

Concept for an internal complaints body pursuant to § 13 of the General Equal Treatment Act

Suggestions for its establishment

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1. Introduction

With the introduction of the General Equal Treatment Act (AGG) in 2006, employers (in the private economic sector as well as in administration) were imposed to designate and publicise a competent body for the treatment of complaints due to discrimination according to the sections 12 and 13 of the AGG. While in the administration this obligation is often implemented, internal complaints bodies are still rare to find in private companies¹. The General Equal Treatment Act does not indicate a sanction for the case, that no internal complaints body is established.

The **Bureau for the Implementation of Equal Treatment (BUG)** aims to counter discrimination within the scope of the AGG as far as possible. Therefore, the potentials of the current version of the AGG should be fully exhausted and, where narrow legislation just allows a limited protection against discrimination, amendments and, if necessary, changes to the AGG should be considered.

Although the requirement to establish an internal complaints body has existed since the approval of the AGG, analyses and research on this have been very limited. Only a modest number of publications exist on this topic.

Within the BUG's Strategic Plan 2018 – 2020, the implementation of an internal complaints body is listed as the BUG's topic and task. In autumn 2018, BUG received financial support from the Federal Anti-Discrimination Agency for the formulation of a comprehensive concept.

Within this project, two focus groups were conducted in Berlin in December 2018. People with a legal perspective on the AGG, as well as people who analysed internal complaints bodies from an employment law perspective were invited. Additionally, people who are in charge of an internal complaints body in a public authority participated. As not everyone interested could participate in the focus groups, six individual interviews, with unfortunately just two representatives from private companies, were also conducted.

Within these talks, aspects regarding the tasks, powers, structure and target group of a complaints body were discussed. Due to the variety of experiences by small and big administrations with different structured complaints bodies, diverse and extremely helpful perspectives were brought into the discussion.

Due to its own capacities, BUG conducted a revision and addition of the concept, in spring 2020. Feedback to the concept made clear, that several points of the concept must be developed further to be fully practicable.

Sincere thanks are given to all people listed in chapter 7 for their contribution and support.

2. General conditions

¹ As there is no empirical research in this field yet, a statement here can only be illustrated and not quantified.

2.1 Short introduction of European legal requirements

The directives 2004/113/EG (which does not apply to labour law) and 2006/54/EG on Equality between women and men form next to the so-called Racial Equality Directive 2000/43/EC and the Employment Equality Directive 2000/78/EG the legal European framework for the AGG. The directives define minimum requirements for the national transposition. The European Commission assesses the implementation of the minimum requirements. A higher level of protection against discrimination, or forms of action to achieve the required protection against discrimination, are left to the discretion of each member state. When the directives were implemented in 2006, Germany decided to introduce the implementation of a so-called inner company complaints body under sections 12 and 13 in chapter 2 of the AGG (context of employment), which is not specifically required by the European directives.

2.2 Short introduction into the AGG

The General Equal Treatment Act entered into force in August 2006 with a delay of three years, and provides protection against discrimination on the grounds of race, ethnicity, gender, religion or belief, disability, age and sexual orientation. Direct as well as indirect forms of discrimination can be sanctioned. Harassment, especially sexual harassment, and the incitement to discriminate can be punished. Although the AGG mentions multiple aspects of life, sanctions, as a consequence of discriminatory action, are largely provided for the context of employment (access to and within employment) and access to and supply of goods and services.

2.3 Legal basis for an internal complaints body

Section 2 of the AGG, in which the ban on discrimination in the context of employment is regulated, covers the scope of application and defines the terms 'employees' and 'employers' in § 6 AGG.

§ 7 AGG determines the principle of non-discrimination in the context of employment. In addition, it lays down that provisions in the law that contradict this prohibition of discrimination are invalid.

On the other hand, § 8 AGG defines exceptions, which allow unequal treatment. This applies, if a reason of disadvantage, named under § 1, for the type of work within the occupation or the conditions of work present an essential and significant occupational requirement. This applies in so far as the purpose is lawful and the requirement reasonable.

§ 9 AGG sets a special exemption for confessional associations which has been proofed and evaluated concerning its conformity with the directives by the European Court of Justice (EuGH) and the Federal Labour Court (BAG) in 2018. Subject to a possible examination by the Federal Constitutional Court (BverfG), the assessment of the EuGH and BAG, that § 9 AGG must be defined more narrowly.

§ 10 AGG norms an exemption on the grounds of age and § 11 AGG defines that vacancy announcements must be free of discrimination.

§ 12 AGG points out, that it is the employer's obligation to make sure necessary actions are taken to deal with and prevent discrimination in companies and the administration. Education and trainings should reasonably point out the inadmissibility of discrimination. If employees violate the principle of non-discrimination, employers must take adequate measures to stop such behaviour. Possible actions could be a written warning, job transfer or termination. Likewise, employers have to protect their employees against discrimination.

§ 13 AGG sets the lawful ground for the employees' right of appeal in a case of discrimination in the company or administration. The complaints body is required to examine the complaint and inform the person affected about the results. The body responsible pursuant to § 13 AGG, needs to be made public according to § 12 para. 5 AGG.

§ 13 Right of Appeal

(1) Employees shall have the right to lodge a complaint with the competent department in the company, business or office, if they feel, in connection with their employment relationship, discriminated against by their employer, supervisor, another employee or third party on any of the grounds referred to under Section 1. The complaint shall be examined, and the complainant informed of the result of the examination.

(2) The rights of worker's representatives shall remain unaffected.

The in the AGG intended internal complaints body shall handle complaint. Complaints pursuant to Section 13 AGG are incidents of discrimination on the grounds of the six criteria referred to under § 1 AGG.

Further requirements for an internal complaints body are not regulated in the AGG. There is no legal obligation to establish a complaints body. In fact, the law requires its existence². Employers must determine a competent authority. The definition of the 'body responsible' must be approached comprehensively and opens up a wide scope for employers to determine who would hold the authority of the complaints body.

It follows that internal complaints bodies can be required on the basis of the AGG, though a limitation only to companies or administrations with a certain number of employees is not stated to establish the body. Omission will not be sanctioned. The law does not specify structural or framework conditions for the mandate, the equipment and approach of the internal complaints body. The responsibility for the establishment of the body is fully given to the employers.

§ 15 AGG provides the right to demand compensation for those affected in a case of discrimination. This is also possible if the internal complaints body has been called into action, but no satisfying measures for the person affected have been taken.

² See: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 17.

According to § 24 AGG, the requirements of the AGG also apply to public-law employment relations in consideration of the special legal status of certain groups of people named in Section 24 no. 1 to 3 AGG.

In summary, the internal complaints body provides an opportunity to prevent legal action by employees and handles cases of discrimination in temporal and spatial proximity.

2.4 AGG commentary on the internal complaints body

Several legal commentaries present interpretations of Section 13 AGG. Those provide orientation, although they are not always consistent in the assessment and interpretation of the law. To get an impression of the large range of interpretations of the § 13 AGG, a few assessments will be shown in the following.

The definition of 'staff' pursuant to § 1 para. 1 AGG, refers to people in dependent employment (salaried employees, workers), trainees, quasi-employment relationships, applicants as well as former employees³. 'Employers', in accordance with § 6 para. 1 AGG, are defined as natural and legal people who employ others, pursuant to § 6 para. 1 AGG. Employees can also be provided temporarily to third parties. They are defined equally under the lawful term of employers.

If discrimination against employees, caused by a third person, falls under the responsibility of the employer, is seen controversially in the commentaries, as the AGG does not define this term. According to the literature, third people could also be business partners and customers⁴.

The commentaries agree that the condition for filing a complaint, is the subjective feeling of an employee who has been discriminated against by either their employer, supervisor, another employee or a third person. Firstly, the subjective feeling leading to a complainant matters⁵. Firstly, it is irrelevant, if actual discrimination appeared, the affected person must only perceive the situation as discriminatory⁶. To what extent the complaint is justified, will be examined during the complaints procedure⁷. Through the connection to the subjective perspective of the employee, the law limits itself to individual complaints by the person affected⁸. According to Adomeit/Mohr, it is not possible to report an observed discrimination or the general conditions within the company to the complaints body by a third person⁹. Furthermore, according to Bauer/Krieger/Günther, it does not matter if the complainant actually inhabits the characteristic they have been discriminated against, or if it was just assumed¹⁰.

Due to the AGG commentary by Däubler/ Bertzbach, the affected person has to be discriminated against in association with employment, to be able to carry out their right of

³ see: Buschmann, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 13

⁴ see: Evaluation des Allgemeinen Gleichbehandlungsgesetzes, Büro für Recht und Wissenschaft, NOMOS, 2016, S. 107ff

⁵ Allgemeines Gleichbehandlungsgesetz, Bauer/Krieger/Günther, § 13 Rn. 4; Buschmann, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 9.

⁶ Allgemeines Gleichbehandlungsgesetz, Bauer/Krieger/Günther, § 13 Rn. 4.

⁷ Allgemeines Gleichbehandlungsgesetz, Adomeit/Mohr, § 13 Rn. 7.

⁸ Allgemeines Gleichbehandlungsgesetz, Adomeit/Mohr, § 13 Rn. 10.

⁹ Allgemeines Gleichbehandlungsgesetz, Adomeit/Mohr, § 13 Rn. 10.

¹⁰ see: Buschmann, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach § 13 Rn. 15.

appeal¹¹. This formulation tends to be broadly understood. The rejection of a delivery driver by customers on the grounds of race or ethnic background, for example, as well as sexual harassment by employees of a third company in a shopping mall or not being invited to a public party for all other employees¹², could be reportable.

§ 13 AGG says that an employee must contact the responsible body in a case of discrimination but does not give a further definition of this term. Therefore, the human resources department, for example, could also be considered as the body responsible¹³.

Employers are given a wide scope in the establishment of a complaints body by the legislation. Already existing staff representatives, like the equal opportunities' representatives could be determined as the body responsible. Creating a fully new organ is not necessary. Only the already existing structures have to be suitable¹⁴. Whether an external complaints body is also possible, is controversially discussed in the commentary's literature. The AGG commentary by Rolf/Giesen/Kreikebohm/Udsching¹⁵ argues that an external establishment outside of a company is not possible, as it has to be ensured that the complaints procedure is realised 'locally and effectively'.

According to Meinel/Heyn/Herms, the worker's council or the staff do not have a right of codetermination in establishing the complaints body¹⁶. The worker's council only participates in the structuring of a complaints procedure. One possible outcome of participating is establishing a collective¹⁷. A collective agreement is an agreement between the worker's council and the employer, which is binding on both parties. This agreement cannot restrict or exclude the content of the right of appeal based on § 13 AGG, but it can determine certain processes and requirements for the complaints procedure.

During the complaints procedure, the complaints body is required to examine the complaint on its content-related merits. According to the AGG commentary by Däubler/Bertzbach, a 'rapid and conscientious analyses of the facts with all reasonable means available'¹⁸ by the employer is required. In reference to Meinel/Heyn/Herms, the hearing of people and examination of documents are possible for the investigation¹⁹.

If the complaints body sees the complaint as unsubstantiated after the examination, it is required to inform the complainant about the results citing its reasons²⁰. But if the complaints body identifies that discrimination has taken place, the employer is, pursuant to Section 12 para. 1 AGG, required to take remedies. The decision of the complaints body is binding for the employer; however, the employer has a certain margin of discretion when choosing measures²¹. Possible steps by the employer could be relocation, a written warning or the termination of the

¹¹ see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 11.

¹² see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 11.

¹³ see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 18.

¹⁴ Beck-online commentary, Benecke, § 13 AGG Rn. 9.

¹⁵ see: Roloff, in: Rolfs/Giesen/Kreikebohm/Udsching, BeckOK Arbeitsrecht, AGG § 13 Rn. 1.

¹⁶ Allgemeines Gleichbehandlungsgesetz, Meinel/Heyn/Herms, § 13, Rn 16a, 17. See: chapter 2.6.1

¹⁷ Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 55.

¹⁸ see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 18.

¹⁹ Allgemeines Gleichbehandlungsgesetz, Meinel/Heyn/Herms, § 13 Rn. 18.

²⁰ see: *Lindemann*, in: Kommentar zum AGG, Hey/Forst, § 13 Rn. 9.

²¹ see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 35; andere Ansicht Meinel/Heyn/Herms, § 13, Rn. 16.

perpetrator²². The aim is to prevent discrimination and rebuild the company's working atmosphere²³. Possible costs due to absence during working time because of personal hearings, have to be covered by the employer to carry the assessment forward²⁴.

The AGG does not formulate any formal requirements or deadlines. The person affected²⁵ by a discrimination can complain personally, consult a member of the employee representatives or, according to the AGG commentary by Däubler/Bertzbach, be even represented by member of the worker's council or a lawyer²⁶. It is also possible to complain anonymously²⁷. Furthermore, the complaint can be made informally, for example verbally²⁸.

A time limit is not intended, but it has to be taken into account, that a claim for damages due to discrimination, pursuant to § 15 AGG, has to be filed within two months. The submission of a complaint does not have an influence on the two months' time limit. Therefore, the affected person has to assert the claim parallel to the complaint, if necessary²⁹.

