

# GERMANY

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## 1. National court system

The German judicial system comprises five jurisdictional branches: ordinary, administrative, social, labour and fiscal jurisdiction. Each jurisdictional branch (with the exception of the fiscal) is organised on two levels of fact finding courts and a third level of supreme courts, which decide only on points of law. In addition, extraordinary relief to the constitutional courts is also available. In many Federal States, there exist specific constitutional courts. The most prominent court is the Federal Constitutional Court in Karlsruhe, which hears cases concerning the constitutionality of laws, administrative acts and judicial decisions. The judicial control of the Federal Constitutional Court is restricted to infringements of the Constitution (Basic Law of 1949).

The first level of the ordinary jurisdiction comprises the local courts, which decide on disputes up to 6000 €, all other disputes are heard by the regional courts in the first instance. The regional

courts have also jurisdiction for appeals against the decisions of the local courts. The judgments of the district courts are reviewed by the courts of appeal. The first appeal can be based on the erroneous finding of facts and/or on points of law. A second appeal is permitted to the Federal Supreme Civil Court (BGH) located in Karlsruhe. This appeal is restricted to a legal review.

The German Administrative Jurisdiction is organised as follows: The system of administrative jurisdiction is three-levelled, with 52 administrative tribunals of first instance at the bottom, 16 High Administrative Courts in the middle and the Federal Administrative Court at the top of the hierarchy. At present the administrative jurisdiction comprises approximately 2,400 judges.<sup>1</sup>

A lawsuit normally starts in the administrative tribunals of first instance, unless the respective legal matter is assigned by law to the High Administrative Courts or to the Federal Administrative Court. The High Administrative Courts are mainly courts of appeal. They re-examine decisions of the tribunals of first instance as to the facts and to the points of law. In contrast to that, the Federal Administrative Court reviews the decisions of the lower courts only on points of law. The respective proceedings are called "revisions". Generally, the actions brought before the Federal Administrative Court are directed against decisions of the courts of appeal. With the consent of both parties, however, it is also admissible to bypass the remedy of appeal and to challenge the ruling of a tribunal of first instance directly before the Supreme Court.<sup>2</sup>

German professional judges hold lifetime tenure. They can only be removed by statutorily prescribed judicial proceedings.<sup>3</sup> Second, German judges, although hierarchically organized, are not subject to orders from superior judges. They are not bound by prior decisions of higher courts other than decisions of the Federal Supreme Courts on remand of the same cases and decisions of the Constitutional Court in similar cases. Matters such as their duties, responsibilities and compensation are all defined as much as possible by statute. The idea is that a judge should be free to do her work without substantive control or interference by a higher authority. Third, the

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<sup>1</sup> *Brandt/Sachs (Schmieszek)*, Handbuch Verwaltungsverfahren und Verwaltungsprozessrecht (2008), p. 361 et seq. Further information in English is available at the website of the Supreme Federal Administrative Court, [http://www.bundesverwaltungsgericht.de/enid/Aktuelles/Information\\_in\\_English\\_g0.html](http://www.bundesverwaltungsgericht.de/enid/Aktuelles/Information_in_English_g0.html)

<sup>2</sup> *Brandt/Sachs (Schmieszek)*, Handbuch Verwaltungsverfahren und Verwaltungsprozessrecht (2008), p. 384 et seq..

<sup>3</sup> See sections 30 et seq. of the German Act on the Legal Status of Judges (Deutsches Richtergesetz), the details are described and analysed by *Wittreck*, *Die Verwaltung der Dritten Gewalt* (2007), p. 140 et seq. An English translation of the Act is available at: <http://www.iuscomp.org/gla/>

parties may challenge the judge of being biased. The grounds for excluding and rejecting a judge are laid down in sections 41 to 49 of the Civil Procedure Code.<sup>4</sup>

## 2. Restrictions regarding access to justice

The national law explicitly sets time limits for asserting a claim against discriminatory misbehaviour:

1. In civil and commercial matters, there are no general provisions restricting the admissibility of litigation pertaining to discrimination. In substantive law, the regular prescription periods are applicable; the time period is three years starting with the accrual of the claim. However, the German Act on Equal Treatment (AGG) explicitly sets time limits for asserting a claim against discriminatory misbehaviour. In civil cases, the respective period is only two months. The period starts running when the discrimination has ended and the substantial claim has emerged. Delayed actions are dismissed (section 21 (5) of AGG).<sup>5</sup>

2. In the case of discrimination in employment matters, a two-tier limitation period applies<sup>6</sup>: According to section 15 (4) of AGG the employee must assert his or her claim for damages and for compensation within a period of two months. The claim must be submitted to the employer in writing. In the case of a (refused) application or promotion, the period starts running at the date when the rejection is communicated to the employee. In other cases of discrimination the period commences at the date when the employee learns about the discrimination. The period is tolled by the submission of the written complaint to the employer. In addition to this, section 61b (1) of the Law on the Procedure in the Labour Courts (ArbGG).<sup>7</sup> sets a three months period for the bringing of a lawsuit against the employer in the labour court. This time limit normally starts at the date when the employee lodges his or her written complaint with his employer.<sup>8</sup> This period does not depend on the reaction of the employer; it is not tolled by negotiations between the parties.<sup>9</sup>

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<sup>4</sup> *Jauernig/Hess*, Zivilprozessrecht (30rd ed. 2011), § 8 III.

