judicially enforced conclusion of a contract, the so-called obligation to contract. In some cases, the disadvantage can only be abolished by the fact that the initially refused contract is concluded and the service is granted. It would be conceivable to impose an obligation to contract when concluding an insurance contract or contracts for services which are available to the general public, such as membership of a sports club.

The law does not exclude compulsory contracting for access to goods and services. The Hagen Local Court, for instance, ordered the conclusion of a failed gym contract in a decision in 2008.

In order to create clarity and to grant the parties concerned an explicit claim regulated by law, the obligation to contract should therefore be laid down by law in Part 3 of the AGG. In its scope of application, civil anti-discrimination protection is mostly applicable to transactions that are available to a broad public, such as bulk businesses and insurance contracts. Personal characteristics are not of importance at all and usually no social relationship similar to an employment relationship is established. Therefore, an obligation to contract is reasonable or proportionate.

However, an exception to the obligation to contract regarding the access to housing seems to make sense, as this would otherwise make it disproportionately difficult to rent out housing.

1.4. Where could further protective aspects be included in the AGG?

To strengthen protection against discrimination and to make it easier for those concerned to report discrimination and thus assert their rights, new aspects of protection should be included in the AGG.

In particular, the introduction of the possibility of litigation in one's own name on another's behalf (Prozessstandschaft) and a collective action right, stronger sanctions and preventive equal treatment measures should be taken into account.

The BUG recommends the inclusion of new aspects to the AGG in the following paragraphs:

General Equal Treatment Act (AGG)

PART 1- GENERAL PROVISIONS

§ 1 Purpose

§ 2 Scope

(…)

§ 5 5 Positive Action

PART 2 – PROTECTION OF EMPLOYEES AGAINST DISCRIMINATION

Chapter 1: Prohibition of Discrimination

§ 6 Persons Covered

(…)

§ 11 Advertisement of Vacancies

(…)

Chapter 3: Employee Rights

§ 15 Compensation and Damages

(…)

PART 3 - PROTECTION AGAINST DISCRIMINATION UNDER CIVIL LAW

(…)

§ 20 Permissible Differences of Treatment

(…)

PART 4 – DEFENCE OF RIGHTS

§ 22 Burden of Proof

§ 23 Support from Anti-Discrimination Organisations

(…)

1.4.1. § 22 Burden of Proof

The provision under § 22 AGG disposes a limited reversal of the burden of proof in favour of disadvantaged persons. Since discrimination can often only be proven by facts which lie within the sphere of the discriminating party, according to § 22 AGG, the proof of evidence which assumes a prohibited discrimination is sufficient to force the other party for exonerating evidence.

> § 22 Burden of Proof
>
> 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.

Nevertheless, the applicable requirements for proof of discrimination under § 22 AGG often make it difficult, if not even impossible, for plaintiffs to enforce their claims in court.

An extension of the facilitation of evidence could achieve a noticeable strengthening of the protection against discrimination.

The requirements for circumstantial evidence to trigger the reversal of the burden of proof should be changed in such a way that statistics and results of testing procedures: Dossier on the subject of "Testing" (in German) can be regarded as sufficient evidence within the meaning of § 22 AGG. In testing procedures, for example, a testing person is used to check whether behaviour towards a person to whom the presumed ground of discrimination is present also occurs towards a testing person without this ground of discrimination. If this is not the case, the testing procedure should satisfy as a sufficient indication of the existence of discrimination in the sense of the burden of proof. Also, the use of testing procedures for the presentation of evidence should not reduce the claim for damages.

1.4.2. § 23 Support from Anti-Discrimination Organisations

In accordance with § 23 AGG, anti-discrimination organisations may represent the interests of a disadvantaged party by assisting and supporting the plaintiff in judicial proceedings. To this end, § 23 authorises legal counseling inside and outside of court. However, assistance in this regard does not go beyond accompanying the client during the hearing. In light of the specific weaknesses of the anti-discrimination laws in practice, it is imperative that the inclusion of anti-discrimination organizations becomes stronger and more frequent.

> § 23 Support through Anti-discrimination Organisations
>
> (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 AGG, therefore, should be supplemented with a right of the anti-discrimination organisations to litigate for the right of a discriminated person in their own name (Prozessstandchaft) and also with a collective action right carried out by anti-discrimination organisations.