The complainant is not allowed to face disadvantages due to the realisation of the right of appeal. This prohibition also applies to witnesses who have testified in favour of the person affected during the complaints procedure³⁰. The so called Maßregelungsverbot (prohibition of disciplinary measures) will remain, even if the complaints body sees the complaint as unsubstantiated, as the employee should not get sanctioned for the use of their own rights³¹.

The right of appeal, pursuant to § 13 AGG, is different in its content from already existing complaints procedures implemented in, for example, the Works Constitution Act (BetrVG), and exists, therefore, next to it. According to Däubler/Bertzbach, only employees can contact the worker's council, whereas the right of appeal, pursuant to § 13 AGG, also applies to non-employees³². The complaints procedure in the context of § 13 AGG as well as the one pursuant to the Works Constitution Act (BetrVG) can, as mentioned by Däubler, be regulated by a collective agreement³³.

Affected employees can also claim their individual legal right of action, regardless of the internal complaints body³⁴.

2.5 Studies on the topic

As mentioned before, so far just two noteworthy studies on the topic of the internal complaints body have been published.

²² Beck-online Großkommentar, Benecke, § 13 Rn. 19.

²³ Allgemeines Gleichbehandlungsgesetz, Meinel/Heyn/Herms, § 13 Rn. 26.

²⁴ Allgemeines Gleichbehandlungsgesetz, Adomeit/Mohr, § 13 Rn. 18.

²⁵ As stated in § 6 AGG.

²⁶ see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 25.

²⁷ see: *Legerlotz*, in: Bürgerliches Gesetzbuch: Allgemeiner Teil – EGBGB, Heidel/Hüßtege/Mansel/Noack § 13 AGG Rn. 8.

²⁸ Allgemeines Gleichbehandlungsgesetz: AGG, Bauer/Krieger/Günther, § 13 Rn. 8.

²⁹ Allgemeines Gleichbehandlungsgesetz, Adomeit/Mohr, § 13 Rn. 42.

³⁰ see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 37.

³¹ see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 39.

³² see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 45.

³³ see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 50.

³⁴ see: *Buschmann*, in: Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 56.

One of them is the study 'Beschwerdestelle und Beschwerdeverfahren nach § 13 AGG' (Complaints body and complaints procedure pursuant to § 13 AGG) commissioned by the Federal Anti-Discrimination Agency (ADS) by Doris Liebscher and Anne Kobes published in 2013³⁵.

In 2015 the Anti-Discrimination Agency 'Antidiskriminierung in der Arbeitswelt' (ADA) (Anti-Discrimination in work environment), as part of Arbeit und Leben Bremen, developed the brochure 'Diskriminierung und Belästigung im Betrieb entgegentreten! Handreichung zur Innerbetrieblichen Beschwerdestelle'³⁶ (To counter discrimination and assault in the company. Guidance for an internal complaints' body).

Both publications are important reference points to the present concept but will not be duplicated here. Therefore, it is recommended to take particular note of the ADS's study on the legal estimation of the internal complaints body (chapter I and IV, page 11f). This concept will not undertake another detailed legal analysis.

§ 13 AGG has also been examined in Chapter 4.1 'Legal protection' of the study 'Evaluation des Allgemeinen Gleichbehandlungsgesetzes'³⁷ (Evaluation of the General Equal Treatment Act), published by the Bureau of Law and Science in October 2016.

2.6 Complaints body through the Works Constitution Act (Betriebsverfassungsgesetz), Federal Law on staff councils in the public sector (Bundespersönalvertretungsgesetz), Federal Equality Law (Bundesgleichstellungsgesetz), Severely Disabled Persons Representation Law (Schwerbehindertenvertretungsgesetz) and at universities

Employers hold the duty to decide about the handling of complaints by employees³⁸.

This results from the existing employment relationship. Next to the complaints body pursuant to § 13 para. 1 AGG, employees also have the possibility of lodging a complaint about discrimination they experienced with another operational body in the company. § 13 para. 2 AGG clarifies explicitly that the right of appeal pursuant to the AGG does not affect further rights of the employee representation. The employee is free to decide which body should be contacted. Several complaints procedures about the same discriminatory situation at different complaints bodies are possible at the same time.

Other complaints bodies will be introduced here.

2.6.1 Complaints bodies according to the Works Constitution Act

³⁵ Liebscher, Doris / Kobes, Anne: Beschwerdestelle und Beschwerdeverfahren nach § 13 AGG. 2013, see: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Beschwerdestelle_und_Beschwerdeverfahren.pdf?__blob=publicationFile.

³⁶ see: <https://www.ada-bremen.de/beschwerdestellen/handreichungen/>

³⁷ see:

http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/AGG_Evaluation.pdf?__blob=publicationFile&v=15.

³⁸ see: *Kania*, in: Erfurter Kommentar zum Arbeitsrecht, § 84 Rn. 1.

a) Worker's council

The workers' council³⁹, as the representative of employees' interests in companies, is an already established and known contact point with its complaints mechanism for employees. It seems reasonable to eventually identify the worker's council as the responsible body pursuant to § 13 AGG.

Due to § 75 para. 1 BetrVG, the worker's council, as a complaints body, is, as well as the employer, responsible for preventing discrimination against the employees on the grounds of race, ethnic background, descent or other origin, nationality, disability, age, political or union activities or attitude, gender or sexual identity, from happening.

aa) Works Constitution Act (BetrVG) and complaints procedure of the worker's council

§§ 84 ff. of the Works Constitution Act makes it possible to lodge complaints. In contrast to the complaints pursuant to § 13 AGG, the area of responsibility of the worker's council is designed more extensive. Complaints regarding work or health protection, the workers' organisation or the performance evaluation are also processed.

Based on § 84 BetrVG, every employee has the chance to call in a member of the worker's council when addressing a complaint to the employer. After examining the complaint, there must be a decision on it and the employee must be informed about the results. When an investigation period takes longer, the employee must be informed about an intermediate reply⁴⁰. If the employers see the complaint as justified, they have to ensure redress.

The complaint can also be addressed directly to the worker's council due to § 85 BetrVG. According to that section, the worker's council is obligated to take and examine the complaints of employees. If the worker's council sees the complaint as unjustified, they must inform the complainants about the decision. If the complaint is seen as justified, the worker's council will enter into negotiations with the employer to obtain consequences or remedy. If the employer, in turn, considers the complaint as unjustified, this decision has to be substantiated to the worker's council and the employee.

If no agreement will be reached between the two parties about the justification of the complaint, or the complaint will not be remedied, the worker's council can call in the conciliation committee. According to § 85 para. 2 BetrVG, the decision of the committee is mandatory, insofar as the case does not relate to a legal claim of the employee. If it does, the labour court decides on the legal claim.

Additional agreements, relating to the structure of a complaints procedure, can be taken in a collective or works agreement.

³⁹ Due to § 1 BetrVG a worker's council can be elected by the employment of at least five employees with a permanent right to vote. Three of them must be eligible, which means to be working more than six months on election day.

⁴⁰ see: *Kania*, in: *Erfurter Kommentar zum Arbeitsrecht*, § 84 Rn. 7.

bb) Judgments, according to the implementation of an internal complaints body in connection with the worker's council.

As mentioned before, due to the vague statutory regulation of the AGG for an internal complaints body, the employer has a wide scope in selecting and structuring the body. The employer's wide discretionary scope also applies to the decision of who will be allowed which powers within the complaints procedure.

In this context, the jurisprudence already had to deal with the workers' council's right of participation, especially in relation to the order of the company, pursuant to § 87 para. 1 no. 1 BetrVG.

In the middle of February 2019, a query in Juris identified 38 judgments in direct or indirect relation to § 13 AGG. These are judgments since the AGG came into effect in 2006 and refer widely to the judicial clarification to what extent the worker's council can assert participation rights in the setup and implementation of the internal complaints body.

The fact that the worker's council does not have any right of participation, relating to the question of, if and where the employer will implement a complaints body has been clarified in court⁴¹ nor is there a right of participation to nominate someone who is in charge of the complaints body⁴². A legal basis for the establishment is standardized in §§ 13 para. 1, 12 para. 5 AGG. A right to conduct the place and personnel follows neither from the AGG nor § 87 para.1 BetrVG. Therefore, it is not a question of the worker's agreement or the behaviour of the employee in the company, but an organizational decision of the employers⁴³. However, the right of participation of the worker's council has to be taken into account in the design of a complaints procedure, if questions of the company's general rules will be affected., according to § 87 para. 1 no. 1 BetrVG⁴⁴. The right of participation includes even an appropriate right of initiative. If the employer does implement a cross-company complaints body, the general worker's council, (but not the local one), has the right of participation in the establishment of the complaints procedure⁴⁵.

b) Youth and trainee representation

The youth and trainee representation⁴⁶ (JAV) of employees under 18 and trainees under 25, is responsible for the actual equality of these employees with other staff, as well as for the integration of young foreign employees, § 70 BetrVG. According to § 70 para. 1 no. 2 BetrVG the youth and trainee representation (JAV) have to monitor the compliance and implementation

⁴¹ LAG Rheinland-Pfalz, decision of 17.04.2008 – Az. 9 TaBV 9/08.

⁴² LAG Nürnberg, decision of 19.02.2008 – Az. 6 TABV 80/07.

⁴³ BAG, decision of 21.07.2009 – Az. 1 ABR 42/08-see: Roloff, in Beck'sche Onlinekommentar Arbeitsrecht, Rolfs/Giesen/Kreikebohm/Udsching, § 13 Rn. 1.

⁴⁴ BAG, decision of 21.07.2009 – Az. 1 ABR 42/08; LAG Hamburg, decision of 7.04.2007 – Az. 3 TaBV 6/07.

⁴⁵ see: <https://www.rechtslupe.de/arbeitsrecht/agg-beschwerdestelle-und-mitbestimmung-des-betriebsrats-311857>.

⁴⁶ According to § 60 BetrVG, the representation is eligible in a company with at least five employees.

of the AGG: In that sense, the JAV is obliged to take and examine suggestions of young employees in accordance with § 70 para. 1 no. 3 BetrVG. Although the term 'complaint' is not explicitly named, suggestions also include complaints⁴⁷. If the examination cannot take place in a reasonable period of time, an intermediate reply has to be given. If the complaint is considered as unsubstantiated, a resolution will be made and the person affected informed.

If the complaint is justified, the worker's council needs to remedy the complaint, according to § 70 para. 1 no. 3 BetrVG. The worker's council has to negotiate this in a worker's council meeting with the participation of the JAV⁴⁸. The JAV will inform the person affected about the results of the assessment in the worker's council and, if necessary, which results were produced in the negotiation between the worker's council and the employer⁴⁹.

Employees under the age of 18 can, beside § 84 BetrVG, as well make use of the collective right of appeal via the worker's council, in accordance with § 85 BetrVG⁵⁰.

Neither the worker's council, nor the JAV are bound by a duty of confidentiality. Personal matters of employees do not count as business or trade secrets⁵¹ and only those constitute an obligation to secrecy, according to § 70 para. 1 BetrVG.

2.6.2 Complaints bodies according to the Employee Representation Act by the state and federal states

a) Staff Council

i. Bundespersonalvertretungsgesetz (BPersVG) (Federal Law on staff councils in the public sector)

Due to § 67 BPersVG, the staff council⁵² has the obligation to protect employees against discrimination on the grounds of their race, ethnic background, descent or other origin, nationality, religion or belief, their disability, age, political or union activities or opinion, as well as their gender or sexual orientation. § 68 para.1 no. 3 BPersVG gives the staff council the task of handling suggestions and complaints. If the committee sees the complaint as justified, they must negotiate with the head of the department regarding the removal of the cause, and work towards a remedy. Otherwise, the complainant has to be informed about the result of the examination if found to be unjustified. This also applies if the staff committee does not reach a remedy with the head of the department⁵³. A complaints procedure, pursuant to §§ 84, 85 BetrVG, is not provided in the Federal Law on Staff Councils in the public sector (BpersVG).

In accordance with § 10 para. 1 BPersVG, every person who performs or has performed duties or powers are subject to a duty of confidentiality. The duty of confidentiality exists towards everyone⁵⁴ and particularly covers the personal relations of the affected employees. Due to the

⁴⁷ see: *Annuß*, in Betriebsverfassungsgesetz, Richardi, § 70, Rn. 14.

⁴⁸ see: *Koch*, in: Arbeitsrechts-Handbuch, Schaub, § 227, Rn. 10.

⁴⁹ see: Beck-Online Großkommentar, Mauer, § 70 BetrVG, Rn. 3.

⁵⁰ see: *Annuß*, in Betriebsverfassungsgesetz, Richardi, § 70, Rn. 14.

⁵¹ see: *Kania*, in: Erfurter Kommentar zum Arbeitsrecht, § 79 Rn. 6

⁵² According to § 12 BPersVG staff councils will be formed in offices with a minimum of five employees able to vote and three of them eligible to be voted for.

⁵³ see: *Gräfl*, in Personalvertretungsrecht, § 68, Rn. 28.