<sup>5</sup> After the expiry of the time limit the claim can only be asserted when the disadvantaged person was prevented from meeting the deadline without any fault of their own.

<sup>6</sup> *Bauer/Göpfert/Krieger*, AGG, section 15 AGG, no 46.

<sup>7</sup> Arbeitsgerichtsgesetz, Law on the Procedure in the Labour Courts.

<sup>8</sup> *Bauer/Göpfert/Krieger*, Commentary AGG, section 15 no. 46, 57 et seq.

<sup>9</sup> Labour Court Berlin, NJW 2008, 1401.

According to section 61b (3) of ArbGG, the employer may request the court to schedule the hearing after a (cooling off period) of six month. This additional period shall encourage settlements among the parties.

It should be noted that the time periods of the AGG only apply to claims which are based on the specific Act on Equal Treatment.<sup>10</sup> They do not bar additional claims for compensation and termination of the discriminating behaviour which can be based on general civil law. Hence, general civil law provides for additional relief. There is a general consensus that discriminating behaviour is unlawful and entails claims for compensation and redress under the German Civil Code (BGB) (see sections 280 and 823, 826 of BGB).<sup>11</sup> These claims are subject to the general prescription period which is three years.<sup>12</sup>

### 3. Length of judicial proceedings

According to the statistics available at the website of the German Federal Agency of Justice<sup>13</sup>, the average duration of proceedings in the local courts is 4.5 months; in the district courts the average is 8.1 months.<sup>14</sup> The average duration of appellate proceedings in the district courts (appeals against the judgments of the local courts) is currently 5.5 months, although the average in the courts of appeal is 7.6 months. There is no information available on the average time span of a second appeal in the Federal Supreme Civil Court. According to our estimations, the average is between 12 and 18 months. The performance of the labour courts corresponds to the situation of the civil courts.<sup>15</sup>

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<sup>10</sup> The adoption of the short limitation periods was a decisive part of the political compromise in the former SPD-CDU coalition which allowed the enactment of the AGG.

<sup>11</sup> A striking (and discussed) example is a judgment of the labour court Jena of 7/8/2009, reg. no. 7 Ca 1960/08. The court applied general civil and labour law and awarded (the unusual sum of) damages of €30.000. The plaintiff had been systematically and continuously mobbed by her former employer. An appeal against this judgment is pending.

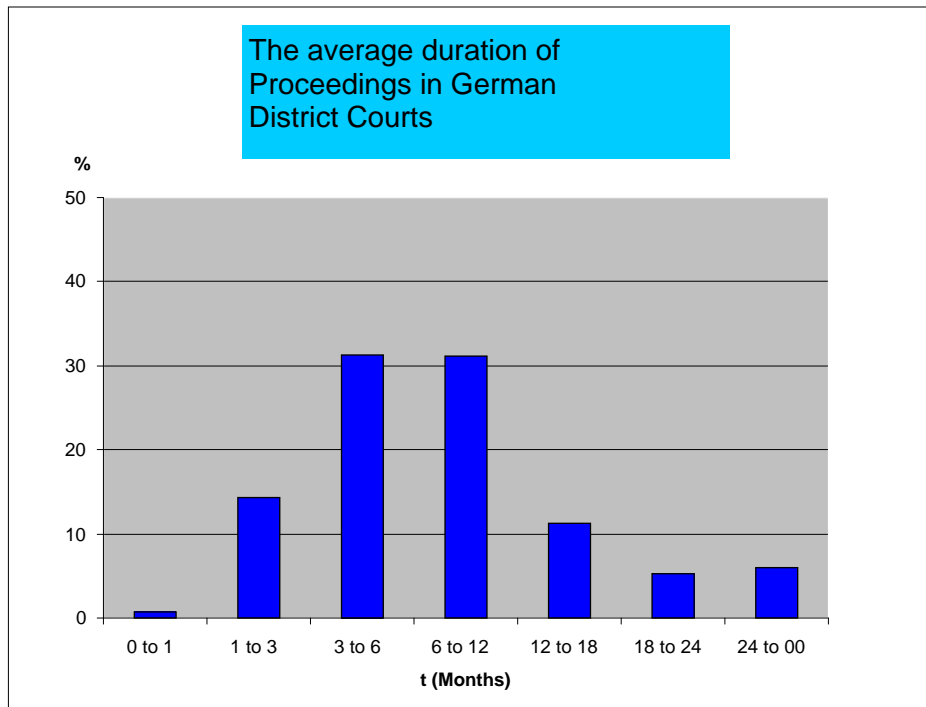
<sup>12</sup> The time periods of the AGG will be reviewed by the ECJ in a close future, as the LAG Hamburg referred their compatibility with the principles of equivalence and efficiency to the ECJ under Article 234 EC/267 TFEU, see case C-246/09, OJ 2009/C 244/02.

