



European Network Against Racism
Réseau européen contre le racisme

ENAR Shadow Report 2012-2013

ENAR SHADOW REPORT

**Racism and related discriminatory practices in
employment in Germany**

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Racism is a reality in the lives of many ethnic and religious minorities in the EU. However, the extent and manifestations of this reality are often unknown and undocumented, especially in official data sources, meaning that it can be difficult to analyse the situation and to establish solutions to it.

The ENAR Shadow Reports are produced to fill the gaps in the official and academic data, to offer an alternative to that data and to offer an NGO perspective on the realities of racism in the EU and its Member States. NGO reports are, by their nature, based on many sources of data - official, unofficial, academic and experiential. This allows access to information which, while sometimes not backed up by the rigours of academic standards, provides the vital perspective of those that either are or work directly with those affected by racism. It is this that gives NGO reports their added value, complementing academic and official reporting.

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Executive summary

The aim of this report is to give an evidence based assessment of the situation of ethnic minorities and migrants in the German labour market in relation to discrimination and racism. Trends and developments of racism and discrimination in the labour market in Germany span over a longer period and are based on the evaluation of ten years of ENAR shadow reporting in Germany.

The Report provides an analysis of the *definitions* which are vital in trying to understand the German situation, followed by a statistical overview of the composition of the German population with a migrant background of nearly 20 per cent and their positions in the German labour market. It contextualises the labour market and its legal framework, giving an outlook of the situation.

Manifestations of racism and structural discrimination in employment are described and perceptions and incidents of discrimination in employment are highlighted.

The context of the labour market and the legal framework is explained, and it will show the surprising discovery of Germany having *fewer problems with direct forms of racism* in the employment relationship between the migrant minority and majority population.

Racism in the employment sector in Germany manifests itself as more indirect; presenting itself as a *structural form of discrimination*. In the perception of an expert in the field of discrimination in employment, Germany is described as having widespread discrimination. Foreign students avoid studying in Germany and migrants are overrepresented in the lower paid sectors. Migrants are less likely to be invited to a job interview.

The German Federal Employment Agency has started to re-evaluate its data and brought out the first labour market report addressing the job situation of migrants.¹ Findings show that migrants in higher education are more likely to not be in paid employment than those with lower qualifications. Anonymous job applications are considered an effective measure against discrimination.

Germany opens its job market for immigrants and high potential immigrants are wanted. Still however, migrants are more likely to earn less, work part time and work in atypical jobs. Less migrants work in the public sector. The symbolic representation of the migrant small shop-keeper and the NSU killings are reflected upon.

Incidence of discrimination in employment and patterns of inequality over the course of time can be found in access to the labour market and in the recognition of qualifications. The access of high-skilled employees is the core problem. Discrimination focuses on Muslims and the socio-economic situation of other parts of the population. The developments in the implementation of the EU anti-discrimination Directive in German legislation have been one of the most profound instigators for changes in the national anti-discrimination policies. As a result of the emergence of the first data on discrimination in the labour market, discrimination in access to employment and in the workplace has become more visible.

This is then followed by a deeper investigation in discrimination in access to employment and in the workplace, in which economic sectors discrimination occurs, where it is more likely to be found and if

¹Federal Employment Agency: Employment market data based on migrant background available for the first time 28.05.2013, http://www.arbeitsagentur.de/nn_426332/EN/zentraler-Content/Presse/Presse-13-029-EN-785584.html, accessed 10.01.2014.

there are any specific geographical areas and relevant actors who discriminate. The next chapter focusses on the challenges and how they are tackled in public policies, access to effective judicial and non-judicial remedies, through an ombudsperson or an equality body or through mediation or conciliation or the labour inspectorate. The role of civil society initiatives, like trade unions, NGO activities or employer organisations will also be looked into. The Report will then provide an assessment of the political and societal developments related to racism and discrimination, along with conclusions and recommendations for Germany.

Main Recommendation:

The German General Equal Treatment Act (AGG)

- A systematic, homogeneous, one-stop interpretation of discrimination cases; a standardised documentation of court cases on the basis of the AGG and intensified research on discrimination;
- Bring provisions of the AGG in line with European law (e.g. independence of the anti-discrimination body, implementation of the AGG to the Länder-level)² and reflect the emerging case-law;
- Apply the restriction of discriminatory practices under civil law to large scale businesses for all “categories” and include racial discrimination in its scope.

State actors and German Politics

- Transfer the Equality body (ADS) from the Ministry of Family Affairs to the Ministry of Labour and Social Affairs, so that they can be responsible in the effective implementation of the EU Directive 2000/78;
- Monitoring legal barriers. The prohibition on refugees being able to work and the prioritisation of German applicants should be evaluated in respect to their discriminating potential;
- Public funding and public contracts should be made dependent on the adherence to the standards set down in the AGG;

German Equality Body (ADS)

- The recommendations in the ADS report on education and the labour market do not concern policy or the implementation of policy measures. As the ADS, because of the lack of effective powers, cannot effectively stop discriminatory practices in the labour market, it should be granted some power to enforce anti-discriminatory practices;
- Find ways to assess effectiveness and impact of budgets in terms of their specific aims, focussing on budget allocation, implementation and the stakeholders involved;
- Establish a unified system and practice of reporting cases of discrimination.

The German Social partners

- Create transparency in the wage system, which reflects unintended and indirect discriminatory effects and provides measure to counter those indirect effects (e.g. pay-gap women-men or migrant-non-migrant)
- Use employer/works council agreements (Betriebsvereinbarung) which regulate the internal peace to set a clear message against discrimination in the workplace or in the public services;
- Anti-discrimination measures should be adhered to at all stages of the recruitment process (e.g. measuring the share of migrants reacting to job-announcements, applying for a job, being invited to an interview, being selected and duration of stay in the enterprise);

² Further recommendation see BUG, p. 13.

Civil society and NGOs

- Establish qualified counselling services, equipped with skills and resources, to improve law enforcement;
- Implement specific measures against structural discrimination in cooperation with the ADS (e.g. collecting equality data, litigating for the use of statistics in German courts, raise awareness on the concept of indirect discrimination);
- Use the different models of the German Labour Inspectorate (Zoll, Gewerbeaufsicht) for the supervision of the implementation of anti-discriminatory measures, policies and legislation, in addition to what is already laid down in the labour regulations and the regulations concerning worker protection (§ 139b GewO).

EU Parliament

- Establish a European system of labour inspection which goes beyond the cooperation of national structures, ensuring that the combating of discrimination is targeted specifically and includes a focus on the interests of the victim.