⁵⁴ see: *Treber*, in Richardi/Dörner/Weber, Personalvertretungsrecht § 10, Rn. 15.

capability of the staff council, a duty of confidentiality does not apply to other members of the staff council, the JVA, substitute members in case of absence, members of the General Staff Council and the step-by-step representation, established at the higher authority, when called upon or involved in a specific participation procedure⁵⁵. This does not include matters of employees who have contacted the staff council confidentially. The staff council has a duty of confidentiality towards the head of the department⁵⁶.

ii. Staff Representation Acts of the Länder

The legal basis of the states' staff councils are Länder laws. Therefore, the design can be different in certain aspects. For the purpose of illustration, a short introduction of the Staff Representation Acts of the states of Bavaria (BayPVG), Berlin (PersVG Berlin) und Northrhine Westphalia (LPVG NRW) will be given. According to the Staff Representation Acts of the states, it is the staff council's task to prevent discrimination against people on the grounds of race, ethnicity, decent or other origin, their nationality, religion or belief, their disability, age, political or union activities or attitude as well as their gender or sexual orientation. The staff council bears the responsibility that the AGG, as applicable law, is given attention⁵⁷. The staff council is obliged to take suggestions and complaints of employees and, if justified, remedied by negotiating with the responsible department⁵⁸.

State staff councils have the obligation of secrecy on matters, which have become known to them, due to their work⁵⁹. Exceptions to the obligation of secrecy exist in the context of safeguarding the ability to work, for example, towards other members of their representation⁶⁰.

b) Youth and trainee representation

The rights and obligations of the youth and trainee representation in administrative and public institutions, are regulated by the Federal Staff Representation Act (BPersVG) and the Staff Representation Acts of the Länder.

The JAV's tasks include explicitly, the acceptance of suggestions and complaints, in particular the concerns of young female employees⁶¹, and questions, due to the vocational training of young employees⁶². In case of justification, the JVA should then work towards realisation at the staff council⁶³. The person affected must be informed about the current development and results of the negotiations⁶⁴.

⁵⁵ see: *Koch*, in: Arbeitsrechts-Handbuch, Schaub, § 266, Rn. 23.

⁵⁶ see: *Treber*, in Richardi/Dörner/Weber, Personalvertretungsrecht § 10, Rn. 16.

⁵⁷ See for example: § 62 LPVG NRW.

⁵⁸ See for example: § 64 LPVG NRW.

⁵⁹ Art. 10 para. 1 no. 1 BayPVG, 11 no. 1 PersVG Berlin, § 9 para. 1 LPVG NRW.

⁶⁰ Art. 10 para. 1 no. 2, para. 2 BayPVG, 11 no. 2 PersVG Berlin, § 9 para. 2 LPVG NRW.

⁶¹ § 65 para. 1 no. 3 PersVG Berlin.

⁶² § 65 para. 1 no. 3 PersVG Berlin; § 61 para. 1 no. 3 LPVG NRW; Art. 57 para. 1 no. 4 BayPVG.

⁶³ § 61 para. 1 no. 3 LPVG NRW; § 61 BPersVG, Art. 57 para. 1 no. 4 BayPVG.

⁶⁴ § 65 para. 1 no. 3 PersVG Berlin; § 61 para. 1 no. 3 LPVG NRW; Art. 57 para. 1 no. 4 BayPVG.

2.6.3 Women's or equal opportunities representative

Only the administration is legally required to implement bodies of equal opportunities representatives. Private companies can do this on a volunteer basis. In fact, equal opportunities representatives in companies are quite rare.

In the administration, they are responsible for ensuring equality of women and men at an institutional level. They mostly provide individual counselling but were not implemented primary for this purpose. They are entrusted to deal with and, as far as possible, prevent forms of sexual harassment. Other forms of gender-based discrimination, like the lack of gender-neutral toilets for example, do not fall in their area of responsibility.

a) Federal Equality Act (BgleiG)

The BGeiG applies to administrations and public institutions at federal level. For its implementation, an equal opportunities representative is elected⁶⁵. Electing, as well as being elected, is determined by law only to 'female' employees.

The equal opportunities representative does not only act in cases of gender discrimination, pursuant to § 1 BGeiG, but is also obliged, with the AGG entering into force, to also promote and monitor the implementation of the AGG, as far as, protection against discrimination on the grounds of gender or sexual harassment is concerned.

It has a wide scope of competences with regards to women with disabilities or at risk of becoming disabled. This group of people is included in the scope of the BGeiG by § 1 para. 3 BGeiG in conjunction with § 2 BGG. In these cases, a double mandate is given by law.

In difference to the already shown complaints bodies, a right of appeal is not explicitly included. § 25 para. 2 no. 3 allows the individual employee consultation and support, especially in cases of the protection against discrimination. Therefore, § 32 para. 1 BGeiG allows and obligates the equal opportunities representative to report to the head of the administration. The rights of participation of the equal opportunities representative do not correspond with those of the staff or industrial constitution law.

According to § 31 BGeiG, the equal opportunities representative is subject to a comprehensive duty of secrecy, in particular, when dealing with events falling within their mandate.

b) State women's equality acts

For a presentation of complaints bodies of the equal opportunities representative in the administration and public institutions at state (Länder) level, the regulations of the Federal Equal Opportunities Acts of Bavaria (BayGIG), Berlin (LGG Berlin) and Northrhine Westfalia (LGG NRW) are introduced. Therefore, there are also be some differences in the organisation of the office between the Länder.

In accordance with § 15 para. 1 LGG NRW, every department with a minimum of 20 employees is required to determine an equal opportunities representative as well as a deputy. A woman has

⁶⁵ According to § 19 BGeiG an equal opportunities representative has to be elected in a department with more than 100 employees or if the number of employees is lower, it it a top federal authority

to be appointed for the position of the equal opportunities representative. Their remit is regulated in § 17 LGG NRW. It includes the consultation and support of individual employees, in matters of equality. Due to § 16 para. 5 LGG NRW, the duty of confidentiality includes personal relations of employees, their confidential matters and incidents reported to the body.

In Berlin, every department is required to have a women's representative, pursuant to § 16 para. 1 LGG Berlin⁶⁶. They, as well as their deputy, are elected by all 'female' employees. According to § 17 para. 7 LGG Berlin, the women's representative is responsible for receiving complaints about sexual harassment to consult the person affected and, if agreed, to forward the complaint to the department. In general, a duty of confidentiality applies to all matters. With the consent of the person affected, this duty can be repealed towards the head of the administration, the staff representative and the overall women's representative.

Pursuant to art. 15 para. 1 BayGLG, Bavarian administrations and public institutions are only obliged to appoint an equal opportunities representative at a size of more than 100 employees. If this threshold is not reached, a 'contact person' is sufficient. A key difference to the State regulations named before is that no gender is determined. Therefore, a man can also hold this function. Art. 17 para. 3 of the Bavarian Equal Opportunities Act provides consultation and support for employees through the equal opportunities representative in individual cases. Cases have to be handled anonymously, due to art. 18 para. 4 Bay GLG.

2.6.4 Representation of severely disabled employees

The representation of severely disabled employees represents the matters and interests of severely disabled employees within a company. Complaint handling due to discrimination, is not their original task. Discrimination due to other discrimination criteria cannot be taken over.

According to § 177 para. 1 sent. 1 SGB IX, a representative, as well as a deputy, must be elected in companies or administrations with at least five severely disabled employees. For the implementation of a representative of severely disabled employees in small companies, employers are given the opportunity to combine multiple company branches with spatial proximity, due to § 177 para. 1 sent. 4 SGB IX. In case of the legal obligation for the employment of severely disabled people, pursuant to § 154 para. 1 sent. 1 SGB IX, a representative must be elected at a company sized 100 or more employees. Severely disabled people with a degree of disability beyond 50 % are entitled to vote.

In accordance with § 178 SGB IX, the tasks of the representative of severely disabled employees include the receiving and handling of complaints. This concludes, in particular complaints about the accessibility of the workplace that means existing structural – as well as communication barriers, which affect the health of severely disabled people or impede their work organisation. § 164 para. 2 SGB IX explicitly stipulates the ground of appeal, based on a discrimination due to a disability by the employer.

If the representative of severely disabled employees considers the complaint as unsubstantiated, this decision has to be justified to the person affected. If the complaint is justified, the employer is obliged to take appropriate measures to redress the ground of appeal in the company.

⁶⁶ According to § 16 para. 2 LGG Berlin, the women's representative is simultaneously the women's representation at universities due to § 59 Berlin Higher Education Law.

Although the employer is required to cooperate, a detailed clarification of how this shall be done is not stated in § 182 para. 1 SGB IX. During the complaints procedure, the person affected must be informed about the status of the case and the results of the negotiations. If there is a delay in negotiating, an appropriate interim announcement can be made⁶⁷.

Unlike the complaints procedure of the worker's or staff council, the employer does not have to provide all necessary files / documents to the representative of severely disabled employees on their own initiative⁶⁸. However, the person with several disabilities can consult the representative of severely disabled employees for the inspection of their personal file or information, according to § 178 para. 3 SGB IX. It must maintain confidentiality about the content of the data, insofar as, the person affected does not release them from this obligation. A general duty of confidentiality does not exist.

2.6.5 Diversity representative at universities

Universities indirectly adhered to diversity through legal requirements on equality and integration (by AGG, Art. 3 GG, SGB participation, State Laws on Universities/higher education), however a direct requirement does not exist. Some state laws on universities/higher education do oblige universities directly or indirectly to design for diversity, which is an adjacent component of non-discrimination, but pursues a different focus.

For example, the state law on universities/higher education of Northrhine Westphalia (HG NRW) requires, in § 3 para. 4, universities to promote equality between women and men, to address disadvantages for women and to take into account the diversity of their members (diversity management) and to meet the legitimate interests of their staff in good employment conditions.

The state law on universities/higher education of Hamburg (HG HH) provides in § 3 para. 4, that universities shall ensure non-discriminatory studies as well as non-discriminatory professional or scientific activities for their students and staff. They should, as far as possible, aim to reduce existing discriminations. The universities develop concepts for the constructive handling of diversity (Diversity Management).

The Thuringian state law on universities/higher education has sets itself the task of working towards preventing or eliminating discrimination at the university on the grounds of ethnicity, gender, religion or belief, disability, age, gender identity or sexual orientation, due to § 5 para. 8 HG TH. § 7 HG TH intends a diversity representative with the right of participation at senate meetings, the university council, university assemblies etc. In consultation with the equal opportunities' representative, the representative for severely disabled people and the inclusion representative, they advocate for the members of the university, consult them and pursues the elimination of existing disadvantages and interests.

⁶⁷ see: *Pahlen*, in: Neumann/Pahlen/Greiner/Winkler/Jabben, SGB IX, § 178 Rn. 7.

⁶⁸ Compare: Information requirement for the worker's council in § 80 para. 2 BetrVG, for the staff council in § 68 para. 2 BPersVG, whereby the agreement of the employee is needed for an inspection of a personal file.

It is noticeable, that universities increasingly provide diversity concept as, for example, it is the case at the RWTH Aachen University⁶⁹ and the Johann Wolfgang Goethe University Frankfurt⁷⁰. However, those provide just a limited complaints procedure.

In 2018, the Hessian Ministry of Culture, in cooperation with the Hessian universities, drew up a model decree for a complaints directive⁷¹. On the basis of this decree, all universities in Hessen have, as of now, made arrangements for the implementation of a complaint's procedure, taking into account their own university's specific circumstances. However, these only cover to a limited extend, the complaints mechanism of the internal complaints body.

3. Current Status of internal complaints bodies

The following chapter tries to make an assessment of the current status, though they are not based on empiric research. A comprehensive scientific review of the current status regarding internal complaints bodies, could not be provided in the context of this project and has not yet (as of summer 2020) been carried out by other bodies. Nevertheless, it seems more than useful to carry out such a comprehensive analysis in the future (with a special focus on private companies), since there is no systematic and well-founded knowledge to what extend the internal complaint bodies, required in § 13 AGG, are implemented.

Carried out as part of this project online research for internal complaints bodies in administrations and companies (on federal, state and municipal levels), a considerable number were identified. However, it was not possible to connect with all company bodies contacted because written contacts or messages left on the available answering machine have not been answered. Contacting internal complaints bodies of administrations has been considerably easier.

The group discussions and individual interviews conducted for the development of this proposal made very clear that the existing internal complaints bodies of the participating administrations have a variety of characteristics, in terms of their structure, mandate and area of responsibility. In addition, the size of the respective department influences the size, or rather, the use of the internal complaints body.

As mentioned before, in a lot of administrations (and perhaps in companies) there are already other referral structures, which are legally required. The establishment of a further contact point (AGG complaints body), which is only unspecific, is therefore only conditionally pushed forward within companies or administrations.

The proposals for the realisation of an internal complaints body, named in chapter 6, have to meet the existing diversity of requirements, potentials and possibilities to obtain a benefit in the concrete practice.

⁶⁹ https://www.rwth-aachen.de/global/show_document.asp?id=aaaaaaaaagnjkk.