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[http://www.bundesjustizamt.de/cln\\_108/nn\\_1635220/DE/Themen/Justizstatistik/Geschaeftsbelastungen/downloads/Geschaeftsentwicklung\\_20der\\_20Zivilsachen\\_20-\\_20Amts-\\_2C\\_20Land-\\_20und\\_20Oberlandesgerichte\\_201995\\_20-\\_202007,templateId=raw,property=publicationFile.pdf/Geschaeftsentwicklung%20der%20Zivilsachen%20-%20Amts-,%20Land-%20und%20Oberlandesgerichte%201995%20-%202007.pdf](http://www.bundesjustizamt.de/cln_108/nn_1635220/DE/Themen/Justizstatistik/Geschaeftsbelastungen/downloads/Geschaeftsentwicklung_20der_20Zivilsachen_20-_20Amts-_2C_20Land-_20und_20Oberlandesgerichte_201995_20-_202007,templateId=raw,property=publicationFile.pdf/Geschaeftsentwicklung%20der%20Zivilsachen%20-%20Amts-,%20Land-%20und%20Oberlandesgerichte%201995%20-%202007.pdf)

<sup>14</sup> All figures relate to 2008.

<sup>15</sup> No specific data on the average time are available. A general statistic can be found at: [http://www.bmas.de/portal/38022/property=pdf/2009\\_09\\_15\\_statistik\\_der\\_arbeitsgerichtsbarkeit\\_2008.pdf](http://www.bmas.de/portal/38022/property=pdf/2009_09_15_statistik_der_arbeitsgerichtsbarkeit_2008.pdf)



According to the cases analysed, the average time of proceedings in the first instances varies from 2 months to 12 months. There are no considerable differences between the proceedings in the civil and in the labour courts. The average time of appellate proceedings was 6 months. As a whole, there are no significant differences between the general figures for civil proceedings and the specific proceedings in discrimination matters.

Regarding the examined case law the following results can be noted: In the courts of first instance the minimum duration of proceedings was 2 months (case no. 8). The maximum was 12 months (case no. 2). The average duration was between 6 and 9 months. In the second instance the minimum duration of proceedings was 3 months (case no. 3) and the maximum 12 months (case no. 4). Finally the duration of proceedings in the Federal Supreme Court or the Federal Labour Supreme Court was between 9 (case no. 4) and 14 months (case no. 23) with an average of about 12 months.

According to the statistics available at the website of the German Federal Statistical Agency<sup>16</sup>, the average duration of proceedings in the lower administrative courts is 12.3 months, in the higher administrative courts as courts of first instance 13.8 months.<sup>17</sup> The average duration of appellate proceedings in the higher administrative courts is currently 10.2 months.

According to the statistics available at the website of the German Federal Statistical Agency<sup>18</sup>, the average duration of proceedings in the lower social courts is 13.6 months. The average duration of appellate proceedings in the higher administrative courts is currently 14.8 months.

## 4. Are procedures concluded within a reasonable time?

In general, the statistics demonstrate that the German judicial system is performing well and the procedures are concluded within reasonable time.<sup>19</sup> Proceedings in the first instances are not lasting longer than one year; most of them are concluded in a period of less than 6 months. The general picture does not exclude, however, that some proceedings are lasting too long. In addition, the average time of proceedings is also differing in the Federal States. In this respect, the situation in the new Federal States and in Berlin is more difficult than in the western parts of the country.

## 5. Does provision exist for speedy resolution of particular cases?

Since the 1970s, German law of civil procedure recognises a general objective of a “speedy trial”. This principle obliges the court to undertake all necessary steps in order to ensure a quick resolution of the case. According to sections 278 and 279 of the Civil Procedure Code (ZPO), the court must carefully prepare the hearing by giving hints and feedback to the parties.<sup>20</sup> According to the specific circumstances of the individual litigation, it shall either schedule a hearing within a short period of time (only a few weeks after the initiation of the proceedings) or it shall prepare

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<sup>16</sup> <https://www-ec.destatis.de/csp/shop/sfg/bpm.html.cms.cBroker.cls?cmspath=struktur,vollanzeige.csp&ID=1024467>.

<sup>17</sup> All figures relate to 2008.

<sup>18</sup> <https://www-ec.destatis.de/csp/shop/sfg/bpm.html.cms.cBroker.cls?cmspath=struktur,vollanzeige.csp&ID=>.

<sup>19</sup> *Murray & Stürner*, German Civil Justice (2004), p. 19 – 22.

<sup>20</sup> *Murray & Stürner*, German Civil Justice (2004), p.166 et seq.

the hearing by written proceedings which are aimed at clarifying the factual and legal issues of the case. In the written proceedings, the judge is obliged to read the briefs and to ask for additional clarification if necessary. On the other hand, the parties are equally obliged to cooperate with the court and to avoid any delaying tactics. The court shall set individual time limits for the briefs and submissions of the parties – if a party fails to comply with the time limits, his or her submissions and briefs are precluded by law (sections 282 and 296 of the ZPO).

In labour law proceedings on the validity of a dismissal, section 61a (2) of ArbGG obliges the courts to schedule a settlement hearing not later than two weeks after the filing of the lawsuit. This requirement is explained by the specific urgency of litigation pertaining to the validity of a dismissal. The defendant is not required to present his or her defences before the hearing. If the court fails to reach a settlement, the defendant must present his defences within a time period set by the court. Untimely assertions will be precluded (section 61a (3) and (4) of ArbGG). We are not aware of any specific case law related to these provisions in the context of anti-discrimination litigation.

## 6. Is it possible to waive the right of access to a judicial body?

A waiver of the right of access to justice is possible as far as the right to appeal a decision is concerned. The German civil procedure is governed by the principle of party disposition, according to which a party can waive his/her right to appeal a decision (section 515 of the Civil Procedure Code (ZPO)). The same is possible as far as a second appeal (revision) is concerned (section 565 of the ZPO). However, it is not possible to waive the right of filing a claim in the first place. During the proceedings, the plaintiff is free to renounce the substantive right. In this case, the court will immediately dismiss the complaint without any further review of the merits (section 306 of the ZPO).