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1. Introduction

Discrimination and racism are a reality in the lives of many ethnic and religious minorities in Europe and in Germany. The extent and manifestations of this fact are often unknown and undocumented, especially with regard to official data sources. As a consequence, it can be difficult to analyse the situation and to establish solutions. Even when there is extensive official data, NGOs often offer a vital alternative data source which comes directly from the experiences of individuals and communities experiencing racism on a daily basis. The ENAR Shadow Reports have become a major tool for monitoring the situation of racism and xenophobia in EU Member States. Both ENAR's national and European Shadow Reports have proved to be an invaluable documented starting point for strategic and coordinated action, particularly for anti-racist civil society advocacy towards national governments, the European institutions, bodies and the media.

The aim of this report, therefore, is to contribute to knowledge and to provide insight from activists and professionals on the ground working to combat racism and discrimination in Germany as an advocacy tool by which to influence policy. This Report takes on a more narrow focus than previous reports, by exploring the situation of racism and discrimination in the field of employment for the period of March 2012 to March 2013. The results will be used at national level to influence policy developments and will be further compiled into a European comparative report to influence European policies. With improved statistical and comparative data, the Shadow Reports will have a demonstrable impact for changing policy and bringing about necessary policy reforms.

1.1 Definitions

ENAR - Fact sheet on structural discrimination in employment gives the following preliminary definition: *"It occurs when people are treated differently and less favourably because of certain characteristics, which are not related to their skills or the requirements of the job. This happens because the organizational systems were designed without taking into account the diverse needs of groups within the community in relation to e.g. their "race" or ethnicity, disability or gender".*³

Since the change of the Citizenship Law in 2000 and the introduction of the concept of "migration background" in 2005, the old division between the (ethnic) German citizen and the foreigner has been extended to a system of definitions cross-cutting this old divide. Slowly, those extended definitions are becoming more recognised and used in official statistics, although most of the labour market statistics are still reproducing the old "German" - "Foreigner" divide.

Labour market statistics and migration background: In the German Social Security Code (Sozialgesetzbuch, §281 SGB III, Section 2), the legislators have expressed their interest in getting additional evidence on the impact of someone's migration background on employment and the representation of this background in labour market statistics. To meet the information needs of the public, the Labour market agency (Bundesagentur für Arbeit - BA) has now begun to issue a quarterly publication containing survey results concerning unemployment statistics, basic social security statistics, statistics on benefits under SGB III (Social welfare), statistics on labour market policies and on the market for apprenticeship training positions.

The term «immigrant» and «migration background» brings together a variety of different and distinct social phenomena. The official use of the term «migration background» is regulated in § 6 of

³ ENAR - Fact sheet on structural discrimination in employment, working paper, not published yet.

the immigrant survey regulation (Migrationshintergrund-Erhebungsverordnung - MighEV):⁴ Thus, an individual has a migrant background if:

1. he/she does not hold German citizenship or
2. his/her birthplace is outside the current borders of the Federal Republic of Germany and the person immigrated into the present territory of the Federal Republic of Germany after 1949 or
3. the birthplace of at least one parent of the person being interviewed is outside the current borders of the Federal Republic of Germany, and the parent immigrated after 1949 into the present territory of the Federal Republic of Germany or
4. He/she is a member of a subset of individuals who are defined as ethnic Germans (Aussiedler, Spätaussiedler = ethnic German minorities in Eastern Europe and the former Soviet Union), if they have acquired German nationality, and/ or their spouses or their descendants have immigrated into the present territory of the Federal Republic of Germany after 1949.

Migration status derives from the information of the respondents; each individual can potentially be assigned a migration status. The following groups can be distinguished:⁵

1. Foreigners without personal experience of migration
2. Foreigners with personal first-hand migration experience,
3. Germans with personal migration experience, including: Ethnic Germans / repatriates (Aussiedler, Spätaussiedler),
4. Germans without personal experience of migration with a migration background, which is derived from the migration of their parents and
5. Germans without an immigrant background.

1.2 Statistical overview

A statistical overview of the composition of the population in Germany is not based on ethnic origin but on «migration background». It is possible to make a distinction between migrant background, between nationals as well as non-nationals and between national minorities without a migrant background, as defined by the Council of Europe.⁶ Data is only disaggregated by sex and age. Data on origin is only available on the basis of «migration background», but the «birthplace» in certain statistics is used as a proxy.⁷

Citizenship⁸

- German citizens 92,3 per cent
- Non-German citizens 7,7 per cent

Migration background

4 [All tables give the numbers of December 2012, http://statistik.arbeitsagentur.de/nn_32022/SiteGlobals/Forms/Rubrikensuche/Rubrikensuche_Form.html?view=processForm&resourceId=210368&input_=&pageLocale=de&topicId=544668&year_month=201212&year_month.GROUP=1&search=Suchen](http://statistik.arbeitsagentur.de/nn_32022/SiteGlobals/Forms/Rubrikensuche/Rubrikensuche_Form.html?view=processForm&resourceId=210368&input_=&pageLocale=de&topicId=544668&year_month=201212&year_month.GROUP=1&search=Suchen), see Table «Deutschland», accessed 30.9.2013.

5 Ibidem

6 BMI, Die nationalen Minderheiten in Deutschland, http://www.bmi.bund.de/DE/Themen/Gesellschaft-Verfassung/Nationale-Minderheiten/Nationale-Minderheiten-Deutschland/nationale-minderheiten-deutschland_node.html, 19.9.2013

7 Zensus 2011. Ergebnisse dynamisch und individuell, <https://ergebnisse.zensus2011.de/>, accessed 30.9.2013.

8 Direct request at the database of the German Census 2011, <https://ergebnisse.zensus2011.de/>, accessed 30.9.2013.

- Individuals without migration background 81,1 per cent
- Individuals with migration background 18,9 per cent

Disaggregating the migrant population according to gender and citizenship can be described as follows:

- 11,3 per cent of individuals with a migration background are German citizens and 7,5 per cent are non-German citizens (foreigners).⁹

Among those individuals without migration background

- 39,4 per cent are male and 41,7 per cent are female

and among those with a migration background

- 9,3 per cent are male and 9,6 per cent are female.