⁷⁰ <https://www.uni-frankfurt.de/80757763/Antidiskriminierungsrichtlinie.pdf>.

⁷¹ The decree as the resource is not publicly accessible.

3.1 Internal complaints bodies in the administration

As part of the preparation of focus groups in December 2018, around 40 internal complaints bodies were identified countrywide, which were invited to participate in the focus groups. Of these, only three bodies were located in a company. Those were partly state-owned companies. All others were located in administration, universities or civil society structures. This leads to the conclusion – without being able to make a well-founded quantitative statement, that administrations are more likely to establish internal complaints bodies. However, due to the lack of evaluation, it is not possible to make a statement about their purpose fullness. It has to be questioned, to what extent accessibility, staff and expertise are sufficiently available.

3.2 Internal complaints bodies in private companies

The research of internal complaints bodies in private companies, as part of the preparation of the above mentioned focus groups, tended to be difficult. Although a small number of such bodies in companies have been identified via online research, it was not always possible to connect directly with them. Messages left on answering machines or telephone requests were not answered even after multiple inquiries.

Since it was not possible to carry out a quantitative analysis during the development of the proposal, it is suggested at this point to commission such a comprehensive study at a suitable location in order to make clear to what extent the implementation of the internal complaints bodies is carried out in companies and in the administration. Such a study would generate valuable information for companies, unions and worker's councils as to whether the AGG has been sufficiently implemented or, if necessary, has to be improved.

4. Purpose of the concept

The following proposals for the establishment of an internal complaints body pursuant to §§ 12, 13 AGG must be seen as components of a modular system. Depending on the location (company or administration), the size of the workplace (small, medium, large, multinational), existence of a worker's or staff council and company agreements related to discrimination or without, very different options for the arrangement for an internal complaints body are possible and necessary.

The concept does not recommend rigid requirements for the internal complaints body but aims to show possibilities and suggestions that should be considered depending on the internal constellation. The aim here must be that the result of the complaints body is to prevent discrimination or, where discriminatory behaviour has occurred, to process and clarify this in a timely manner and to the satisfaction of the parties involved.

Since § 13 AGG only provides rough guidelines, the concept also has the function of reflecting all relevant aspects of the arrangement for the internal complaints body and making concrete suggestions as to how this can be done in practice. Assessments and feedback from the above-mentioned focus groups and individual interviews were extremely relevant in this aspect, as they evaluate concrete practice and make this experience available for future developments.

The following proposals are intended to be recommendations for operational and administrative practice and are aimed to improve the development of existing internal complaints bodies and, where they do not exist, at the appropriate establishment of such bodies. Companies and administrations may have a different starting points, but both represent a target group of this proposal.

5. General standards for the internal complaints body

5.1 Information about the internal complaints body

§ 12 para. 5 AGG already point out that (...) “Information on the bodies responsible for dealing with complaints pursuant to § 13 AGG must be made public in the company or administration. “The announcement can be made by notice or publication at an appropriate place or by information and communication technics, usually used within the company or administration“.

Consideration should also be given to the possibility of including information on the role, location and office hours of the internal complaints body in welcome documents or as an annex to the employment contract when new employees start working. The information should be made available in several languages, depending on the company. Since, ideally, the internal complaints body only needs to take action in rare cases, their visibility is probably limited. Therefore, information about discriminatory behaviour, the AGG and the internal complaints body should be given or made accessible proactively to all employees in larger companies or administrations in regular intervals (potentially once a year). This could take place by posters, information flyers, a circular or by using the intranet, where information is accessible at any time.

Furthermore, reasonable information should be likewise provided about other existing complaints bodies and contact points in the company or administration and their individual tasks and responsibilities (see explanations in chapter 2.6). This would facilitate direct access to the appropriate body for employees (with experience of discrimination).

The proposals given here, strengthen the presence of the complaints body and subsequently allow a low-threshold access to and an increased use of the body.

5.2 Access to the internal complaints body

The internal complaints body is as affective as its accessibility to employees. This means that the body should be accessible time-wise, location-wise as well as in a continuous manner.

As part of the preparation of the already mentioned focus groups, making contact with the bodies failed in several cases due to the fact that messages left on the answering machines of the internal complaints bodies were not answered. Emails sent to the internal complaints bodies, which were given as contact details on websites of companies and administrations, were not responded to, even after a few weeks and several attempts of making contact.

If this also occurs for internal complaints bodies in the case of specific inquiries, those affected by discrimination are discouraged from seeking support from the internal complaints body. This should be avoided at all costs.

5.2.1 Accessibility and equipment

With regard to the accessibility, a barrier-free accessibility of the internal complaints body must be taken into account. Ideally, the body has rooms accessible for people with a physical disability. Communicating with the complaints body should equally be possible for people with decreased vision or hearing. Also, it should be possible to consult interpreters in case of non-German or sign language speaking employees.

With regard to the office hours of the complaints body, people in shift-work, but also part-time employees, should have access to the complaints body during their work time. As it seems unrealistic to have the complaints body constantly in service, technical opportunities should be used. Answering machines, a specific email address etc. could enable making contact. However, this only applies if these methods of communication will lead to a prompt response. Therefore, it is indispensable to grant the complaints body sufficient time resources for their work. Furthermore, necessary precautions should always be taken in case of sickness, holiday or any other absence of the complaints body.

Furthermore, confidentiality must be ensured as a significant prerequisite for making contact with the complaints body by the affected people. In considering these proposals, an adjustment of the equipment may be required. In regard to the setup of the location, discretion should be granted, so that, if possible, the complaints body is settled in an individual office, which, depending on its location, provides sufficient privacy. Due to the sensitive topic and data, the office should be equipped with locking facilities, as well as its own technical devices, such as printer, fax, telephone and shredders.

5.2.2 Acceptance and trust by employees

Another central aspect of the adequate accessibility to the internal complaints body is the acceptance by employees. If this is not given, no complaints will be received, even if it would be urgently required in the specific company or administration. Employers should take this into account when appointing the body. Connecting the complaints body with Human Resources is not to be rejected in general. However, if discrimination (e.g. in filling vacancies or promotion) comes from Human Resources (even if those are just executed by instructions of management) it is not expedient to settle the complaints body within Human Resources. The barrier to lodge a complaint there, should therefore, be weighed out well. It could be considered to delegate this task to a person trusted by the employees.

An interviewee, who herself was leading an internal complaints body, saw the relation of trust between the employees and the person leading the body, as obligatory. Regarding the recommended competences of the complaints body, it will be referred to in chapter 5.4 below.

5.3 Cooperation with other representatives or representative structures

Depending on the company or administration, representatives for severely disabled employees, young employees, trainees, equal opportunities (only in administration) and a worker's or staff

council exist in the workplace. Those individually hold specific mandates, as described in chapter 2.6. The responsibilities of these bodies cannot sharply be separated from the mandate of the internal complaints body. The equal opportunities representative can receive and examine cases of discrimination against women and men, or cases of sexual harassment. Likewise, the representative for severely disabled employees can deal with cases of discrimination against severely disabled people and work towards remedy. Also, the worker's and staff council are often a contact point in cases of discrimination, as on the one hand, both are equipped with the necessary mandate and on the other hand often have a high level of trust by the employees.

With the complexity of existing contact points, it may be different for people affected, to identify the right and responsible body. A transparent communication between the different representatives/bodies is necessary. Therefore, as already mentioned in chapter 5, sufficient information given to the employees and a transparent access to the complaints body, would be effective, as well as the regulation⁷² of a complaints procedure, in which amongst others, the responsibility of the body, as well as the relation to possible other contact and consulting points is explained.

A possible non-acceptance of a complaint due to discrepancies relating to differing responsibilities or mandates should be prevented. It needs to be considered that the possibilities of appeal, pursuant to § 13 AGG and the Worker's Constitution Act, are not identical, but rather stand cumulatively side by side. § 13 AGG also opens up the possibility of appeal against third parties (e.g., customers or suppliers) and, besides that, allows management personnel to file a complaint. The last ones are excluded from the complaints procedure of the BetrVG. Beyond the categories of discrimination of the industrial constitution law has a wider range than the ones named under § 1 AGG.

Similarly, the differing mandates could impede processing concrete cases of discrimination. A lack of regulations on the responsibilities, may lead to double mandating, which then may lead to a conflict of interest and, in the worst case, to opposing solutions. Problems, relating to the variety of complaints institutions, arise in particular, in the context of the exercise of the mandate with regard to the level of anonymity and confidentiality (see chapter 6.3.5).

In light of the necessary competences of an internal complaints body, which will be explained in detail in the following chapter, it could be considered that the different complaints bodies, depending on the status of the complaints procedure, do exchange views and bring in their expertise in the assessment of the case.

For example, a state-owned company has implemented an internal complaints body, which is coordinated by a legally trained person, who is appointed to serve as diversity representative. Cooperation with the representative of severely disabled employees, the equal opportunities representative and the staff council have been institutionalized in a commission. This appeals commission meets up several times each year or, if required, in concrete cases and incorporated the expertise and perspectives of the other representatives. In addition, the Human Resources Department is also included. In an interview, the coordinator of this commission stated that, she

⁷² An internal regulation of the working methods of internal complaints bodies, which is generally agreed on, which also describes the cooperation with other internal bodies

insisted that the general staff council, the general women's representation, the general representation of severely disabled employees and also the general JAV should participate.

Depending on the size and structure of the workplace, this model is highly recommended. This approach, however, would be disproportional in small private companies.

In any case, it seems reasonable to work towards a constructive and transparent cooperation from the employers', as well as the representatives' perspective.

5.4 Necessary competences

5.4.1 Knowledge of the AGG

Regardless of whether the internal complaints body is managed by a person or a commission, it is indispensable that there is a sound knowledge of legal protection against discrimination and the General Equal Treatment Act.

An interview partner who manages an internal complaints body estimated that there was no need for a special qualification. From her point of view, legal training is a very good basis to be able to manage an internal complaints body. However, social pedagogical or psychological training would also be very helpful if the legal tools would additionally be acquired. Even person with administrative training, who is trained in leading communication could, according to her assessment, perform such a task well.

It does not appear to be absolutely necessary to designate a person with legal knowledge for the position of the internal complaints body. It is sufficient to train the authorised person with regard to discrimination and legal protection against discrimination, in order to be able to adequately fulfil the role of the internal complaints body. For people who do not have a legal qualification, it should be considered that annual training on the skills needed in the position be provided, which will lead to a gradual accumulation of skills. Such training is available from a wide range of providers. In addition to the relevant educational institutions, these are also the anti-discrimination counselling centres, which offer such specific high-quality training programs.

Possibilities for exchange with other internal complaints bodies or anti-discrimination counselling centres appear to be extremely helpful. Employers' and employees' associations could consider supporting an exchange of internal complaints bodies and providing the appropriate conditions.

5.4.2 Consulting competences

Next to an adequate understanding of the legal framework, it is highly appropriate, to entrust a person with counselling skills with the internal complaints body. Again, if the person selected does not have the necessary competence, the possibility of specific training should be provided. A high level of competence in consulting and support strengthens the willingness of employees to perceive the internal complaints office as a trustworthy contact point and make use of it, in cases of discrimination.

One interviewee considered a high level of communication skills, both written and spoken, as a central competence of the complaints body that had to be accompanied by personal acceptance of the staff.

5.4.3 Mediation competences

As a third component, it is suggested that competences on mediation, conciliation and conflict management be considered. Since cases of discrimination may arise from personal conflicts, it is essential that people in internal complaints bodies possess such skills.

One interviewee said that her mediation training is very helpful in her role on an internal complaints body and that she would take further training if necessary.

5.4.4 Evaluation

In addition to the above-mentioned training, as means of quality assurance, regular practical reflection offers an opportunity for professionalization of the complaints body. By means of evaluation of the complaints procedure, consulting methods and strategic planning can be further developed and optimized, so that the findings and impulses found can offer a solution-oriented procedure in similar occurring situations.

6. Conceptual suggestions

The following discussion is a step-by-step approach of relevant aspects to the establishment and implementation of the internal complaints body and concrete proposals on how to design the complaints body expediently are offered.

6.1 Internal/institutional environment

Firstly, we should look at the possibilities offered by the company and/or the administration to create a non-discriminatory environment in the company. This environment is a major factor in promoting discrimination or a non-discriminatory work atmosphere.

If sexist jokes are told by an executive at a work party, it may be seen as a signal that sexist language, or even action, is appropriate. The same applies if colleagues make racist remarks and this is tolerated uncoment by the supervisor.

A tool that has been in use for several years to define standards within workplaces, are works and/or service agreements⁷³. For individual workplaces/companies or administrations, these are usually negotiated and passed by management or the employer and the worker's or staff council. Those can define, inter alia, regulations about the work time, working time accounts, breaks, holidays, work environment or requirements related to socially acceptable behaviour of employees. Therefore, requirements for non-discriminatory behaviour can be an integral part of such work agreement⁷⁴.