## 7. Access to non-judicial procedures

Specific non-judicial procedures are offered by Federal Agency for the Protection against Discrimination (ADS),<sup>21</sup> a department within the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth.<sup>22</sup> The Federal Agency was established by section 25 of the AGG, it shall provide assistance to persons affected by discrimination (section 27 (2) AGG).<sup>23</sup> Its main task is the informing of affected persons on their subjective rights and on available redress mechanisms. The Agency shall also promote ADR-settlements between the parties. A person affected by discriminating behaviour can directly and informally contact the agency by telephone, e-mail, letter or fax. The collaborators of the Agency may also arrange a personal meeting with affected party.

The dispute resolution scheme of the Federal Agency is framed as follows. Firstly, the counsellors of the ADS shall provide general information on the legal situation, possible claims, and the time limits. However, the Agency is not authorized to give legal advice in a technical way.<sup>24</sup> If the parties seek an amicable settlement, the Agency shall try, with the consent of the person affected, to contact the opposite party. If the parties agree on mediation, the ADS will not represent the discriminated party. Instead, it operates as a neutral mediator.<sup>25</sup> Therefore, the ADS is not entitled to give a decision either. However, in order to support the victim of discrimination the Federal Anti-Discrimination Agency shall also provide information about specialised counselling services and facilitate the contact of the affected persons with qualified lawyers or victims' organisations. Finally, it should be mentioned, that the conciliation proceedings of the Agency are not a prerequisite for the admissibility of judicial proceedings in the civil or labour courts; they are strictly complementary.

The ADS does not have the competence to initiate proceedings in the sense of investigations for discrimination. The office can also not issue sanctions or claim compensation payments. The discriminated person is required to pursue possible legal claims individually. The Anti-Discrimination Office has only a general monitoring role. It can be consulted on draft legislation as any other expert in hearings of the relevant committees of the parliament, however, a specific

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<sup>21</sup> Federal Anti-Discrimination Agency, German abbreviation: ADS.

<sup>22</sup> Unusually, the German Act does not establish decentralised anti-discrimination agencies – even not at the level of the 16 Federal States.

<sup>23</sup> At the agency's website ([www.antidiskriminierungsstelle.de](http://www.antidiskriminierungsstelle.de)) people affected by discrimination will find an electronic contact form.

<sup>24</sup> *Bauer/Göpfert/Krieger*, AGG, section 27 no. 12.

<sup>25</sup> *Bauer/Göpfert/Krieger*, AGG, section 27 no. 13.



regulation requiring its involvement in the legislative process does not exist. The office and the relevant Commissioners of the government and parliament have to jointly submit a report to the Bundestag [1<sup>st</sup> Chamber of Federal Parliament] covering discriminations on any of the grounds covered by the law every four years.

Finally, the Anti-Discrimination Office is supposed to involve in its work non-governmental organisations as well as institutions at European, federal, *Laender*, or regional levels that are active in the area of protection from discrimination on any of the grounds covered by the law (article 29 of the General Act on Equal Treatment).

Two *Länder* governments, Berlin and Brandenburg have also established offices similar to the Anti-Discrimination Office.<sup>26</sup> In addition, a number of municipalities have established Anti-Discrimination Offices, such as the municipalities of München, Frankfurt, and Hannover.

To conclude, the Anti-Discrimination Office can certainly make a considerable contribution to the effective protection from discrimination, but is likely only to achieve this aim by relying on the support of other institutions. Namely, considering the federal structure in Germany, it will be important to also have functioning anti-discrimination offices in all *Länder*. As mentioned above, only two *Länder* governments have established anti-discrimination offices thus far.

In select categories of legal disputes under civil law it is not only possible, but often even required to involve a mediation body for the settlement of the dispute. A number of *Länder* have introduced mediation laws providing for the requirement to first involve a mediation body before filing a lawsuit before court. In addition to this obligatory mediation procedure it is also possible for the parties to subject themselves to mediation on a voluntary basis. In relation to labour disputes article 54 of the Law on Labour Courts (ArbGG) stipulates an obligatory date with the aim to reach a friendly settlement at the beginning of the hearing. This date is already a part of the proceedings and not, as in the case of obligatory mediation in civil cases described above, a condition for the admissibility of a lawsuit. The legislator also provided the federal Anti-Discrimination Office with a mediation function in line with article 7 para 1 of Directive 2000/43/EC. Finally, judicial proceedings once launched can be ended by way of mutual settlement. Discrimination cases on the basis of “race” or ethnic origin often seem to be settled in this way.

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<sup>26</sup>Landesstelle für Gleichbehandlung - gegen Diskriminierung within the Senate (government) for Integration, Work and Social Matters of the Land Berlin Senatsverwaltung, <http://www.berlin.de/lb/ads/> (01.04.09), Antidiskriminierungsstelle Brandenburg within the Office of the Commissioner for Integration of the Land Brandenburg, [http://www.masgf.brandenburg.de/sixcms/detail.php?id=17455&\\_siteid=19](http://www.masgf.brandenburg.de/sixcms/detail.php?id=17455&_siteid=19) (01.04.09).