Table 1: Individuals by age and migrations background - in %¹⁰

Individuals without a migration background	Under 18	12,1
	18 - 29	10,5
	30 - 49	22,2
	50 - 64	17,4
	65 and older	18,9
Individuals with a migration background	Under 18	4,4
	18 - 29	3,5
	30 - 49	6,2
	50 - 64	3,0
	65 and older	1,7

Table2: Individuals by marital status and migration background – in %¹¹

Individuals without a migration background	Single	31,5
	Married/ in a civil partnership	37,2
	Widowed / civil partner deceased	6,6
	Divorced/civil partnership dissolved	5,9
	Not stated	/
Individuals with a migration background	Single	8,5
	Married/ in a civil partnership	8,6
	Widowed/ civil partner deceased	0,7
	Divorced/ civil partnership dissolved	1,1
	Not stated	0,0

Table 3: Individuals by migration background and length of residency in Germany in years – in %¹²

Under 5 years	11,4
5 – 9 years	12,4
10 – 14 years	14,1
15 – 19 years	15,8
20 years and over	46,3

⁹ Ibidem

¹⁰ Ibidem

¹¹ Ibidem

¹² Ibidem

National Minorities in Germany:¹³ Four different ethnic minorities with distinct cultures and non-German native languages have lived in territories with a dominant German population for centuries and have always held German citizenship. These are the ethnic Danish minority, the Frisian ethnic group, the German Sinti and Roma and the Sorbian people. These national minorities have special rights and are protected and supported by the Federal Government. In addition, they are under the special protection of the Framework Convention of the Council of Europe for the protection of national minorities. Their languages (Danish, North and Saterland Frisian, Romany, upper - and lower Sorbian) are protected by the European Charter for regional or minority languages. The compliance of providing protection as formulated in these two agreements is regularly monitored by the Council of Europe. The above instruments are intended to ensure that the culture and language of national minorities are maintained and receive special protection in the long term.

Danes and Frisians: In Schleswig-Holstein, Germany's most northern *Bundesland*, there is an estimated population of 50.000 ethnic Danes.¹⁴ Germany's Frisian ethnic minority is largely resident in Schleswig-Holstein's West Coast area and in North-West Niedersachsen, as well as in the *Kreis* (administrative district) of Cloppenburg. An estimated population of 60.000 individuals define themselves as Frisians.¹⁵

Roma and Sinti: An estimated population of 60.000 German Sinti and 10.000 German Roma respectively are resident in Germany. Both the Sinti and Roma ethnic minorities are believed to have originated from the North-West regions of present-day India and Pakistan. Sinti have been resident in German-speaking territories since the 14th century. Roma began to settle in Germany Roma in the second half of the 20th century. During the National Socialist dictatorship, Sinti and Roma were victims of persecution and genocide – both in Nazi Germany and in territories under German occupation. An estimate of 500.000 European Roma were deported either by SS task forces or the German *Wehrmacht* and murdered in extermination camps; a large part of their cultural heritage was destroyed. Today, German Sinti and Roma are resident in all parts of Germany.¹⁶

Sorbians: The modern Sorbian ethnic group consists of an estimate of 60.000 individuals. As an ethnic group, they live exclusively on German territories, namely in the region of Oberlausitz (Freistaat Sachsen) as Upper Sorbes and in the region of Niederlausitz (Land Brandenburg) as Lower Sorbes. The Sorbian people descended from Slavonic ethnic groups who originally settled in a North-Eastern region of the Carpathian Mountains, and immigrated to the regions situated between the Baltic Sea and the Erz Mountains about 1500 years ago.¹⁷

A statistical overview of the religious diversity in Germany is not possible because data on religion is generally not collected. The census 2011 has, on a voluntary basis, asked about the major religions and the number of adherents. Data on the religious composition can be derived from proxy such as church tax payers and from studies on specific religious groups, such as Muslims.¹⁸ In Germany, the

13 BMI, Die nationalen Minderheiten in Deutschland, http://www.bmi.bund.de/DE/Themen/Gesellschaft-Verfassung/Nationale-Minderheiten/Nationale-Minderheiten-Deutschland/nationale-minderheiten-deutschland_node.html, 19.9.2013

14 BMI, Dänische Minderheit, http://www.bmi.bund.de/DE/Themen/Gesellschaft-Verfassung/Nationale-Minderheiten/Nationale-Minderheiten-Deutschland/DaenischeMinderheit/daenischeMinderheit_node.html, 19.9.2013.

15 BMI, friesische Volksgruppe, http://www.bmi.bund.de/DE/Themen/Gesellschaft-Verfassung/Nationale-Minderheiten/Nationale-Minderheiten-Deutschland/FriesischeVolksgruppe/friesische-volksgruppe_node.html, 19.9.2013.

16 BMI, deutsche Roma und Sinti, http://www.bmi.bund.de/DE/Themen/Gesellschaft-Verfassung/Nationale-Minderheiten/Nationale-Minderheiten-Deutschland/DeutscheSintiUndRoma/deutscheSintiUndRoma_node.html, 19.9.2013.

17 Ibidem

18 e.g. Bundesamt für Migration und Flüchtlinge: Muslimisches Leben in Deutschland, June 2009, <http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Forschungsberichte/fb06-muslimisches-leben.html>, accessed 10.1.2014.

state collects a church tax for the churches in Germany from those who are registered as a member of a church.¹⁹

- 30,8 per cent belong to the Roman Catholic Church (statutory corporation).
- 30,3 per cent belong to the Protestant Church (statutory corporation).
- 38,8 per cent belong to other religions or did not state any religious belonging

Those main religious groups are composed of mainly German citizens and non-German citizens are a tiny minority in those Christian churches.²⁰

- 28,9 per cent of Roman Catholics are German citizens and 2,0 per cent are non-German citizens.
- 30,0 per cent of Protestants are German citizens and 0,3 per cent are non-German citizens.
- 33,4 per cent of those who belong to another religion or did not state any religion are German citizens and 5,4 per cent are non-German citizens.

According to research by the Protestant Church in 2010 on religious affiliations, the religious membership of the population of Germany can be described as follows.²¹

- 30,15 per cent Roman Catholic Church (statutory corporation)
- 29,23 per cent Protestant Church (statutory corporation) (EKD)
- 4,89 per cent Muslims
- 1,55 per cent Orthodox
- 0,40 per cent other Christian denominations/ Free Churches
- 0,30 per cent Buddhists
- 0,24 per cent Jews
- 0,12 per cent Hindus
- 33,06 per cent are unaffiliated with any religion

2. The context: labour market and legal framework

2.1 Outlook of the labour market

The Federal Employment Agency in Germany has reported for the first time on developments in the employment market based on migrant backgrounds. This has been made possible by means of a voluntary census of job seekers, unemployed persons and employable beneficiaries. Relevant information on migrant background was collected for 70 per cent of those polled. Initial findings are now being submitted in a report.²² This report shows that people with a migrant background often face more difficulties in the employment market than those without a migrant background. With regard to the migration that has taken place in the last decades, and measured against the proportion of migrants in the population in Germany, it can be seen that those with a migrant

19 Direct request at the database of the German Census 2011, <https://ergebnisse.zensus2011.de/>, accessed 19.9.2013.

20 Ibidem

21 Evangelische Kirche in Deutschland (EKD): Statistik über die Äußerungen des kirchlichen Lebens in den Gliedkirchen der EKD im Jahr 2010, <http://www.bpb.de/nachschlagen/zahlen-und-fakten/soziale-situation-in-deutschland/145148/religionszugehoerigkeit>, 19.9.2013.