⁷³ To this, the Hans Böckler Foundation created an archive of works and service agreements. See: https://www.boeckler.de/index_betriebsvereinbarung.htm

⁷⁴ Therefore, the Hans Böckler Foundation published a compilation of agreements with the title: 'Diskriminierungsfreie Betriebs- und Dienstvereinbarungen zum Thema Chancengleichheit und Gleichstellung'

In fact, participants in the focus groups from some workplaces reported that a comprehensive works agreement forms the basis for a solid establishment of the internal complaints body⁷⁵. In some cases, it is also stipulated that this body should not only react to concrete cases of discrimination, but should also be proactive in preventing discriminatory behaviour and exclusionary procedures and structures.

Relating to the given service agreement of the state-owned company, one interviewee mentioned: ‘We gave ourselves a foundation as we at least envisioned how we deal with each other and what we do/do not tolerate‘.

The works agreement was considered as extremely helpful. For example, one interview partner stated that she thinks an AGG complaints body in which employers and employees’ representatives work together is useful, since, even in the case of major conflicts, constructive cooperation is always possible, as there is a common basis (in this case a works agreement, note by author).

Therefore, it seems recommendable to use a works agreement which can be proposed and contextually influenced by the worker's council, to underpin and strengthen the internal complaints body. It would make sense to supplement the training of worker's councils in such a way that it also includes the initiation and negotiation of works agreements and, as well, pay special attention to the design of the internal complaints body.

Furthermore, a framework for the desired behaviour (e.g., respectful, solidary) of non-discriminatory employees and management can be outlined through a works agreement. This provides an additional basis to sanction discriminatory behaviour appropriately.

6.2 Scope of application of the internal complaints body

§ 13 AGG defines the scope of application for the internal complaints body relating to discrimination on grounds of the six reasons for discrimination⁷⁶, as cited in the AGG was already discussed in chapter 2.3. Furthermore, § 13 AGG regulates that the employers bear responsibility for the internal complaints body and that such an institution should be established in companies, as well as administrations.

§ 6 AGG defines the personal scope of application for the ban on discrimination and § 24 AGG expands this to public employment relationships. Therefore, § 6 para. AGG defines employees as natural and legal people, as well as legally responsible, unincorporated firms, which employ people. Where employees are transferred to perform works and services, the provider of the temporary work remains the employer, whereas the borrowing employer will be the ‘third party’ pursuant to § 6 AGG. Likewise, people that ordered the work or service are employers in accordance with the AGG, where applicable.

by Andrea Jochmann-Döll and KarinTondorf. See:

https://www.boeckler.de/pdf/mbf_bvd_hintergrund_chancengleichheit.pdf

⁷⁵ A works agreement specifically focussed on non-discrimination can be find for the University of Aachen:

https://www.rwth-aachen.de/global/show_document.asp?id=aaaaaaaaaagnjx

⁷⁶ It would be also desirable to uptake further grounds of discrimination, as for example, the social background. However, this cannot be demanded yet and would have to take place on a voluntary basis.

'Employees', pursuant to § 6 para. 1 AGG, are people in dependent employment (salaried employees, workers), trainees, people in quasi-employment relationships and home-workers. Due to the wording 'Berufsbildung' (Vocational training), this not only refers to the training relationship 'trainee' relating to the BBiG (Federal Training Law), but also re-trainees, volunteers, interns, etc. is taken into account....⁷⁷ Quasi-employment relationships relate to people who are not employees (according to the definition of the Federal Labour Law), but are comparably in need of social protection, due to their economic dependence through work and service contracts⁷⁸. Self-employed people and board member are only covered by the scope of the AGG in the access to employment and career advancement, according to § 6 para. 3 AGG.

In general, according to § 6 para. 1, sent. 2 AGG, the internal complaints body is open to former employees, as well as people who have applied for positions in the companies/administration and felt discriminated against⁷⁹. Whether this possibility of appeal is used, particularly by the latter target group sufficiently, and/or whether adequate access for applicants to the internal complaints body exists, has not yet been assessed.

According to the legal wording 'feels', (discriminated) (§ 13 para. 1 AGG) the subjective feeling of a person affected is decisive for contacting the internal complaints body. An objective examination does not have to be taken beforehand. The responsible complaints body is, therefore, not allowed to refuse an investigation on the grounds that no discrimination is given.

6.3 Powers

The following chapter outlines the guidelines of § 13 AGG and complements this with further detailed aspects, which must be taken into account in the development and establishment of the complaints body. The following introduction describe the possible and targeted powers of an internal complaints body.

6.3.1 Establishing the powers in an internal regulation

It seems very reasonable to define the powers of the internal complaints body and to fix the individual procedures in an internal regulation. This secures procedural and legal certainty for all parties involved in the complaints procedure.

As already mentioned several times, the circumstances in companies and administrations are diverse and the needs are hardly comparable. Therefore, it seems reasonable to define what appears to be necessary for the respective company or administration when the complaints body has to take responsibility and how the internal complaints body should operate, and on what powers this is based. This can be initiated by the responsible person in the complaints body, but should be coordinated with the employer, as they are responsible for setting up the body and taking action against discrimination. The right of codetermination of the worker's council, already described in chapter 2.6.1, must be taken into account when designing the procedure of the complaints body.

⁷⁷ see: *Ernst/Braunroth/Wascher*, in *Allgemeines Gleichbehandlungsgesetz*, § 6 AGG Rn. 4; Thüsing, in: *Münchener Kommentar zum BGB*, § 6 AGG Rn. 7

⁷⁸ see: *Schlachter*, in: *Erfurter Kommentar zum Arbeitsrecht*, § 13 AGG Rn. 3.

⁷⁹ see: *Buschmann*, in: *Allgemeines Gleichbehandlungsgesetz*, Däubler/Bertzach, § 13 AGG Rn. 13.

Ideally, these internal regulations also contain concrete references to the structure, scope of application and competence. In this context, it is useful to establish definitions for the scope of application. It is also recommended, an explanation of the counselling approach and the procedure and complaint be provided, as well as sanctions that may result from a discrimination. One focus should also be paid to the accessibility of the regulations for employees.

Accordingly, the internal regulation could include the following points, whereby modifications due to the size and structure of a company or workplace should also be made:

- Preamble
- Guiding principles
- Scope of application (objective/personal)
- Definitions
- Competence
- Responsibilities of the contact person
- Right of appeal and prohibition of repression
- Handling of confidentiality
- Counselling and complaints at the complaints body
- Complaints procedure
- Communication channels and timing of the complaint handling
- Measures and sanctions in case of a breach of the ban of discrimination
- Preventive measures
- Final provisions (entry into force/changes)

6.3.2 Receiving a complaint

The core responsibility of the body is receiving complaints of people who had the impressions of being exposed to discrimination.

6.3.3 Analysing a complaint

It is then up to the body to analyse the complaint. In cases where there is also an equal opportunities representative or a representative of severely disabled employees and a double mandate could likely occur, it should be agreed internally who takes care of the specific incident in order to ensure that no conflicting results are produced.

It does not necessarily have to be assumed, that any complaints will be handled or assessed in the established internal complaints body pursuant to § 13 AGG. This could be the case, for example, if the person affected only wants to report an incident to the body but does not want it to be followed up. In the first consultation, it should be considered whether, according to the notification of the incident, the analysis and implementation of possible new strategies for the parties affected is already sufficient or a formal complaints procedure should be opened.

6.3.4 Counselling concerning legal options of the person affected

Low-threshold counselling is often a first step towards recognizing discrimination and considering options for action. The course of the complaints procedure should be explained here, since all procedural steps should always be carried out in consultation with the person affected throughout the whole complaints procedure.

With regards to the individual right of appeal in § 84 BetrVG discussed in chapter 2.6.1, the opportunity to involve a member of the worker's council or other internal representatives in the complaints procedure should be granted.

In the context of the focus groups and interviews it became clear that there are very different forms of counselling in the internal complaints body. Some bodies offer a legal, 'partial' consultation. Other bodies see this as stepping beyond their mandate and/or a conflict of interest. In the event of complaints in which the employer is the cause of discrimination, legal consultation may lead to the clarification of the legal rights of the person affected and, if necessary, supporting legal action. Against the background of providing non-discrimination, this should be seen as rather unproblematic, but may lead to a conflict of interests in the operational reality. Especially in those cases, it is essential to have a clear definition of the powers, which clearly indicate how counselling action can be taken in the internal bodies.

6.3.5 Anonymity and confidentiality

Acting upon the following three constellations of a complaint should be considered.

- i. A personal complaint in which the affected person is known by name.
- ii. A complaint lodged by the person affected, who asks for anonymous handling⁸⁰.
- iii. A complaint lodged by a person who themselves is not affected by discrimination, but who wishes to remedy an existing form of discrimination.

Beyond the specification of § 13 AGG, the internal complaints body should be granted comprehensive authority to accept and deal with all the constellations mentioned here. All three forms require specific handling, which should be reflected in the tasks of the body.

It is also necessary to clarify, in which case constellations anonymous processing is not possible. In the case of reported sexual harassment, for example, it would be necessary to indicate the location, time and person affected, in order to clarify the facts. When suspecting a systematic inequality of remuneration, the disclosure of the complainant would not be necessary.

With regard to the complaints bodies and their mandate, as has been already presented in chapter 2.6, there is a discrepancy regarding the confidentiality with the powers of the already established complaint bodies on other legal grounds. Only the equal opportunities representative has a comprehensive right to silence, but only in cases of sexual harassment. The worker's and staff council, as well as the representative of severely disabled employees, only have partial statutory obligation of confidentiality.

Another problem is to ensure confidentiality on the one hand and the legal obligation of § 12 AGG, where on the other, the employer is required to follow up on complaints.

The AGG does not make any statements about the extent of confidentiality of the internal complaints body, so that only a principal recommendation of the procedure is given in order to resolve the shown discrepancies in everyday practice. The top priority for an effective and successful complaints body is the trust of the employees in the complaints mechanism.

⁸⁰ Especially in the case of a confidential handling of a complaint, it must be considered, that this may limit the consistent processing of a complaint when the complainant cannot be named

Therefore, it is necessary that the complainant is informed about the procedure and options for action and, at any point in time, can decide about every other step of the complaints procedure. The confidentiality clause should also include the results of the examination itself. This leads to the consequence that the documentation of the complaints should be kept separate from the personnel file and that passing on such information requires the consent of the person affected.

Ultimately, it should be left to the person affected to determine whether, and to what extent, the complaints procedure will be formally followed and whether, the duty of assessing the case, pursuant to § 12 AGG, applies when the employer is aware of the discrimination.

However, consideration should be given, for example, to disregarding the obligation of confidentiality in the cases of complaints that give justified suspicion of a criminal offence.

6.3.6 Access to records

The clarification of the mandate should ensure that the body is given the possibility to adequately investigate and verify facts and incidents. The complaints body should be able to exercise its powers at its discretion and in light of the principle of proportionality. If the body is not granted this mandate, its effort to handle a discrimination expediently, will not be reached. In certain case constellations in which documents or data can prove or invalidate discrimination, the body should be given the opportunity to inspect and verify files or payrolls. Regarding the right of investigation and examination, it should also be possible for the body to access e-mails for the purpose of securing evidence and to protect them from loss. In any case, this must be done within the framework of the applicable data protection regulations.

6.3.7 Interviewing people involved in the incident and witnesses

In the case of complaints against individuals, it seems essential to be able to ask them to have an informative dialogue during working hours. This possibility should not be limited only to the complainant and the person accessed but should also include possible witnesses who have witnessed or observed the discriminatory act.

Furthermore, the right to interview should be extended to third parties (customers, etc.), as long as it serves to clarify the facts. If multiple discussions for clarifying and/or processing the facts are needed, those should not be limited, as long as the relevance of the interviews are reasonable.

6.3.8 Proposing solutions for the case

In practice, there can be extremely complex cases of discrimination (from a thoughtless and unintentional, but still discriminatory statement, up to an intentional discriminatory incident).

Therefore, it is not possible to give an exhaustive description of solutions that would be appropriate for the respective case situation. It is necessary to clarify that it should be a mandatory part of the body's mandate to not only receive a complaint and forward it to management or Human Resources, but also to actively search for solutions and propose concrete measures that each of the relevant protagonists can implement within the scope of their powers.

In order to use the example of a thoughtless statement, the body should have the power to propose to the person causing the discrimination, to apologise. Only if this does not take place, or if there is a more serious form of discrimination, the body should contact the HR department with concrete proposals and, if necessary, initiate legal action through them. This would lead to a high level of consistency in the anti-discrimination practice of the company or workplace. Expertise regarding the decisive handling of discrimination, would be pooled and integrated into internal processes. However, if the body would not hold the power of proposing solutions, they could be made from various protagonists in a non-coordinated way and, as a consequence, lead to inconsistency.

6.3.9 Right of proposal for measures or sanctions

A stronger level of intervention would provide the power to impose specific measures and sanctions. In contrast to what was just said in chapter 6.3.8, this power would include proposing specific measures, for example training of employees, in order to have them be carried out by the Human Resources Department. If the body is constituted in the form of a commission and the employer is represented by the Human Resources Department in that commission, it is conceivable that the decision on sanctions (e.g. dismissal) could already be taken in the commission. However, this would require certain framework conditions.