Information on mediation in discrimination cases having the AGG as a legal basis is difficult to obtain. First, the relevant legislation is relatively new. The AGG only entered into force in 2006 and only two *Länder* thus far provided for the obligatory mediation procedure in discrimination cases under Section 3 of the AGG in their law. It is not exactly clear to what extent the interests of the victims of discrimination are actually protected in mediation proceedings. The very principle of mediation proceedings is that both parties are considered equal and that the mediator does not take a specific side of the (potential) victim.<sup>27</sup> In addition, the compliance with the principle of confidentiality is usually a crucial prerequisite for successful mediation proceedings.<sup>28</sup>

In relation to the level and the extent of advice provided by mediators, especially legal advice, the Law on Legal Advice (RBG) imposed considerable restrictions on mediators. The law was superseded by the Law on Legal Services of December 2007, regulating that mediation and any comparable form of alternative dispute settlement is not considered provision of legal services (article 2 para 3 no 4) and can thus also be performed by persons who are not admitted attorneys such as, for example, mediators. However, also under the Law on Legal Services, mediators must not propose individual settlement regulations for the one or other party. It thus remains questionable whether victims of discrimination are always sufficiently informed and aware of their alternative legal possibilities during mediation. There is also no specific person to represent the interests of the victims, even though it is possible for a party in the mediation proceedings to be supported by a person of his or her choice.

The outcomes of these mediation procedures are not publicly known. Information on usual outcomes of mediation in discrimination cases on the grounds of “race” or ethnic origin is not available. However, in the light of the above it is questionable whether the outcomes are effective, proportionate and dissuasive.

## 8. Legal aid

In the labour and in the local courts, representation by a lawyer is not mandatory. However, in approximately 50% of all cases in the local courts, at least one party is represented by a lawyer. The situation in the labour courts is to some extent different as the plaintiffs (employees) are

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<sup>27</sup> S. Kracht in: F. Haft/K. von Schlieffen, *Handbuch Mediation – Verhandlungstechnik, Strategien, Einsatzgebiete*, München 2002, p. 366, <http://www.anwalt-hs.de/Fragen-zur-Mediation> (29.03.09).

<sup>28</sup> C. Hartmann in: F. Haft/K. von Schlieffen, *Handbuch Mediation – Verhandlungstechnik, Strategien, Einsatzgebiete*, München 2002, pp. 713-714.

often represented or supported by trade unions; employers are regularly represented by a lawyer. In discrimination cases, plaintiffs may also seek the support (or the representation) by anti-discrimination organisations (see section 23 of the General Act on Equal Treatment (AGG)). According to section 23 (2) AGG, anti-discrimination organisations shall be authorised, under the terms of their statutes to act as legal advisor to a disadvantaged person in the court hearings. In the civil courts, the organisations are admitted as litigant's advisers (section 90 of the Civil Procedure Code (ZPO)).

Legal aid is available in all judicial proceedings, with the exception of arbitration.<sup>29</sup> The legal framework is found in sections 114-127 of the ZPO. As a matter of principle, section 11a (3) of the Law on the Procedure in the Labour Courts (ArbGG) refers to sections 114 et seq. of the ZPO. The underlying principle is set forth in section 114 of ZPO.<sup>30</sup> According to this provision, “a party, whose personal and economic circumstances are such that he or she cannot in whole or part afford the costs of conducting litigation, will receive legal aid on application, if the intended prosecution or defence of litigation offers reasonable prospects of success and appears not to be capricious.”

The application for legal aid is filed with the court where the main proceedings are pending or will be filed. In the latter case, a draft of the statement of claim (complaint) will be attached to the legal aid application.<sup>31</sup> Before deciding on the application, the Court informs the opponent and the opponent regularly submits a written response to the asserted claim (or defence). As the court regularly verifies whether the claim seems founded, the application is sometimes (ab) used by the parties in order to get information about the prospects of (their respective) success in the litigation. The second condition refers to the financial eligibility. The latter is based on an elaborate statutory income and property test, which refers to the aggregate of all income and earnings of the party, including financial support by the spouse.<sup>32</sup> However, certain amounts are deducted, especially for accommodation and the maintenance of children. The evaluation of the applicant's property is effected similarly to the evaluation under the Social Welfare Law. For instance, if the allocable income is, after all deductions, 700 Euro, an amount of 275 Euro is expected to be paid. The payment can be made by instalments – the maximum is 48 months.

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<sup>29</sup> *Murray & Stürner*, German Civil Justice, p. 117.

<sup>30</sup> The procedure is described by *Murray & Stürner*, German Civil Justice (2004), p. 116 et seq.

<sup>31</sup> A defendant applying for legal aid normally attaches a copy of his defence to the application.

<sup>32</sup> *Zöller/Philippi*, Sec. 115 ZPO (Commentary, 29<sup>th</sup> ed. 2009), paras 3 et seq.

Accordingly, the order granting legal aid sets the monthly amount the party is required to pay and how it should be paid.