22 Bundesagentur für Arbeit, Press Info 029 of 28.05.2013, Employment market data based on migrant background available for the first time http://www.arbeitsagentur.de/nn_426332/EN/zentraler-Content/Presse/Presse-13-029-EN-785584.html, accessed 17.8.2013.

background are frequently unable to successfully participate sufficiently in working life. The challenge remains to enable equal opportunities for all.²³

- Based on existing evaluations, 35 per cent of the unemployed have a migrant background. Educational criteria play a decisive role in the chances to join the employment market. At 52 per cent, the proportion of unemployed persons with a migrant background without a vocational qualification is slightly higher than the proportion of those without this background (48 per cent). Things are different in the case of those who have completed industrial training or schooling: at 18 per cent, the proportion of those with a migrant background is much lower (82 per cent for persons without a migrant background).²⁴
- The proportion of employable beneficiaries receiving basic welfare benefits ("Hartz IV") with a migrant background is around 42 per cent; 10 per cent is in Saxony-Anhalt and 60 per cent is in Hesse.²⁵

This presents the situation in December 2012, as highlighted for the first time by the Federal Employment Agency. In future, the Agency will publish quarterly issues which will be continuously updated in order to satisfy public information requirements.

2.2 Legal framework

The Residence Act governs access to the German labour market for employees from abroad. In principle, citizens of EU countries do not need a labour permit, but interim regulations exist for Romanian and Bulgarian citizens. Third-country nationals require a residence title to take up employment – applications can be filed with the representation of the Federal Republic of Germany abroad or within Germany at an aliens' authority – and usually need the approval of the Federal Employment Agency. In addition, Germany has to observe several directives issued by the Council of the European Union, which oblige Member States to prevent specific discrimination in the private sector by means of national legislation:²⁶

- 2000/43/EC equal treatment irrespective of racial or ethnic origin,
- 2000/78/EC equal treatment in employment and occupation,
- 2002/73/EC equal treatment of women and men in access to employment, vocational training and promotion,
- 2004/113/EC equal treatment of men and women outside the labour market.

These directives also concern the area of employment and occupation (especially the relationship between employer and employee), and are intended to prevent discrimination based on gender, sexual orientation and identity, national or ethnic origin/ identity, religious identity and belief/world view, disability, and age. In Germany, the directives have been transposed by the General Equal Treatment Act (AGG) in 2006. It also contains specific regulations concerning employment that complement the General Civil Law. Additional anti-discrimination provisions can also be found in specific labour laws.²⁷ The following list provides a short overview of the anti-discrimination and equal opportunity laws which apply in modern Germany at federal and national levels:²⁸

- Basic Law (Grundgesetz/Constitution), Article 3;
- SGB III - employment promotion agreement made by the Federal Government;
- General Equal Treatment Act (AGG);

23 Ibidem

24 Ibidem

25 Ibidem

26 http://www.arbeitsagentur.de/nn_426332/EN/Navigation/Startseite/Englisch-Nav.html, accessed 19.9.2013.

27 Benecke, Martina: Rechtsvergleich der europäischen Systeme zum Antidiskriminierungsrecht, Antidiskriminierungsstelle des Bundes, 2010.

28

http://www.arbeitsagentur.de/nn_348238/zentraler-Content/A10-Fachdienste/A104-Chancengleichheit/Allgemein/Rechtliche-Grundlagen-Gesetze.html, accessed 19.9.2013

- Lisbon Treaty of Amsterdam of 1997, Article 19 TFEU and Article 21 of the Charter of Fundamental Rights;
- German Employment guidelines (since 1998);
- EU Equal Treatment Directive 2000/43/EC and 2000/78/EC;
- Strategy for equality between women and men 2010-2015;
- EU Directive 2006/54/EC;

The Works Constitution Act (Betriebsverfassungsgesetz) regulates workers councils.²⁹ The effective enforcement of the regulations of the Equal Treatment Act (AGG) and the permanent elimination and prevention of discrimination in the workplace have been defined as the social responsibility of those involved in a given work situation. This includes certain additional rights that have been granted to the Works Council and trade unions involved in the operation. The social partners, employers, workers and their representatives are requested, within the framework of their tasks and possibilities of action, to implement the objectives of the AGG. In companies where the requirement of the Works Constitution Act (BetrVG) (employment of at least 5 workers) exists, the Works Council or a Trade Union represented in the operation can take legal action.³⁰

There has been cases of misuse of the Equal-Treatment Act, known as «AGG-Hopping», which had been used by lawyers and law firms for cases where a job applicant applies, according to them, without any intention of accepting a potential job offer, but rather with the aim of getting rejected in order to be able to sue the respective employer for having been rejected for discriminatory reasons. The rejected applicant will then, allegedly, use the AGG to claim compensation under § 15 para 2. A database on «AGG-Hoppers» was established by a big law firm, but after public pressure by an anti-discrimination NGO, this was closed in 2009.³¹

The Bureau for the Implementation of Equal Treatment (BUG), an NGO actively pursuing litigation in the anti-discrimination sector, provided an expert opinion to the conclusion that in practice, the application of anti-discrimination laws refers to numerous substantive and procedural hurdles for victims of discrimination wanting to enforce their right to equal treatment with the help of the AGG. The BUG developed concrete reform proposals concerning the AGG which have been taken on board by the German national platform of ENAR (NgR) for further discussion.³² These concrete reform proposals include the strengthening of the role of work councils in anti-discrimination procedures or the prohibition of victimisation at the workplace as it is foreseen in the EU-directive (2000/78/EC).

Numerous provisions must be brought into line with European Union law. In part, this has already been clarified by case law, for example, discriminatory dismissals and discrimination associated with third parties. One example is 4.3. § 2 Abs. 4 of the AGG, which states that dismissals are covered exclusively by the general and special dismissal protection regulation. This regulation should be abolished without replacement. In accordance with the Court of Justice of the EU, in its verdict on 6 November 2008, the Federal Labour Court clarified that, in accordance with the principles of social considerations, the anti-discrimination regulations provided for in the AGG are to be taken into consideration in dismissal cases and have the potential of invalidating a dismissal.³³ Thus, the Court

²⁹ http://www.allgemeines-gleichbehandlungsgesetz.de/index.php?option=com_content&view=category&layout=blog&id=47&Itemid=72&limitstart=5, accessed 19.9.2013

³⁰ Ibidem

³¹ http://www.allgemeines-gleichbehandlungsgesetz.de/index.php?option=com_content&view=category&layout=blog&id=48&Itemid=73, accessed 19.9.2013.