If this power is granted, this would be particularly meaningful at the level of preventive measures – as set out in § 12 para. 1 AGG – as they could be done in a timely manner and would not be initiated or implemented internally (company-wise or administrative-wise) in different departments.

6.3.10 Execution of measures or sanctions

Due to the timely implementation of the complaint, the relationship of trust established in the complaints procedure, and the already mentioned necessary competences of the body, a power to mediate between the parties would be worth considering.

The AGG clearly formulates in § 12 para. 3 AGG that, it is the employer's mandate to take measures in cases of discrimination, where this is appropriate, necessary and reasonable in the specific case. Therefore, it is not the internal complaints body who acts for all legally relevant sanctions (such as warning, job transfer, relocation or dismissal), but only the employer or the people representing the employer.

6.3.11 Execution of measures in cases of discrimination without an individual perpetrator

The previous statements can only be used in cases of discrimination where there is a specific person who is responsible for causing discrimination. If this is not possible or if there is indirect discrimination⁸¹, the internal complaints body should still be capable of acting.

If no perpetrator of a racist smearing can be identified, the internal complaints body should, nonetheless, be able to take prompt action to remove the smearing, unless the employer does

⁸¹ An indirect discrimination occurs, when neutral regulations themselves have exclusionary effects on groups of people protected by the AGG. In most cases, there is no intention and it is usually not possible to identify people that caused the discrimination.

so. If sexist pictures were hung up on company walls, the material could also be removed, without the knowledge of who put them up.

Therefore, the internal complaints body should have the power to also take measures in cases of discrimination without a perpetrator.

6.3.12 Monitoring the implementation

Where the internal complaints body has a right to propose sanctions, this right should be extended to the monitoring of the implementation. In a positive sense, this is an assurance that cases are documented, investigated and processed and, where necessary, sanctioned in an appropriate and timely manner, in order to send a signal in companies and administrations that discrimination is not accepted, and that consequences arise from such actions.

6.3.13 Taking measures reactively and proactively

In the context of the designation of the possible powers of the internal complaints body, two areas of work should be identified. On the one hand, as mentioned above, these are reactive measures, when concrete cases of discrimination are presented to the body. These have already been described sufficiently.

In the following, the possibility of taking proactive measures to prevent discrimination in the company and office, shall be discussed.

Since discrimination does not always originate from an individual person, but - as mentioned - can also be the result of procedures, regulations or measures, such forms of discrimination within the company remain completely unprocessed if the internal complaints body can only respond to individual complaints from affected people. Therefore, it would be highly recommended that proactive handling of direct and indirect discrimination of the internal complaints body be enabled.

One participant of the focus groups stated: "However, the actual focus of this complaints commission is the prevention, which also means the developing of measures and training opportunities and similar action, to not even get into the situation to consult a complainant at the body."

6.4 Tasks of the internal complaints body

The following suggestions outline the requirements of § 13 AGG and supplement them with further details regarding the task assignment, which must be considered in the concrete development and design of the complaints body. This sometimes appears to be a duplication of the powers already mentioned above. However, what a body does and, what it is allowed to do on its legal basis, the works or service agreement, is not necessarily identical. The mandate or power provides the right to take action. The powers will not always be reflected in the activities. Therefore, the activities are presented separately from the powers.

Furthermore, it will be listed which other tasks appear to be useful and are directly or indirectly related to the tasks specified by the AGG. An extension to the tasks presented here, would strengthen the work of the body and, in the long term, have a positive impact on non-discrimination in the company and/or administration.

6.4.1 Information about the complaints procedure

The complaints body should consider the rights of the affected person in order to create a comprehensible and accessible explanation of discrimination, as well as information about the body, like their contact details and office hours. If necessary, the information should be provided in several languages, in easy language and in barrier-free formats. This would promote a transparent procedure and provide insight to the employees as to what is to be expected when lodging a complaint.

This information goes beyond the requirements in § 12 para. 5 AGG and should not only point out the existence of the AGG internal complaints body and where it can be found but should also state step by step how a procedure is handled.

To create appropriate transparency for the complaints mechanism, it is recommended that the procedure of a complaint by the internal complaints body be outlined and publicised. In the event of a personal complaint, what steps are to be taken should be presented. As shown in chapter 6.3.5, the people affected should be informed about the requirements of an eventual anonymous handling of their complaint. Therefore, people affected by discrimination have the possibility of access if lodging a complaint is an appropriate and desired mechanism for them, before handing in a complaint in the company or workplace.

6.4.2 Receiving a complaint

Even if § 13 AGG does not state explicitly that receiving a complaint is part of the body's tasks, this is an integral part, as otherwise, no investigation of the case could take place. Nevertheless, receiving a complaint shall be re-examined here since the framework and the form in which a complaint is received may be decisive on whether the affected person develops trust in the role and the ability of the body. This indispensably includes the presentation of the complaints procedure and the process by which the complainant should be prepared. The lodging and assertion of discrimination is not subject to any form or time limit, but perhaps determined through a collective agreement and/or works or service agreements. It is important to note the so-called imperative nature ("Unabdingbarkeit"), pursuant to § 31 AGG, which states that no deviation from the requirements of the AGG⁸² can be made to the detriment of the person protected.

Adverse conditions, such as leaving unanswered messages on the answering machine of the complaints body, inaccessibility, the discriminatory or prejudicial behaviour of the body's contact person or indicating to the affected person that the stated facts are not taken seriously, should be avoided by all means. Absolute care must be taken to avoid everything that will cause the affected person to avoid contacting the internal complaints body or withdrawing the case before clarification has been brought forward.

6.4.3 Examining the situation

The AGG states that the presented facts must be examined. The person affected will usually be asked to explain the facts. Where people have witnessed the situation, they should be asked to describe the situation. Furthermore, the accused person will normally have to be heard, in order to present the facts from both sides. Therefore, separate questioning should be carried out,

⁸² see: *Lindemann*, in: *Kommentar AGG*, Hey/Forst, § 13 AGG Rn. 8.

particularly in cases of sexual harassment, as a confrontation would not be an appropriate method. Furthermore, it should, perhaps, be examined whether people accused have already been noticed due to similar acts, and whether potentially sanctions have already been imposed.

Therefore, clear internal procedures should be defined in which time frame a complaint will be examined, witnesses and/or suspects and a decision be made regarding possible sanctions.

Since discrimination does not always originate from individual people (or groups), but may also be of a structural or systematic nature, the described approach in the AGG will only allow a limited investigation in cases of systematic discrimination. In this case, the analysis of internal processes, procedures or regulations may have to be examined for discriminatory effect. Unequal payment can be cited here as a form of systematic discrimination. An affected person can perhaps contact the complaints body, but the investigation of the case must follow different routes than in cases of individual exclusion.

6.4.4 Assessing the facts

§ 13 AGG does not specifically refer to the assessment of a complaint. However, it is recommended that the examination of a case be separated from its assessment. The examination requires clarification of the facts and clarifies whether the complaint constitutes discrimination within the meaning of the law or whether it is another type of complaint.

The assessment however, has to look for appropriate measures (which does not necessarily mean disciplinary actions) and, ideally, identify them in order to clarify and/or process the situation.

6.4.5 Presenting the results of the examination

It is then the responsibility of the internal complaints body, or the employer, in cases with disciplinary consequences, to inform the complainant about the results⁸³. Although the law does not provide for an obligation to state reasons⁸⁴, this however, is recommended due to the purpose of documentation, to prevent unnecessary lawsuits for the parties involved or for the benefit of the employer, as a means of encountering subsequent claims⁸⁵. For such situations, communication skills are required. As it is uncertain whether the employer will take the desired or demanded measure requested by the complainant in every case, the assessment of the facts should be communicated appropriately.

6.4.6 Measures to end discriminatory situations

§ 12 para. 3 AGG sets out a number of options which measures can be taken by the internal complaints body and/or the employer. These are ,in individual cases suitable, necessary and appropriate measures in order to prevent discrimination, such as a written warning, job transfer, relocation or termination'.

⁸³ Both, oral and written communication channels are conceivable here. In order to be able to comply the duty of documentation solidly, a written notification to the person affected should be also made in any case.

⁸⁴ In the absence of legal requirements, any justification, which allows an informative decision of the affected person, is sufficient, compare: ArbG Ulm, Judgement of 09.09.2014 – Az. 6 Ca 36/14 – see Annex B.

⁸⁵ Beck-online commentary, Benecke, § 13 AGG Rn. 18.

The presented proposal would also like to suggest measures which are already starting at a lower level of confrontation.

6.4.7 Moderated exchange between involved parties

In order to make the function of the internal complaints body as effective as possible and based on the knowledge that discrimination can also arise from misunderstandings, prejudices or interpersonal conflicts, the internal complaints body should take action as early as possible.

Efforts should be made to make the perpetrators of discrimination (if they are individuals) aware of their behaviour and the consequences of this for others. If this leads to discernment and permanently to non-discriminatory behaviour, the aim of non-discrimination would already be achieved by a low-threshold instrument. In such cases, there will be no need for any disciplinary sanctions. For this purpose, as already mentioned in chapter 5.4, a qualification of the body for dispute resolution, conflict mediation or comparable competences are necessary.

6.4.8 Arbitration

If the moderated exchange does not lead to settling the case, the arbitration exists as a possibility.

Arbitration as a concept intends that two parties in dispute go to an arbitration body which tries to identify a solution that is acceptable for both parties. If both agree, the outcome of the arbitration is binding to both parties. If this conflict resolution strategy is assigned to the internal complaints body, the body – with the appropriate qualifications and mandate - could try to mediate in a conflict that caused discrimination. In this respect, the internal complaints body should be able to rely on external experts, such as anti-discrimination advisory bodies with proven competence on mediation.

As a result of such an arbitration, the person causing the discrimination, could agree to work in another shift, be relocated to another branch or agree to stop using the wording perceived as discriminatory. The accused person would not be threatened with further consequences, as long as they adhere to the arbitration arrangement. Depending on the case constellation, a risk of repetition could be permanently prevented in this case.

Such an approach may be used in the procedure of less serious cases and must be consistent with suitability, necessity and appropriateness.

6.4.9 Written warning

In more serious cases of discrimination or harassment, disciplinary sanctions are perhaps necessary, which would then have to be implemented by the employer. Attention must also be paid to an appropriate grading.

The AGG obliges first a written warning. The consequence of this will usually be a formal statement in the personnel file. It is advisable to carry out a legal disciplinary examination. If this competence does not exist within the internal complaints body, an exchange with the employer or the Human Resources Department would be appropriate.

6.4.10 Job transfer/relocation

Job transfer/relocation is also listed in the AGG as an option for sanctions, which would fall within the responsibility of the employer. In this case, the particular circumstances of the company or workplace must be taken into account. In small companies or rural administrations, job transfer/relocation does not necessarily lead to the separation of the perpetrator and the person affected by discrimination. Here it is in the hands of the employer to decide whether the perpetrator is to be relocated due to a discrimination. It then does not matter whether this person agrees to the sanction.

6.4.11 Termination

A termination due to discrimination is the Ultima ratio of the sanctions that an employer can impose. To this end, it must be assessed whether there is serious discrimination and whether there is no prospect of taking other effective ways of dealing with the discrimination appropriately.

A written warning, job transfer, relocation and termination are disciplinary steps which are always taken by the employer. In such cases, the internal complaints body will, after assessing the situation, make a recommendation concerning further steps to be taken by the human resources department or the employer.

In cases where an internal complaints body is established, it seems reasonable to involve the human resources department, as such measures can then be taken in a consensual and seamless manner.

An interviewee reported incidents in which a termination due to discriminatory behaviour was necessary. A smooth procedure could be ensured due to the involvement of the human resources department in the complaints commission

6.4.12 Taking measures in cases of discrimination without an individual perpetrator

As already mentioned in chapter 6.3.11, the functions delegated to the complaints body should not only be limited to cases of discrimination caused by an individual perpetrator, but should also include measures against discrimination without an individual perpetrator.

6.4.13 Taking measures reactively and proactively

§ 12 para. 1 and 2 AGG state preventive measures to protect against discrimination as organisational obligations of the employer. Taking measures preventively should be determined according to the given operational and official circumstances. Prevention can, for example, be achieved by designing the work environment appropriately. This includes the possibility that the complaints body develop proposals for precautionary measures. Therefore, it could be pointed out in a discussion with the human resources department that appropriate arrangements for people with a disability are necessary and that failure to take such precautions constitutes discrimination within the meaning of the Disability Rights Convention. If structural changes are made within the workplace, the internal complaints body could i.e. suggest that unisex toilets are installed, even though no trans* or inter* person is working in the company as of yet. Likewise, the complaints body could work towards information materials that calls upon the

staff to ensure respectful behaviour towards, for example, refugees in the company who still speak little German.

6.4.14 Documentation, monitoring and evaluation

Next to the already mentioned tasks, the internal complaints body should document its requests or complaints within a data protected format and in an appropriate way develop data about the type, form and discrimination criteria of the body. This applies especially to big administrations or companies, which receive a significant amount of complaints. This working method supports monitoring and evaluation, due to discrimination and allows to undertake appropriate preventive measures, if it appears that, for example, a high amount of sexual harassment in the company occurs.