On the other hand, legal aid in German procedural law comprehensively covers the costs of the litigation: It includes the court's fees and the lawyer's fees as far as they are legally fixed. According to section 122 (1) of Civil Procedure Code, the party supported by legal aid is also relieved of the obligation to advance court costs, expert witness fees, and the like. However, there remains a high cost-risk: The party which receives legal aid still bears the considerable risk of being obliged to pay the litigation cost of the opponent should the lawsuit be lost.<sup>33</sup>

In addition to this, German social law provides for so-called legal assistance for needed persons which does not depend on the institution of court proceedings. Under the Legal Advice Assistance Act the Federal States are obliged to organise a framework of legal assistance which shall function either through "legal advice centers" or by reimbursement of private attorneys who assist the needed persons. At present, most Federal States provide for specific programs. Persons seeking legal advice assistance must apply to the local court for a formal authorization. The authorization depends on the income and on the significance of the legal issue. In most Federal States all lawyers are required to support the program.

The General Act on Equal Treatment (AGG) defines anti-discrimination associations as bodies of persons pursuing, in accordance with their statute, the special interests of disadvantaged persons or groups of persons in accordance with article 1 of the AGG, provided they do not pursue these interests on a temporary basis only and provided they do not act with a commercial interest (article 23 para 1, 1<sup>st</sup> sentence of the AGG). These associations may, within the scope of their statute and provided they have at least 75 members or are comprised of at least seven associations altogether, appear in court proceedings as counsel to disadvantaged persons.<sup>34</sup> There are various forms of participation of associations in court and administrative procedures, which are outlined in the below.

NGOs can participate by way of providing advisory services or by simply being present in court and acting as counsel to the aggrieved persons, article 23 of the General Act on Equal Treatment. In accordance with article 23 of AGG associations can also cooperate with specialised attorneys.

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<sup>33</sup> *Kilian*, Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience, in: *Moorehead & Pleasence* (ed.), *After Universalism, Re-engineering access to justice* (2007), p. 31, 43.

<sup>34</sup> Article 23 para 1, 2nd sentence and para 2.

If representatives of associations act as counsel, they can appear in public hearings, except in criminal proceedings. In the context of enforcement of individual claims, the associations can only perform a function of support. Contrary to the concept of a class action, the primary focus for anti-discrimination associations here is the individual claim of the aggrieved person. It is also important to note that the counsel does not act on behalf of the person, that is, s/he is not an attorney at record, but only acting alongside the party in the proceedings. The counsel can perform all procedural activities required during the hearing, including the presentation of facts, motions, declarations of acceptance as well as waivers. This capacity is, however, limited to the hearing itself. The presentation of the counsel is considered presentation of the party, unless the party immediately objects or corrects the presentation. However, the relevant codes of procedure, especially those providing for a basis to prohibit further involvement of support persons, remain applicable.

The rights and duties are otherwise regulated in the codes of procedure of the relevant proceedings, such as article 73 para 5 of the Law on the Social Courts (SGG), article 67 para 7 of the Law on the Administrative Courts (VwGO), article 14 para 4 of the Law on Administrative Procedures (VwVfG), article 46 of Law on Labour Courts (ArbGG), or article 90 of the Civil Procedure Code (ZPO)<sup>35</sup>.

The acting person must be (legally) capable to act, i.e. s/he must be capable to take legal action. This is required for the acting person only and not for the association. It is not necessary to have a power of attorney. The legitimation stems from the fact that the party brings the counsel along in the hearing. The legal position of the counsel is linked to the presence of the party and ends when the party leaves the courtroom. However, an express authorization is often recommended.

Associations can also pursue violations of prohibitions of discrimination based on civil law in accordance with the provisions of the Law on Actions for Injunction (UKlaG) and the Law against unfair Competition (UWG) if they fulfil the requirements for the entry into the list of qualified institutions.<sup>36</sup> For example, in case of violations of legal prohibitions of the AGG by the General Terms and Conditions (AGBs) of contracts or in case of practices contrary to consumer

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<sup>35</sup> Article 90 of the Civil Procedure Code provides as follows: (1) “During the hearing the parties can bring counsel (‘Beistände’). A person can be a counsel if he or she is entitled to act as an attorney at record to represent the person during the hearing in those proceedings in which the party could lead the dispute independently. The court can accept other person as counsel if it is pertinent (‘sachdienlich’) and if this is required considering the circumstances of the case. ... (2) The arguments brought forward by the counsel are considered arguments of the party, unless they are immediately revoked or corrected.”

<sup>36</sup> Bundestag Ds 16/1780, p. 48, <http://dip21.bundestag.de/dip21/btd/16/017/1601780.pdf> (03.04.09).

protection legislation, associations are entitled to file injunctions. In case of violations of competition rules these violations can be claimed in the interest of the consumer.

In a limited number of cases specifically regulated by law, such as the Act on Equal Treatment of Persons with Disabilities (BGG) (article 12) and its corresponding provisions of the Laws on Equal Treatment (LAGs) of the federal states, as well as the Social Code IX (SGB IX) (article 63) it is possible for an association to exercise the rights of discriminated persons with the persons' approval and thus act as legal representation. In accordance with article 23 para 4 of the AGG these specific rights of action and powers of representation of associations that are in the benefit of persons with disabilities, remain untouched. However, this possibility does not exist for the protection against discrimination on the grounds of "race" or ethnic origin. The same is true for the possibility of collective claims, which are not possible in the context of the protection against discrimination on the grounds of "race" or ethnic origin, which makes it difficult for associations to address the problem of structural discrimination, being a particular concern in the context of "racial" discrimination.

Associations need to be established in a certain legal form. They must constitute a consortium of either natural or legal persons of any kind who voluntarily unite in order to pursue common goals. Corporate companies cannot be considered. The legal form would usually be that of a registered association even though this is not compulsory. It is also not necessary for the association to have legal capacity, i.e. the capacity to be a subject of legal rights and duties.