³² http://www.bug-ev.org/fileadmin/user_upload/AGG_Novellierung_vorläufige_Endfassung.pdf, accessed 19.9.2013

³³ Federal Labour Court (BAG) 6.11.2008, NZA 2008, 1285, http://www.bundesarbeitsgericht.de/download/jahresbericht_2008.pdf, and EuGH, Rs. C 13/05, NZA 2006, 839 (Navas), <http://dejure.org/dienste/vernetzung/rechtsprechung?Text=C-13/05>, both accessed 10.1.2014.

accounted for the fact that EU regulations do not permit the exemption of cases of dismissal from being covered by anti-discrimination regulations, as § 2 Abs. 4 AGG seems to suggest.³⁴

However, the BUG has claimed that the legislature has a responsibility for its policies and its constitutional implementation and it should not wait for decisions to be taken first by the European Court of Justice or the German Federal Constitutional Court. This relates to the religious privilege in § 9 AGG, which does not conform with European legal standards or to the state level, particularly in the area of government action which is not properly covered. On a procedural level, deadlines have proven to be too tight and problems have arisen regarding the shift of the burden of proof and the lack of support for anti-discrimination associations. The lack of qualified counselling services which are equipped with skills and resources, are a hindrance to law enforcement.³⁵

3. Manifestations of racism and structural discrimination in employment

3.1 Perceptions of discrimination in employment

In January 2013, the German Association of Cities (Deutscher Städtetag) published a position paper³⁶ on issues regarding immigration to Germany from Romania and Bulgaria. The paper lamented about the growing number of immigrants from Central and Eastern European EU member states. Although the position paper and the public statements of the cities renounced reproducing the stigmatization of citizens from these countries, the paper was however the starting point for a heated debate on the issue. The focus was mainly the Roma, which resonated in mainstream media and tabloids in a critical discussion on the abuse of freedom of movement and welfare fraud.³⁷ The German Minister of the Interior, Hans-Peter Friedrich, warned of a new dimension of "poverty immigration" after 2014 (after the abolition of restrictions on the freedom of movement for Romania and Bulgaria). The nightmare scenario he drew in the media demanded, in his opinion, the further restriction of the freedom of movement, their exclusion from the provision of social services and lower barriers for the deportation of EU citizens. The European Commission responded sceptically to these demands because so far no figures on abuse of social benefits were presented.³⁸ This highlights the perception of discrimination in the general public, as well as in the administrations. Often there is no sensitivity towards the stigmatized group, in this case the Roma, or to any EU citizenship and what they are calling for is an unequal treatment of EU citizens.

The Online Magazine «Migazin – Migration in Germany»³⁹ provides a good overview on migration issues and such debates in Germany. It reviews studies, articles and projects related to migration. Under the tag «labour market», all relevant publications related to labour market issues are collected. In the period under review, labour market discrimination was publicly discussed in a number of reports and studies:

³⁴ http://www.bug-ev.org/fileadmin/user_upload/AGG_Novellierung_vorläufige_Endfassung.pdf, accessed 19.9.2013

³⁵ Ibidem

³⁶ Position paper des Deutschen Städtetags zu Fragen der Zuwanderung aus Rumänien und Bulgarien. 22.01.2013.

³⁷ Ibidem, p. 7, e.g. <http://www.handelsblatt.com/politik/deutschland/oekonomen-analyse-die-maer-von-der-armutseinwanderung/7893718.html>, <http://www.abendblatt.de/hamburg/article114925640/Ich-bin-doch-auch-ein-Buerger-der-EU.html>, all accessed 10.1.2014.

³⁸ Positionpaper of ENAR platform Germany, Netz gegen Rassismus (NgR): Integration und Partizipation statt Stigmatisierung - Zuwanderung aus EU-Staaten nach Deutschland Anforderungen an die künftige Bundespolitik, 2013

³⁹ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, accessed 14 August 2013

Discrimination is widespread in Germany: A report from the Federal Anti-Discrimination Office (ADS) discovered discrimination to be widespread in Germany, in nurseries and schools, as well as in the workplace – with potentially fatal results. According to the report, individuals with a non-German background are particularly vulnerable.⁴⁰

Foreign students avoid studying in Germany: A study published by the Friedrich-Ebert-Foundation (FES) illustrates how far-right and extremist political thinking are widespread in German Society, including the middle classes. In his last study concerning the issue, the former Berlin Ombudsman for Integration sceptically concluded that, in order to develop into a more open-minded «immigration society», German society still has a long way to go. The study also discovered that, due to fears about being subjected to prejudice and discrimination, international students are reluctant to study in Germany.⁴¹

Migrants are overrepresented in the low paid sector: According to an international study conducted by the *Institut für Arbeitsmarkt- und Berufsforschung*, on average, non-German citizens are more likely to work for low wages. One in three employees with a migrant background was found to be working for a low pay.⁴² In comparison with the international community, Germany was still claimed to be in a good position. Non-German citizens were also found to be six times more likely to become dependent on basic security at old age (*Grundsicherung*).⁴³ Children who hold German citizenship were found to be significantly more likely to be enrolled in a *Gymnasium* and qualify for being enrolled in Higher Education institutions than those without a German passport.⁴⁴

Migrants are less likely to be invited to a job interview: In an article published in the online magazine *Migazin – Migration in Germany*, Alev Dudek discusses the issue of job recruitment discrimination on ethnic or cultural grounds, frequently resulting in applicants with a migrant background not being invited for job interviews. As he claims, applicants are often unaware of the true reason why they were not selected for interview, the main problem being that such discriminatory practices are rarely addressed and scrutinised in the German media.⁴⁵

The German Federal Employment Agency's first labour market report addressing the job situation of migrants: In 2006, German Chancellor, Angela Merkel, implemented an *Annual National Integration Summit*, declaring the issue of “integration” as a major social and political priority. At the 6th *Annual National Integration Summit*, which took place in May 2013, the main topics were the creation and promotion of a “Culture of Welcome” in Germany, as well as the job situation of individuals with a migration background and possible actions to improve their ‘integration into the labour market’. Significantly, critics described the results of the summit as “symbolic politics” with no consequences in the real world, claiming that key issues had been omitted from the discussion. However, the summit marked the German Federal Employment Agency's first labour market report that specifically addressed the job situation by individuals with a migration background.

Migrants in higher education more likely to be without paid employment: According to the initial results, migrants who have been through higher education are significantly and more often without paid employment than migrants who have received industrial or other vocational training within the German dual job education system. The OECD report on the Labour Market Integration of Immigrants and their Children mentions a shortage of employees with a migrant background in the public sector

⁴⁰ Ibidem

⁴¹ Ibidem

⁴² BIBB: Berufswünsche junger Migranten liefern keine Erklärung für mangelnde Erfolgchancen, <http://idw-online.de/de/news511859>, accessed 10.1.2014.

⁴³ Ibidem

⁴⁴ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 14 August 2013.