A "Prozessstandschaft" means that anti-discrimination organisations have the opportunity to assert the rights of the discriminated person in their own name. By doing this, the organisation would be the plaintiff and could lodge pleas, make requests in court, and question witnesses. The risks involved in litigation are thus assumed by the organisation representing the plaintiff. Of course, a prerequisite for this representation in court is that the affected person agrees to the assertion of the rights by a third party. Under the AGG, this option is not yet possible, but it is already established under the Disability Equality Act, the Consumer Protection Act, and the Environmental Protection Act.

The introduction of a collective action right would make it possible to have a breach of the prohibition of discrimination assessed by the court, regardless of individually discriminated against persons. In the case of a collective action right, the organisations itself can bring forth the claim. Since in principle, only those who have their rights personally affected may bring an action before the courts, the collective action in and of itself constitutes an exception to this. Therefore, they are only permitted in areas where there is an explicit legal basis to do so. In Germany, there already exists a collective action right in the area of discrimination based on a disability. It would be worthwhile to secure this possibility for representation in the AGG as well. To ensure that there is no legal interference in the legal relationships of third parties, the collective action right should be limited to cases of public interest (as in the cases of the Disability Equality Act, the Consumer Protection Act, and the Environmental Protection Act).

See the discussion in the Feryn case before the European Court of Justice.

1.4.3. § 25 Federal Anti-Discrimination Agency

Structurally, the Agency and its head is affiliated with the Federal Ministry for Family Affairs, Seniors, Women and Children (BMFSFJ), but can act independently.

BUG advocates for an alteration of the structure of the FADA. The FADA should be an independent institution that is not affiliated with a ministry.

In addition, the head post of the FADA, which has so far been filled by appointment by the Minister, should be upon public recruitment. Preselection should be based on suitability, aptitude, and professionalism. The last selection process should be decided by the German House of Representatives (Bundestag).

Furthermore, a legal aid fund should be incorporated in the FADA's budget because many cases fail simply due to a lack of sufficient financial resources to conduct a case or to be supported strategically. The legal aid fund should be available to both anti-discrimination organisations and claimants themselves alike.

§ 25 The Federal Anti-Discrimination Agency

(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 for Family Affairs, Senior Citizens, Women and Youth, regardless of the competence of any Parliamentary Commissioners of the German Bundestag or Federal Government Commissioners.

1.4.4. § 27 Tasks

Pursuant to § 27 (1) AGG, the FADA mandate stretches to cover every person's request who believes they have experienced disadvantaging treatment based on one of the grounds listed under § 1 AGG. Along with counseling the affected party in cases of discrimination, the tasks of the FADA include, in accordance with § 27 (3) AGG, taking measures to prevent discrimination related to the categories of § 1 AGG, as well as conducting academic research on discrimination.

In the course of amending the AGG, it is advisable to also clarify the mandate of the FADA.

BUG advocates for the entire deletion of the disclosure obligation (Weiterleitungspflicht) in § 27 (2) s. 3 AGG, as these authorities do not or, only to a limited extent, have consulting capacities at their disposal.

Going forward, consideration should also be given to expanding the mandate of the FADA so that it could support claims in court (i.e. by submitting legal opinions) or even lodging claims itself. A fourth sentence should be added after § 27 (2) s. 3 that would explicitly authorize the ADA to, in reasonable cases, contribute to the claim (amicus curiae), or, to accompany particularly benchmark cases via assisting, via a litigation in its own name on behalf of the discriminated person (Prozessstandschaft) or via a collective action.

The right to participation or consultation should also be considered, so that the respective Federal Ministry can forward relevant discrimination legislative drafts in good time before a resolution is passed to FADA. The FADA should be granted the right to release an opinion.

The FADA should also serve a monitoring function. With this, the FADA would be an observatory agency for the guarantee of the objective implementation of the legislation governing equal pay between men and women in the same or similar occupations (Transparency Act for the Gender Pay Gap).

This monitoring function should also apply to so-called “Public Sector Duties”. Should Public Sector Duties – as already demanded in another section -be included in the AGG, they would need a monitoring body, for example, to observe the implementation of measures and to offer further training. Such public equal treatment obligations can only be adequately effective if an appropriately mandated agency verifies whether the objectives and results set are achieved. For this purpose, the appointment of the FADA as a monitoring agency should be considered. This requires a solid legal foundation which would also enable FADA to assign appropriate sanctions.

§ 27 Tasks

(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.

1.4.5. § 28 Authority

On the basis of the described tasks of the FADA, § 28 AGG has to be formulated accordingly. This is the only way for FADA to have sufficient authority to carry out the proposed tasks.

§ 28 Authority

(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.

(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.