The special interests of disadvantaged persons exercised by the association need to be enshrined in the association's statute, that is the alleged discrimination ground in a given case has to be covered by the statute. The representation of interests does not have to be the only, but has to be an essential aim pursued by the association and must not be a subsidiary aim only. Within the framework of their statutes associations may represent any persons whose interests they want to pursue. The representation is not limited to the association's members.

Anti-Discrimination associations can, within the framework of their statutes, provide legal advice to persons affected by discrimination. This possibility constitutes an exception to the otherwise applicable prohibition to provide legal services as prescribed by the Act on Legal Services (RDG), article 23 para 3 of the AGG. According to article 23 para 3 of the AGG the decisive aspect is whether the legal support is linked to the discrimination at hands. It is unclear whether the legal advice also includes the enforcement of ceded claims in court or out of court

proceedings. This possibility is not covered in the wording of the law, however, the view is sometimes expressed that, given the history of the law<sup>37</sup>, it is not possible for anti-discrimination associations to enforce ceded claims. However, in accordance with general principles, the ceding of compensation and reparation claims following from article 15 and 21 of the AGG is possible as article 398 of the Civil Code (BGB) allows the transferral of cedeable claims through contract without requiring a specific regulation.

Finally, associations can participate in proceedings before international bodies, such as the European Court for Human Rights or the UN Treaty Bodies.

Generally, trade unions can also provide legal protection to their members and present them in judicial proceedings in employment related matters or social matters, amongst others. The trade union can also cover the costs incurred for lawyers and other expenses.<sup>38</sup> In addition, article 17 para 2 of the AGG, in conjunction with article 23 para 3 of the Work Constitutions Act, equips trade unions and work councils with the right to claim the omission of a discrimination under certain conditions.<sup>39</sup> Many trade unions have been active in the area of providing advice to so called multipliers and have established information centres. The topic of discrimination is usually included in seminars organized by the trade unions.

## 9. Forms of satisfaction available to a vindicated party

The General Act on Equal Treatment (AGG) provides for various sanctions for violation of the law, mainly in the form of financial compensation. It covers compensation for financial damage as well as immaterial damage. The AGG distinguishes two alternative settings: remedies in employment law (sections 15 – 16 of the AGG) and remedies in private relations (sections 19 – 21 of the AGG).

In employment matters, discriminated persons may assert the reparation of damages from the employer under section 15 (1) of the AGG. However, if the employer (or its staff) did not commit

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<sup>37</sup> The ceding of claims was initially foreseen in the draft law but later expressly excluded.

<sup>38</sup> See, for example guidelines of the Trade Union Verdi, [http://freie.verdi.de/news\\_und\\_material/data/rechtsschutz\\_verdi\\_kurz.pdf](http://freie.verdi.de/news_und_material/data/rechtsschutz_verdi_kurz.pdf) (04.04.09)

<sup>39</sup> See above, Chapter 1. See R. Buschmann in: W. Däubler/M. Bertzbach: *Allgemeines Gleichbehandlungsgesetz*, Baden-Baden 2007, article 17 note 10-11, 13, 27.

the breach of the duty intentionally or by negligence, the claim is excluded.<sup>40</sup> When the damage does not constitute economic losses, the employee is entitled to an appropriate compensation in money (section 15 (2) of the AGG). This claim does not presuppose the fault of the employer, it is sufficient that there is an objective discrimination against a person.<sup>41</sup> In the specific event of a non-recruitment of the plaintiff, the compensation shall not exceed three monthly salaries, if the employee would not have been recruited if the selection had been made without unequal treatment.<sup>42</sup>

Problematically, the claim for damages is excluded when the employer is not responsible by fault for the breach of duty. This limitation of the remedies provided for by sections 15 (1) and 21 (2) of the AGG is being criticized by the European Commission.<sup>43</sup> In 2008, the Commission started infringement proceedings against Germany for the insufficient implementation of the anti-discrimination directives. According to its warning letter of 1/31/2008,<sup>44</sup> the fault requirement of section 15 (1) of the AGG does not conform to the directives. However, the recent case law of Federal Supreme Labour Court on section 15 (2) of AGG shows that German courts are interpreting the national provisions according to the requirements of European law.<sup>45</sup> In addition, the victim may have recourse to the remedies under general contract (section 280) and tort law (sections 823 et seq. of the German Civil Code (BGB)).<sup>46</sup>

In civil law, section 21 of the AGG provides for three remedies. First, the victim of discrimination has the right to claim rectification of the infringing act. Second, the victim can claim the perpetrator to desist from further discriminatory acts if it is likely that such acts will occur (section 21 (1) of the AGG). Third, the victim is entitled to damages resulting from the discriminating misbehaviour (section 21 (2) of the AGG). In addition, section 21 (3) of the AGG provides that the victim may have recourse to the remedies under general tort law (section 823 et seq. of the BGB). Article 22 of the AGG, which shifts the burden of proof in discrimination proceedings on the infringer, is also applied to the remedies of general civil law.<sup>47</sup>

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<sup>40</sup> The burden of proof lies with the employer.

<sup>41</sup> BAG, 1/2/2009, NZA 2009, 945 with references to the pertinent case law of the ECJ, 4/22/1997, C-180/95, *Draempaehl*, ECR 1997 I 2212.