⁴⁵ Ibidem

in Germany. Meanwhile, the first OECD Integration report shows that young individuals with a migrant background are catching up with their non-migrant counterparts – at school as well as in the job market. Still, highly-qualified individuals with a migrant background encounter more difficulties in the labour market compared to those who hold lower qualifications.

Anonymous job applications considered as effective measure against discrimination : Anonymous job application procedures are commonly considered an effective measure against (various kinds of) discrimination, as has recently been evidenced in a pilot project in the *Bundesland* North Rhine-Westphalia, in which an anonymous application process showed that 20% of positions were filled by applicants with a migration background. Currently, an increasing number of Bundesländer are trying out the new anonymous system. As another study shows, 43% of Germans would be ready to hire a care-giver or nurse with a migration background.⁴⁶

Germany opens its job market for immigrants: Recently, Germany has been opening its job market for immigrants from countries outside the European Union. Accordingly, the Federal Government has adjusted the country's Employment Regulation. However, the Integration Commissioner of the Federal Government (Integrationsbeauftragte) has admonished the government to consider that many immigrants desire to relocate to Germany with their families. To accommodate them in Germany, the Commissioner encouraged the Federal government to take Canada's immigration policy as an inspiring example of good practice.

High potential immigrants are wanted: According to the OECD Economic Outlook for Germany, the country's labour market will soon be in need of an increased number of immigrants from outside the borders of the EU, particularly in respect to highly-qualified immigrants.⁴⁷ Recent years have seen a continual increase both in the number of individuals immigrating to Germany and in the number of immigrants with high academic or professional qualifications. This is reflected in a study issued by the North Rhine-Westphalian branch of the *Institut für Arbeitsmarkt- und Berufsforschung* (IAB), a national institute dedicated to research the labour market in Germany. To quote North Rhine-Westphalia's Minister for Labour, Integration and Social Affairs, Guntram Schneider: "We've never had so many well-qualified immigrants".⁴⁸ Unsurprisingly, the percentage of immigrants and individuals with a migration background who are highly proficient in German has also been increasing continually.⁴⁹

Migrants are more likely to earn less, work part time, in atypical jobs: However, according to the IAB study, on average, immigrants entering the German labour market still earn significantly lower wages (by about 40 per cent) than their non-migrant counterparts. Even after working in Germany for many years, in most cases, there remains a significant gap in wages.⁵⁰ According to the Federal Office of Statistics, in 2010, roughly one in five migrants was employed in a low-pay sector – in the case of migrants from countries outside the EU, this was even the case for one in three.⁵¹ While the number of employees with a migrant background has been continually increasing, so has the number of individuals in atypical employment situations. Again, this is particularly the case for migrants without German citizenship, especially for those from outside the EU. However, an EU-wide comparative study concludes that in German cities such as Berlin and Stuttgart, the labour market situation is actually exceptionally favourable towards migrants, compared with many other European urban centres. However, the study emphasises that such results cannot be generalised for Germany as a

⁴⁶ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 10. Januar 2013, accessed 30.9.2013.

⁴⁷ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 28. Februar 2013, accessed 30.9.2013.

⁴⁸ Migazin, <http://www.migazin.de/2012/12/11/minister-schneider-noch-nie-hatten-wir-so-viele-gut-qualifizierte-zuwanderer/>, accessed 10.1.2014

⁴⁹ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 4. Dezember 2012, accessed 30.9.2013.

⁵⁰ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 7. Januar 2013, accessed 30.9.2013.

⁵¹ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 2. August 2012, accessed 30.9.2013.

whole.⁵² Employers in Germany frequently disregard the rights of employees with small part-time jobs ("Minijobber"), particularly (though by no means exclusively), if those employees have a migrant background. Thus, on average, migrants are much less likely to receive continued payment of wages in case of illness. Often they accept jobs with comparatively poor working conditions, because they feel they have no alternatives.

Less migrants work in the public sector: A recent OECD report has also shown a shortage of individuals with a migration background in the public sector – and moreover, compared to Germans without a migration background, migrants are significantly more likely to feel discriminated against by official bodies and authorities. One positive note, however, the official Social Report for North Rhine-Westphalia for 2012 illustrates that the poverty risk for individuals with a migrant background has been decreasing in recent years.⁵³

The symbolic meaning of the migrant small shop-keeper and the NSU killings: New developments in the way labour market discrimination and racism taking place in public and political discourses, like e.g. hate speech, polarisation of public or political debate, are currently not observed. As the trial on the NSU killings, which have been extensively described in the Shadow Report on Germany 2011/12, is still going on and the inquiry commission of the Federal Parliament concluded before the end of the parliamentary period 2013, it is still too early to draw a conclusion related to the labour market. The Nazi killer-trio has killed, within a period of 10 years, 10 small-shopkeepers of migrant background. Up to now, there are no studies or reflections available, which analyse the symbolic meaning of targeting small shopkeepers. What is clear is that being a small shop-keeper was a way in which low qualified labour ("Guestworkers"), who were made redundant after the crisis of 1973 and at the end of the guestworker recruitment period, could establish themselves outside of the industrial sector in Germany. One target of the killer-trio was Keupstreet in Cologne, a centre for migrant small shopkeepers, where they planted a nail bomb in 2004, injuring 22 people.⁵⁴ German labour market policies have to be seen within the framework of a contradictory approach. On the one side, there is the urgent need for qualified labour and on the other side there is the deeply rooted notion of locking up and protecting the labour market and controlling any migration, symbolised by the europeanisation of the German asylum approach after 1993, which created an apartheid-like system of hierarchical access to labour markets and different levels of legal protection and exploitability.

3.2 Incidence of discrimination in employment

There is generally not much known about incidence of labour market discrimination and racism. A study of the Federal Equality Body (ADS) comes to the conclusion that there are little new and representative studies which demonstrate evidence of discrimination or discriminating mechanisms.⁵⁵ A differentiated look at the types of employers (big enterprises, small and medium size enterprises) or individual industrial sectors is therefore not possible either. Evidence and studies related to individual dimensions of discrimination, such as discrimination related to sexual orientation or religion and worldview, are rarely available.⁵⁶

⁵² Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 12. Juni 2012, accessed 30.9.2013.

⁵³ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 11. März 2013, accessed 30.9.2013.

⁵⁴ http://de.wikipedia.org/wiki/Nagelbomben-Attentat_in_K%C3%B6ln, accessed 30.9.2013.

⁵⁵ Diskriminierung im Bildungsbereich und im Arbeitsleben. Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages

http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Gemeinsamer_Bericht_2013.pdf?__blob=publicationFile, accessed 30.9.2013.

⁵⁶ Ibidem

According to a study of the Expert Council of German Foundation for Integration and Migration (Sachverständigenrat deutscher Stiftungen für Integration und Migration - SVR), commissioned by the ADS, 10 per cent of interviewees with a migration background felt «very strongly» or «strongly» disadvantaged. 24,3 per cent of those who have been in education or a job have felt discriminated in 2012.⁵⁷ Grounds of discrimination, such as ethnic background, religion and world view and sexual identity, play a minor role in the counselling requests received by the ADS over the last years.