Furthermore, such monitoring and the possibility of proving the handling of the discrimination case can be used as evidence for the employer, should the claimant decide for legal action.

On the basis of documentation and monitoring, regular evaluation supports the internal complaints body in advancing its development of complaint handling, but also the retrospective evaluation monitoring of the impact of the complaints procedure and helps to develop relevant action strategies and to document results.

6.5 Complaints procedure

As has already been mentioned several times, the AGG does not offer any information on the design of the complaints procedure. Therefore, the employer has a generous discretion as to what type of complaints culture should be implemented in the company or administration.

In light of the discussions and considerations that have been offered so far, the wide range of discrimination as ground of a complaint must be taken into account when designing the complaints procedure. Complaints can be based on discrimination by the actions of the employer, other employees or third parties, and may be introduced to the complaints body.

As already mentioned, the right of co-determination of the worker's council must be taken into account when introducing and establishing the complaints procedure.

In the following, a step-by-step introduction of a possible process of a complaints procedure is given. This should be used as an orientation and has to be modified and adjusted according to the size and structure of a company or department.

The basis for a complaints procedure is first of all, that the employer has determined a complaints body or person in the company or administration, which is accessible for the employees, § 12 para. 5 AGG.

A multi-stage complaints procedure appears to be appropriate. § 13 para. 1 AGG provides the following three stages: a) Receiving a complaint b) its examination and c) notification of the results of the examination. Depending on the powers granted to the body by the employer, all of these steps can be taken by the complaints body. It is up to the employer to decide whether other institutions should be involved in the complaints procedure.

6.5.1 Receiving a complaint

Written, oral and electronic complaints should be made possible.

Depending on the location of the internal complaints body, it could be that the complaint will be made alternately or cumulatively to another complaints mechanism. To prevent a double processing, the complaints procedure should be determined in an internal regulation, as proposed in chapter 6.3.1. Since the rules of procedure may not regulate the competence with regard to complex discrimination cases and there may be an overlapping of the tasks of the equal opportunities representative or representative of the severely disabled employees, it should be agreed, internally, who is to deal with the incident. Due to the great importance placed on the trustworthiness of the complaints body, it should be considered including the first contacted body/mechanism to be included in the complaints procedure.

6.5.2 Initial consultation

At the beginning of the initial interview, sufficient time should be given to describe the incident. This should be recorded appropriately, if necessary, by further enquiring the person undertaking the counselling. Depending on the circumstances, it can be helpful to ask the complainant for a memory record and identify evidence.

The consent of the complainant to document the complaint should be sought.

Throughout the conversation, confidentiality should be aimed for. Therefore, the role of the complaints body and the conditions should be explained. In particular, although there is principally no entitlement to an anonymous handling of the complaint, as explained in chapter 6.3.5 the granting of a confidential handling is highly recommended. In this context, reference should also be made to the legal obligations of the employer when acquiring knowledge of discrimination, according to § 12 AGG.

Comprehensive advice also includes the introduction of the concrete process of the complaints procedure. It should be explained, how the complaint will be handled, who will be informed about it, who will be interviewed about the case and what measures are possible. Every (further) step should be communicated and taken only after consultation with the complainant.

It should be noted that, although the complaint handling is not bound to a time limit, a possible claim for damages by the claimant, pursuant to § 15 AGG, must be made in writing to the employer within two months.

6.5.3 Investigation of the facts

As already mentioned, the complaints body should hold extensive powers relating to the investigation of the facts. Next to the inspection of records, it is necessary to question possible witnesses individually with reference to the prohibition of consequences pursuant to § 16 AGG introduced in chapter 6.8.7.

6.5.4 Evaluation of the facts

After determining the facts, it is to be examined whether the complaint is justified. The assessment also includes searching for appropriate measures. Due to the respective powers of the internal complaints body, it can carry out its measures like mediation or arbitration.

At this point, it is significant which expertise the body has and if it is capable of doing a (legal) assessment by itself, or if it must be done by the legal department, human resources department or external lawyer.

Insofar as the result confirms that no discrimination, according to the AGG, happened, the internal complaints body could still consider taking in the case, to intervene and enter to the conflict counselling, for example, in the form of mediation.

6.5.5 Notification of the results of the examination and proposing solutions

After the examination has been carried out, the complainant shall be informed about the results of the examination, irrespective of its outcome within a reasonable period of time. A rejection of the complaint should be clearly justified. In the event of delays, an intermediate reply shall be considered.

In case the body has a right to propose measures/sanctions, it can impose them, which are then implemented by the relevant people responsible.

6.5.6 Executing the measure or sanction

In the event of a breach of non-discrimination, the employer has to take measures or sanctions. As already mentioned, it is the sole responsibility of the employer to impose disciplinary sanctions such as a written warning, job transfer, relocation or termination. However, less drastic measures can also be taken, such as an oral warning or behavioural advisory.

Depending on the powers of the body, it can carry out measures, such as mediation or arbitration, by itself.

6.5.7 Monitoring the implementation

Insofar as the complaints body is granted the right to propose measures and sanctions, it should also be allowed to monitor their implementation.

6.6 Structure

The central issue for the internal complaints body is its structure. As already mentioned before, this is decisive for its operation, mandate and position in a company or administration. Based on previous experience (see chapter 2.6), a variety of compositions of the complaints body are possible.

In the following, some options for the structural design will be presented. These were introduced by participants of the focus groups and interviews. Further options are conceivable.

6.6.1 AGG representatives

- i. Designation of a person from the human resources department

It is common practice to implement the complaints body within existing institutions. Often in the form of the designation of an individual person by the employer, who is already working in the human resources department and represents the interest of the employer, in the course of their work.

This is certainly a pragmatic solution for medium sized companies or administrations. However, the powers, qualifications and competences of the person and the conditions for the exercise of the function, discussed in the proposal, would be decisive. The more pronounced those are, the more complaints can be handled competently, which can have an impact on a respectful and conflict-free work environment. Although the human resources department has relevant competences and is ultimately the decision-maker of staff decisions, establishing the complaints body solely in the human resources department without the involvement of the employee's representatives, also has a certain potential for conflict. Acting on the employers' side may jeopardise the credibility of the employees' perception of their interests, especially with a view to an investigation that is carried out as objectively as possible and aiming for a problem solution, but also in a case of discrimination caused by the employer. In this context lodging a complaint directly at the human resources department could constitute an obstacle.

ii. Legal department

If the employer prefers legal expertise in the internal complaints body and if a legal department or judicial office is located in the company or administration, the complaints body, pursuant to § 13 AGG, can also be placed there. This ensures a legal expertise that is able to assess all aspects of labour law. This is particularly helpful in cases of complaints about discrimination relating to labour law.

iii. Equal opportunities representative/ Representative of severely disabled employees

The possibility of supplementing the existing tasks of the equal opportunities representative or the representative of severely disabled employees is only an option for the administration, as this position is not required in a company.

Since these representatives focus on a certain group of people, there is already an awareness relating to discrimination. Within the staff, they are perceived as supporting their interests, resulting in a high level of trust and credibility. However, since all grounds of discrimination must be covered by the body, in accordance with § 13 AGG, it must be ensured that there is no unbalanced focus on one ground of discrimination in the performance of the task. The consequences of a double mandate and the associated risk of a conflict of interest should be reflected. Therefore, the distribution of tasks of the complaints body should be clarified and aligned with the relation between the existing consultation contact points in relation to the different complaint mechanisms.

iv. AGG representative assigned by the employer

Obvious and probably mostly practised, is the designation of an individual person by the employer. This appears reasonable its implementation for small or medium sized companies or administrations. However, it may undermine the function of the right to lodge a complaint, if the necessary competences of the complaints body are not sufficiently developed for a widely accepted and successful complaints' management.

6.6.2 AGG appeals commission

The following chapter presents some possible constellations of an appeals commission, as they were partly introduced at the focus groups and in interviews.

In general, the possibility of exchanging experiences and benefiting from different qualifications and backgrounds, as well as the use of different perceptions and evaluations of perspectives, are reasons for a comprehensive and diverse composition of the complaints body. For a trust-based work and acceptance by the employees, a gender-specific composition or even a representation of all grounds of discrimination according to the AGG might be helpful. It should be possible to report the incident to a person of the same gender, especially in cases of sexual harassment.

- i. Coordinator, Human Resources Department, Worker's council (company)

If there is a willingness to set up a complaints body in a company, consideration should be given to the involvement of the company's central actors. These would be the Human Resources Department and the worker's council. These two institutions already have a clear task in the company. Nonetheless, a person who takes over the coordination of the complaints commission should also be assigned. Ideally, they would have the skills and experience described above. Cases of discrimination affecting disciplinary aspects, allow the Human Resources Department to be directly involved.

- ii. Coordinator, Human Resources Department, Staff Council (administration)

The same applies to the administration. The staff council would then be involved as part of the complaints commission.

- iii. Coordinator, Human Resources Department, Worker's council, Representative of severely disabled employees (company)

It would be recommended that a complaints commission be implemented, which includes the representatives relating to discrimination (representative of severely disabled employees and, so far they exist, the equal opportunities representative).

In Berlin, a state-owned company has established such a structure on the basis of a comprehensive works agreement⁸⁶. There, several cases of discrimination are dealt with each year and, depending on the situation, are clarified by the coordinator, the human resources department or by the group-specific representatives, after the commission has obtained an assessment of the facts collectively.

Furthermore, this company attaches great importance to the prevention of discrimination. The complaints commission has the mandate to take preventive action. Meetings of the complaints commission are held every three to four months to discuss and pursue preventive approaches. The meetings would take place even if no specific incidents had been reported, an interview partner commented. The company's diversity strategy, which was clearly communicated to the outside world, was underpinned by a well-functioning and solidly mandated body.

- iv. Coordinator, Human Resources Department, works and staff council, equal opportunities representative, representative of severely disabled employees (administration)

⁸⁶ https://bug-ev.org/fileadmin/DV_partnerschaftliches_Verhalten_T0005916_2_.PDF

Such a complaints commission would also be conceivable for an administration, which then should also include the equal opportunities representative. Especially in bigger administrations, comprehensive and diverse set up of the body seems expediently.

6.6.3 External AGG complaints body (company)

During the focus groups, it became clear that companies, in particular, have usually not implemented an active complaints body. It was considered whether an external complaints body might be a possible option for companies. A complaints body is hardly ever installed, especially in small and medium-sized companies, with less than 50 employees. Since in such cases it would require a disproportionate effort to select a person for the body, to train them, to build up and maintain competences, it should be analysed, whether an external "service as – complaints body" would be conceivable. In any case, the body would have to leave the final decision on the complaint to the employer, since, according to the AGG, this decision is incumbent on the employer. The option seems reasonable, in that a neutral and expert analysis of an incident could also be carried out for smaller companies, but this analysis would then have to be transferred back to the employer's side with a recommendation for further action.

For example, one participant of the focus group estimated that an external body would be worth considering because people who use the body would not have to reveal themselves. Anonymity is not always guaranteed in a university context, for example.

Even if some of the AGG commentaries do not see an external complaints body covered by the AGG⁸⁷, this option should further be analysed and reflected. A requirement for outsourcing must be that the body is easily accessible to the employees and that a sensitive handling of complaints relating to discrimination is ensured, as well as that where disciplinary sanctions are necessary, those are taken by the employer.

6.7 Target group of the complaints body

6.7.1 Employees

The most obvious group of people who can appeal to the internal complaints body are the employees of a company or administration. Here, various AGG commentaries have pointed out that this definition of 'employee' must be interpreted broadly. This includes, as discussed in detail in chapter 6.2, employees, trainees, people in quasi-employment, applicants and temporary workers, according to § 6 para. 1 AGG.

6.7.2 Third parties

At workplaces open to the public, with customers or access for third parties, employees are entitled to appeal to the internal body, if they have been discriminated against by a third party, § 12 para. 4 AGG. However, this means at the same time, that third parties who have been discriminated against by employees, cannot lodge a complaint with the body, as they do not have an employment relationship. They only have the possibility of an assertions towards the owner of the company and to take legal action.

⁸⁷ For example *Buschmann*, in Allgemeines Gleichbehandlungsgesetz, Däubler/Bertzbach, § 13 Rn. 18; *Stein*, in: Allgemeines Gleichbehandlungsgesetz, Wendeling-Schröder/Stein, § 13 Rn.12; aO Nollert-Borasio/Perreng, Allgemeines Gleichbehandlungsgesetz, § 13 Rn. 2.

In the context of communication regarding the internal complaints body, it should be made clear when the body does not take action and which steps (e.g. a house ban for discriminatory customers) it can take. In the event of discriminatory situations between customers, it would not be the responsibility of the company or administration to guarantee non-discrimination.

6.8 Competence

In the final chapter, further aspects, which seem important for the successful implementation of an internal complaints body, shall be discussed.