<sup>42</sup> This provision corresponds to the former section 611a BGB.

<sup>43</sup> According to the case law of the ECJ, 4/22/1997, C-180/95, *Draempaehl*, ECR 1997 I 2212, remedies for discriminatory infringements shall not depend on the fault of the infringer.

<sup>44</sup> 2007/23620 K(2008) 0103; AuR 2008, 145, 147 f.

<sup>45</sup> See supra at footnote **Error! Bookmark not defined.**

<sup>46</sup> Note, however, that these remedies are equally based on fault.

<sup>47</sup> MünchKomm/Thüsing, Sec. 22 AGG, (commentary), no. 5.



## 10. Adequacy of compensation

As a matter of principle, German civil law does provide for a full compensation of sustained damages, although it does not allow punitive damages.

According to well established and constant case law the compensation of damages shall not entail an unjust enrichment of the claimant. Thus, the amount of damages and compensation awarded under these provisions is limited and does normally not exceed the amount of three monthly salaries.

However, section 15 (2) of General Act on Equal Treatment (AGG) limits the amount of damage to three monthly salaries in the case of a discrimination related to the access of employment. This cap applies if the applicant would not have been recruited if the selection had been made without unequal treatment. In practice, this limitation is also applied in other constellations under the AGG.

In the selected cases, the awarded compensation ranges between 500 and 10,000 € with an average of about 3,000 to 4,000 € (usually the equivalent of 3 monthly salaries). A compensation of 42,839 € was awarded in a case of discrimination concerning redundancy payment.

## 11. Rules relating to the payment of legal costs

The reimbursement of legal costs is dealt with by sections 91-107 of the Civil Procedure Code (ZPO). As a matter of principle, German procedural law applies the “costs follow the event” principle and, accordingly, the losing party must pay all costs, including court fees and the opponent’s necessary expenses, especially the attorney’s fees (section 91 of the ZPO). The amount of the fees depends on the value of the claim and is fixed by statutory provisions. With the exception of family matters, there is no discretionary power of the courts regarding the allocation of the costs of the proceedings.

In labour law proceedings, the situation is different: a compensation of costs is always excluded. According to section 12a of the Law on the Labour Courts (ArbGG),<sup>48</sup> each party bears his or her attorneys' fees independently from the outcome of the litigation. As a rule, this provision shall encourage employees to initiate proceedings without the risk of paying the other side's costs. However, if the plaintiff retains a lawyer, he must pay the normal costs as fixed by the Law on the Remuneration of Lawyers. In appellate proceedings, the general rules on costs (sections 97 and 91 of the ZPO) are applied.

According to section 154 (1) of the Code of Administrative Court Procedure (VwGO) "the defeated party shall bear the costs of the proceedings." If an appeal is unsuccessful the costs shall be borne by the party who initiated it (154 (2)). Finally, section 155 (1) of the VwGO provides that in the case of a party partly succeeding and partly being defeated, the costs shall be shared or split proportionately.<sup>49</sup>

## 12. Rules on burden of proof

The central norm regulating the burden of proof is article 22 of the General Law on Equal Treatment, basically providing for an alleviation of the burden of proof for the claimant in the same way as article 8 of Directive 2000/43/EC, thus not clearly regulating a shift of the burden of proof in the strict sense. If, in the case of a dispute, a party proves facts leading to the assumption that a case of discrimination has occurred on any of the grounds listed in article 1 of the law, it is for the other party to prove that there has been no violation of the regulations on the protection from discrimination. In accordance with relevant case law, article 22 General Law on Equal Treatment only requires an assessment "from the perspective of an objectively rational person in the individual case".<sup>50</sup> It is sufficient that the court is convinced of the considerable likelihood of a causality between the relevant fact (in this case the sex of the claimant) and the disadvantage suffered.<sup>51</sup> Indications which make a discrimination especially for that reason plausible are

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<sup>48</sup> Article 12 a para 1 1st sentence of the Law on Proceedings in Labour Disputes provides as follows: "In first instance proceedings the successful party is not entitled to compensation for delays and to reimbursement of costs for the involvement of an admitted attorney."

<sup>49</sup> *Brandt/Sachs*, (*Brandt*), Handbuch Verwaltungsverfahren und Verwaltungsprozess (2008), p. 1049 et seq.

<sup>50</sup> The relevant cases, however, mainly deal with discrimination on the basis of age or sex. Case law dealing with the burden of proof under the GLET in the context of discrimination on the ground of "race" or ethnic origin does not seem to exist. The first case dealing with access to housing and discrimination on the ground of "race" or ethnic origin resulted in a dismissal of the lawsuit, see Germany/Landgericht [District Court] Aachen, Judgment of 17 March 2009, case no.: 8 O 449/07.

<sup>51</sup> Germany/Arbeitsgericht [Labour Court] Stuttgart, Judgment of 5 September 2007, case no.: 29 Ca 2793/07, para. 41.

sufficient. It is sufficient to prove that the existence of facts is more likely than their non-existence.<sup>52</sup>

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<sup>52</sup> Germany/Arbeitsgericht [Labour Court] Berlin, Judgment of 12 November 2007, case no.: 86 Ca 4035/07, para 55  
Germany/Arbeitsgericht [Labour Court] Berlin, Judgment of 19 October 2006, case no.: 2 Sa 1776/06, para 24.