Table 1: Statistical evaluation of counselling requests related to the labour market, according to the grounds of discrimination.⁵⁸

	Labour law	Percentage	2010	2011	2012
Age	649	25,85%	150	156	302
Gender	640	25,49%	182	199	192
Disability	523	20,83%	141	140	204
Ethnic background	435	17,32%	120	127	145
World view/Religion	192	7,65%	46	64	56
Sexual identity	72	2,87%	20	18	22
Total	2511		659	704	921

Complaints and counselling requests in the field of employment have been mainly related to access to the labour market, working conditions and internal mobility to get a better job. The numbers of direct and indirect discrimination complaints are equally balanced. Insult, harassment and coercion are dominating, but there are some complaints related to sexual harassment, bullying and instruction to discriminate. Counselling request in the field of labour market discrimination have been seen by the complainants mostly related to their ethnic background. This is reported as well from anti-discrimination counselling organisation active in the field. Other complaints have been related to age, disability, skin colour and gender which often intersect with proxies for ethnic background, such as language, skin colour and religion/world view.

Superiors and colleagues who are perpetrators of discriminatory acts in employment are named. There is a specific discrimination risk related to employment and recruitment agencies, human resources departments in the public administration (Personalämter) and temporary employment agencies (Leihfirmen).⁵⁹

Complaints and counselling requests to the Federal Anti-discrimination Body (ADS) often have been related to Muslims wearing a headscarf; in many cases, there is multiple discriminations on the grounds of religion, ethnic background and gender. Counselling NGOs see a high discrimination risk for women with headscarves looking for a job or an apprenticeship training position, independent of the qualification of the women. Women with a university degree are similarly affected as women with low qualifications. They often resign when they are searching for work or are trying to find a job in ethnic businesses to avoid the exclusion of the labour market.⁶⁰

⁵⁷ Ibidem

⁵⁸ Ibidem.

⁵⁹ ADS-Umfrage Beschwerdestelle, siehe Kapitel I.IV in: Diskriminierung im Bildungsbereich und im Arbeitsleben. Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Gemeinsamer_Bericht_2013.pdf?__blob=publicationFile, accessed 30.9.2013.

⁶⁰ Ibidem

There is something specifically German-related to the so-called «tendency enterprises» (Tendenzbetriebe), which are religious employers or trade unions. They have their own labour legislation, like the Christian churches or fall under the exception of the Equal Treatment Act (AGG), like the trade unions. They are allowed to employ only members of their own organisation and therefore legally can discriminate against others. This is reported quite often regarding religion or sexual orientation grounds from religious employers, like the Christian churches.⁶¹

3.3 Patterns of inequality over the course of time

The following short conclusion highlights trends and developments of racism and discrimination in the labour market in Germany over a longer period and is based on the evaluation of ten years of ENAR shadow reporting from Germany.⁶² As the results of research carried out within the last ten years suggest, currently, the most relevant issues are the insecure work and life situation of so called «Illegals», meaning undocumented migrants, and the continuous discrimination against Muslims and Turkish individuals, as well as Germans with a Turkish background.

Access to the labour market: The insecure situation of undocumented migrants has been mentioned in every Shadow Report over the last 10 years. They have no rights to work or even be resident in the EU. The majority of this group are immigrants from so called secure third states; these are states where no official reasons for escape and migration exists. Given their geographical location as countries neighbouring the EU, many individuals use these countries as transit states. The EU has made agreements with the governing bodies of these states to control the movements of refugees and detain these individuals from entering EU territory. In these designated «secure third states», refugees are registered – a procedure that has been implemented to keep them outside the borders of the EU. Significantly, they are obliged to make their application for asylum in the first ‘secure’ state they have entered. Crucially, individuals from third countries have no freedom of movement within the EU. Consequently, there are economic and discriminating exclusions which split individuals into distinct groups; those who have the right to move freely and those who do not. As research for this report has shown, undocumented migrants are an important resource for the societies and labour markets of the EU. Migrants are underpaid and work in precarious conditions, have no labour rights, no admission to healthcare systems or other social benefits and are subjected to permanent legal and private insecurity, and face the continuous danger of being arrested and deported. They frequently work in sectors such as the construction industry, licensed houses, agriculture, transportation, private domestic service and the sex industry. For the German state, these individuals do not have any legal or ‘legitimate’ identity other than as criminals. Currently, there are no developments to officially enable these individuals to legally live and access the labour market in Germany.

Admission of Qualifications: Another ongoing problem is institutional discrimination which is reflected in the lack of recognition of professional qualifications gained outside of Germany. Even for highly-qualified professionals, there are problems in having their qualifications officially recognized in Germany. The German government has repeatedly promised to change this situation and open the labour market, but frequently, better access to a cheap, exploitable international workforce seems to be the exclusive aim of such promises.

Discrimination of Muslims: Continuous discrimination against Muslims is a reaction to international terrorism and a result of a racist anti-Muslim discourse. The anti-Muslim discourses are mainly supported by conservative governments, some parts of the civil society and right wing parties. It

⁶¹ Ibidem

⁶² ENAR shadowreports.

permeates throughout the entire German society. The important point of the anti-Muslim discourse was the so-called 'headscarf debate' where Muslim women became targets of discrimination. E.g. the Labour Court in Berlin ruled in March 2012, that the early exclusion of a woman wearing a headscarf from the application procedure is to consider as discrimination.⁶³

Socio-economic situation: The continuous discrimination of Turkish individuals or German citizens with a Turkish background can be interpreted as a racist reaction of middle- or upper- class (nationalistic) citizens who are afraid of losing their social position within German society. But even in the working and subaltern classes, racist views against Turkish individuals or German citizens with a Turkish background seem to be omnipresent. The extremely competitive nature of the labour market in unstable socio- economic situations, such as the recent European crisis, sent millions of individuals into poverty and created a climate characterised by social insecurity, precarity and instability. Germany, as the self-proclaimed 'winner' of the crisis, has recently been pressing for a hegemonic position in respect to European policy. Nationalism and racism are nurtured by simplistic 'explanations' and 'solutions' to the crisis and by ideological appeals (made both by the state and other political players) to patriotism in a situation of social insecurity. Thus, they foster socio-economic antagonisms which are arguably an important part of capitalist societies.

Developments in the implementation of anti-discrimination legislation: An important development in German policy and society is the (late) implementation of the EU-Anti-discrimination regulations (2000/43 and 2000/78), which Germany implemented in 2006, with a delay of four years.