6.8.1 One or more bodies in a company or administration

Both companies and administrations can have branches, subsidiaries or affiliated work units. This leads to the question of whether there is a need for an internal complaints body per work unit or whether a central contact point at superordinate level seems more reasonable. The AGG does not give any indications on this question. Therefore, it is the responsibility of the employer to answer this question. The following aspects should offer guidance:

- i. Is the complaints body accessible to all employees without major barriers?

In a company with several operating sites, which have little exchange and communication with each other, it would be an insurmountable obstacle to settle the internal complaints body just in the central office. In an international office, in turn, in which teams communicate and work together with electronic communication devices on a daily basis, it would be a lower barrier, if the internal complaints body is accessible in another country within the same time zone, during given office hours. Therefore, the respective circumstances must be analysed and should be reflected in the decision of where to locate the complaints body.

- ii. Which structure should be chosen?

For larger administrations or companies it stands to reason to implement a qualified complaints commission, as this probably will be used more frequently. The equipment and competences of a larger complaints body promises the potential to handle cases properly and, perhaps, also take preventive action. However, it is necessary to consider which options can and should be implemented in the specific setting.

6.8.2 Location(s) of the complaints body

When implementing a complaints body, it should be, as presenting in more detail in chapter 5.2.1, taken into account that the premises of the complaints body allow an undisturbed conversation. Therefore, the body needs premises that are designed in such a way, that people affected by discrimination can report their case in a save space.

6.8.3 Forms of discrimination

Although direct forms of discrimination are more commonly recognised in the employment sector, the complaints body should not only take action in cases of individual and direct discrimination. The handling of systemic and indirect forms of discrimination, like unequal pay, should equally be part of the competences of the internal complaints body. Therefore, the body must have the required analytical skills to be able to identify and process such cases.

6.8.4 Reactive and/or proactive mandate

Next to the reactive handling of cases pursuant to § 12 para. 1 AGG, the AGG also states preventive measures to protect against discrimination. As discrimination can mostly be prevented proactively, it would be extremely helpful to prevent discrimination from occurring. However, this requires an open mandate for the complaints body.

Experience reported during the focus groups point out that a proactive handling of discrimination in companies has been received positively by the employees and has a positive impact on the work environment.

6.8.5 Accessibility of the body for applicants

As already indicated in chapter 6.2, in current practice, it cannot be assumed that job applicants regularly seek contact with the internal complaints body in cases of discrimination. In most cases, the information on when and where the body can be contacted will not be available. It should be considered whether this information should already be made available proactively in the context of communicating with applicants. Low-threshold and prejudicial procedures could solve complaints in a pragmatic way and avoid lengthy and exhausting legal actions against the company.

6.8.6 Funds for the internal complaints body

In the context of the focus groups, experience was gathered on the extent to which an independent budget for the complaints bodies would be needed. Here it was reported that funds for e.g. printing information material or training were generally satisfactorily available from the general budget for training and printing material and in this way, a flexible use of funds was possible. It was perceived as too inflexible, if the body has an annually defined budget at its disposal, which would then have to be used within the calendar year. A municipal internal complaints body stated that there was no budget available and that this was considered the better way. An underuse of the budget would quickly lead to the adjustment of the budget plan. An upward adjustment would then always have to be very well justified, not only by the body, but also by political decision makers. This was perceived in a similar way by others, as budgets could have been taken from general funds for printing or office materials, without restricting the body too much.

6.8.7 Prohibition of sanctioning

The legal regulation of § 16 AGG constitutes a special regulation of the general prohibition of repression in accordance with § 612a BGB. According to § 15 AGG, no one, neither the complainant, nor the people supporting them or other third parties, are allowed to be sanctioned due to lodging a complaint relating to a perceived discrimination. This protection must be ensured within the company or administration and must be taken into account equally when a complaint has been lodged at the internal complaints body. This norm should be particularly taken into account, especially in cases where the human resources department is entrusted with the task of a complaints body.

In this context, the Labour Court of Kassel found, in a judgment of 11.02.2009 – AZ. 8 Ca 424/08, that lodging a complaint pursuant to § 13 AGG does not constitute a reason for termination. In the proceedings, the plaintiff could not be accused of exercising the right of lodging a complaint according to § 13 AGG⁸⁸. If complaints, which have been proved as

⁸⁸ ArbG Kassel; judgement of 11.02.2009 – Az. 8 Ca 424/09.

unjustified would always create a risk of an immediate termination for the complainant, the entire complaints procedure provided by the AGG would also be ad absurdum.

6.8.8 Grounds of discrimination

Although this seems obvious, the horizontal task of the internal complaints body should be briefly pointed out here. All grounds of discrimination referred to in § 1 AGG must be covered by the complaints body. This is particularly important if the complaints body is established within other representatives (equal opportunities representative or representative of severely disabled employees), so that all complaints on grounds of discrimination listed in the AGG are handled. As the differentiation of discrimination categories has been developed through jurisprudence⁸⁹, all groups of people covered by the AGG should be able to use the complaints mechanism. Those are, for example, people who suffer from a strong stigma due to a chronic disease, but do not have a degree of disability, or intersex people who are not explicitly listed in the AGG, but are protected against discrimination by the category gender.

6.8.9 Cooperation of the body with other representatives

Since the existing bodies and structures (works/staff council, equal opportunities representative, representative of severely disabled employees, youth and trainee representation and internal complaints body) in companies or administrations each have their own objectives, which sometimes overlap, it seems very useful to aim for and have a constructive cooperation and transparent exchange between these mechanisms.

Feedback from the focus groups clearly indicate that, where constructive cooperation between the bodies is ensured, preventive and reactive work against discrimination is, as a result, stronger and more impact oriented.

6.8.10 Parallel complaints procedures

Since it is not foreseeable for those affected by discrimination whether an internal settlement can be concluded successfully, they can take legal parallels at any time. Likewise, lodging a complaint at bodies outside of the company, like the Federal anti-discrimination agency, is possible.

The AGG does not set any time limit for an internal complaints procedure. However, legal action is only possible if the two months limit is met. This means on the one hand that, internal complaints bodies have to work towards the handling of a complaint in a timely and purposeful manner, as to not undermine judicial assertion. Since even then the two-month period cannot always be observed, the affected person may have to submit an assertion required by the AGG in order to not forfeit their legal rights. Since this can sometimes be perceived as counterproductive by employers, legislators should, among other reasons, consider extending this time limit.

⁸⁹ see: Evaluation des Allgemeine Gleichbehandlungsgesetzes, Büro für Recht und Wissenschaft, Nomos Verlag, Oktober 2016, pp. 38 ff.

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The sole responsibility for any error or inaccuracy in this text lies with me as the author.

Annex A: References

Adomeit, Klaus/Mohr, Jochen: Allgemeines Gleichbehandlungsgesetz (AGG). Kommentar zum AGG und zu den anderen Diskriminierungsverboten, Stuttgart, 2011, 2. Auflage.

Antidiskriminierungsstelle des Bundes (Hrsg.): Evaluation des Allgemeinen Gleichbehandlungsgesetzes, Niestetal, 2016.

Bauer, Jobst-Hubertus/Krieger, Steffen: Allgemeines Gleichbehandlungsgesetz: AGG. München, 2018, 5. Auflage.

Bauschke, Hans-Joachim: AGG, Allgemeines Gleichbehandlungsgesetz im öffentlichen Dienst, Kommentar, Köln 2007.

Berliner Stadtreinigung: Dienstvereinbarung über partnerschaftliches Verhalten, Berlin, 2016.

Boecken, Winfried/Düwell, Franz Josef/Diller, Martin/Hanau, Hans (Hrsg.): Gesamtes Arbeitsrecht, Baden-Baden, 2016.

Boemke, Burkhard/Danko, Franz-Ludwig: AGG im Arbeitsrecht, Heidelberg 2007.

Däubler, Wolfgang/Bertzbach, Martin: Allgemeines Gleichbehandlungsgesetz. Baden-Baden, 2018, 4. Auflage.

Däubler, Wolfgang/Hjort, Jens Peter/Schubert, Michael/Wolmerath, Martin (Hrsg.): Arbeitsrecht. Individualarbeitsrecht mit kollektivrechtlichen Bezügen, Baden-Baden, 2017, 4. Auflage.

Ernst, Hildegard/Braunroth, Anna/Wascher, Angelika/Franke, Bernhard/Lenz, Martin: Nomos Kommentar. Allgemeines Gleichbehandlungsgesetz, Baden-Baden, 2013, 2. Auflage.

Ghaffarizad, Kiana/Mebrahtu, Sewita: Diskriminierung in der Arbeitswelt, (k)ein Nischenthema?! In: IQ Fachstelle Kompetenzentwicklung und Antidiskriminierung (Hrsg.) Alles schon fair? Mit Recht zu einem inklusiven Arbeitsmarkt, München 2016.

Gsell, Beate/Krüger, Wolfgang/Lorenz, Stephan/Reymann, Christoph, beck-online, Grosskommentar, 2018.

Heidel, Thomas/Hübtege, Rainer/Mansel, Heinz-Peter/Norck, Ulrich (Hrsg.): BGB Allgemeiner Teil | EGBGB, Bonn, Band 1/5, 2015, 3. Auflage.

Hey, Thomas/Forst, Gerrit (Hrsg.): Kommentar AGG, Frankfurt am Main, 2015, 2. Auflage.

Hans Bäckler Stiftung (Hrsg.)/**Jochmann-Döll, Andrea/Tondorf, Karin:** Diskriminierungsfreie Betriebs- und Dienstvereinbarung zum Thema Chancengleichheit und Gleichstellung, Düsseldorf, 2011.

Landes Zahnärztekammer Baden-Württemberg (Hrsg.): Allgemeines Gleichbehandlungsgesetz Handlungsleitfaden für Arbeitgeber (https://lzk-bw.de/fileadmin/user_upload/Downloads/Recht/4.Arbeitsrecht/Allgemeines_Gleichbehandlungsgesetz_Handlungsleitfaden.pdf).

Liebscher, Doris/**Kobes**, Anne: Beschwerdestelle und Beschwerdeverfahren nach § 13 AGG, 2013.

Meinel, Gernod/**Heyn**, Judith/**Herms**, Sascha: Allgemeines Gleichbehandlungsgesetz. Arbeitsrechtlicher Kommentar, München 2010, 2. Auflage.

Müller-Glöge, Rudi/Preis, Ulrich/**Schmidt**, Ingrid (Hrsg.): Erfurter Kommentar zum Arbeitsrecht, München 2020, 2. Auflage.

Neumann, Dirk/**Pahlen**, Ronald/**Greiner**, Stefan/**Winkler**, Jürgen: Sozialgesetzbuch IX, Rehabilitation und Teilhabe behinderter Menschen, Kommentar, München, 2020, 14. Auflage

Nollert-Borasio, Christiane/**Perreng**, Martina: Allgemeines Gleichbehandlungsgesetz. Basiskommentar zu den arbeitsrechtlichen Regelungen, Frankfurt am Main, 2015, 4. Auflage.

Oetker, Hartmut: Ausgewählte Probleme zum Beschwerderecht des Beschäftigten nach § 13 AGG. In: Neue Zeitschrift für Arbeitsrecht, Heft 5/2008, S. 264-270.

Richardi, Reinhard (Hrsg.): Betriebsverfassungsgesetz mit Wahlordnung, München, 2018, 16. Auflage.

Richardi, Reinhard/ **Dörner**, Hans-Jürgen/ **Weber**, Christoph (Hrsg.): Personalvertretungsrecht, München, 2020, 5. Auflage.

Riesenhuber, Karl (Hrsg.): Das Allgemeine Gleichbehandlungsgesetz, Grundsatz- und Praxisfragen, Berlin, 2007.

Rolfs/ Giesen/ Kreikebohm/ Udsching, BeckOK Arbeitsrecht, AGG § 13, 51. Edition 2019.

Rühl, Monika/**Hoffmann**, Jochen: Das AGG in der Unternehmenspraxis. Wie Unternehmen und Personalführung Gesetz und Richtlinien rechtssicher und diskriminierungsfrei umsetzen, Wiesbaden 2008.

Sächsischer Landtag, Kleine Anfrage der Abgeordneten Sarah Buddenberg (DIE LINKE): Beschwerdestellen gemäß § 13 Allgemeines Gleichbehandlungsgesetz (AGG) im Landesaktionsplan zur Akzeptanz der Vielfalt von Lebensentwürfen. Dresden, 2017 (http://edas.landtag.sachsen.de/viewer.aspx?dok_nr=10842&dok_art=Drs&leg_per=6&pos_dok=0&dok_id=undefined).

Säcker, Franz, Jürgen/**Rixecker**, Roland/**Oetcker**, Hartmut/**Limpberg**, Bettina: Münchener Kommentar zum BGB, Band 1/13, München, 2018, 8. Auflage.

Schaub, Günter: Arbeitsrechts-Handbuch, München, 2019, 18. Auflage.

Westhauser, Martin/**Sediq**, Mariam: Mitbestimmungsrechtliche Aspekte des Beschwerderechts nach § 13 AGG. In: Neue Zeitschrift für Arbeitsrecht, Heft 2/ 2008, S. 78-82.