Access high- skilled employees: Another significant recent development, arguably more in form than in content, is the adjustment from the Green- Card to the Blue- Card system. The aim of this change in regulation is to open the European labour market for highly-qualified professionals from third country nations. These prospective future employees have to present a contract of employment, a very high income and have no rights for social benefits and access to the health care system. Furthermore, the Blue Card policy arguably illustrates attempts at drastically reducing the average wage of highly-qualified professionals, since the minimum income of € 44.800/€ 34.944 determined in the Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, establishing the Blue Card system is significantly below the average professional starting salary of € 48.000 in Germany. Seasonal workers, refugees or non-German citizens tolerated in Germany (without official visa) are excluded from the possibility of obtaining a Blue- Card.

3.4 Discrimination in access to employment

There is little known about direct and indirect discrimination and unfair practices in access to employment. But individual cases show that there are differences in treatment according to different ethnic/religious minorities and gender groups in contrast to majority German citizens. In the following section, unjustified differences and obstacles in recruitment policies are presented. While there is evidence of direct discrimination and unfair practices, like job postings and job applications, selection on the basis of names, addresses or pictures added to the application letter, evidence of indirect discrimination is much harder to detect. There are cases of unjustified language and clothing requirements, as well as evidence of unintentional behaviour or institutional policies resulting in unequal treatment, like assessment tests, culturally biased practices during a job interview or setting objective criteria which negatively affects minorities and migrants.

⁶³ Arbeitsgericht Berlin: Diskriminierung einer Muslima im Bewerbungsverfahren (Kopftuchurteil), <http://rechtsanwaltarbeitsrechtberlin.wordpress.com/2012/11/03/arbeitsgericht-berlin-diskriminierung-einer-muslima-im-bewerbungsverfahren-kopftuchurteil/>, accessed 10.1.2014.

As several reports and studies have shown, discrimination for cultural, ethnic or religious reasons is still a major issue in Germany. An OECD study from 2009 on the disadvantages encountered by migrants in Germany in the labour market confirms that migrants are markedly less likely to find employment than Germans with the same level of education, but without migrant status.⁶⁴ Significantly however, this does not seem to be the case for migrants with lower or no formal professional/vocational qualifications, whose job situation, on average, seems to be similar to that of non-migrants at the same level.⁶⁵ By comparison, highly-qualified professionals from a migrant background are markedly less likely to find suitable employment than migrants with lower or no formal qualifications. In the case of male employees, while roughly 90 % of highly-qualified non-migrants are in appropriate employment, only 81% of highly-qualified migrants are in similar positions.⁶⁶ Importantly, the ratio is markedly more disadvantageous for women with a migration background, with only 64 % of professionally qualified women (in the age group of 20-29) in suitable employment, compared to 86 % of their non-migrant peers in age, gender and qualification.⁶⁷

According to a study conducted by the Institute for the Future of Labour (IZA) at the University of Konstanz, a foreign-sounding surname can already keep applicants with a migrant background from getting job interviews. Often, intuitively (and probably, in many cases unconsciously), many employers seem to perceive applicants from a migrant background as less qualified than non-migrant applicants with a similar level of qualifications and job experience.⁶⁸

Given that in Germany it is still customary to include a photo with a job application, getting job interview invites is especially difficult for Muslim women wearing headscarves. In general, as an unpublished study conducted by the Austrian University of Linz confirms, these women are particularly vulnerable to being victims of discrimination. Being a woman with a migrant background wearing a headscarf has been described as a combination of three “obstacles” to labour market access.⁶⁹

The Online Magazine *Migazin – Migration in Germany* lists several cases in which women experienced discrimination in different contexts, from private employers, but also in the public sector, particularly from official bodies such as job services within the social security system.⁷⁰ Thus, women reported that they were told to take off their headscarves when applying for employment. Compared to their peers of the same age and gender, young adult women wearing headscarves frequently have a significantly harder time finding an apprenticeship within the formal German dual job training system. As several individual case reports in *Migazin* illustrate, job discrimination for Muslim women takes place in all strata of society and the labour market. In the health sector for example, applicants for positions as doctor's assistants have been turned down for wearing headscarves and similar treatment can also be seen in competitive professional fields such as journalism or public relations. In some cases, charities or other organisations affiliated to either the Catholic or Protestant Church (both of which are statutory corporations in Germany), have openly

64 Uslucan, Haci-Halil and Cem Serkan Yalcin: Wechselwirkung zwischen Diskriminierung und Integration – Analyse bestehender Forschungsstände. Expertise des Zentrums für Türkeistudien und Integrationsforschung (ZfTI) im Auftrag der Antidiskriminierungsstelle des Bundes, Essen, 2012, http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/expertise_zfTI_wechselwirkung_zw_di_skr_u_integration.pdf?__blob=publicationFile, accessed 30.9.2013.

65 Ibidem

66 Ibidem

67 Ibidem

68 Press Release No. 30, 9. February 2010, Im Teufelskreis der Diskriminierung, <http://www.aktuelles.uni-konstanz.de/presseinformationen/2010/30/>, accessed 10.1.2014.

69 Diskriminierung bei der Jobsuche. Das Foto macht den Unterschied, <http://www.taz.de/!123352/>, accessed 10.1.2014.

70 Migazin, Tag «Labour market» <http://www.migazin.de/tag/arbeitsmarkt/>, accessed 10.1.2014.

(and in fact illegally according to EU legislation) rejected female applicants for being Muslim, or even because they were coming from a practising Muslim family.⁷¹

However, a growing number of women have started to take legal action against discrimination when accessing the labour market – increasingly with success. In one typical case, the law court in Berlin sentenced a dentist to pay a compensation sum equivalent to three monthly salaries. In this case a dentist asked a Muslim girl applying for training on the job to take off her headscarf during working hours.⁷² Other cases were resolved with a court settlement. Also, some of these conflicts have markedly increased awareness, causing companies to adjust their job advertisements and recruitment practices. Additionally, the Intercultural Council (Interkulturelle Rat in Deutschland e.V.), a nationwide society dedicated to the promotion of equal opportunities and the combat against racism and xenophobia, has launched projects to improve the career opportunities of young adult Muslim women. Thus, it has established a platform supporting female students to find suitable internships.⁷³

Given the structural employment discrimination experienced by applicants from a migrant background (by Muslim women especially, but by no means exclusively), which is in fact harmful to the German economy as a whole,⁷⁴ there have also been increasing demands for the implementation of anonymised application procedures, which should be compulsory for the public sector.⁷⁵ The publication of the forthcoming study conducted by the University of Linz (cited above) is likely to increase such demands.

Importantly, several studies, among them one conducted by the national Anti-Discrimination Body (ADS) clearly show how job discrimination based on gender and cultural, religious or ethnic background grounds is an obstacle against integration and a major disadvantage for German society in general.⁷⁶ Thus, raising awareness and taking action against discrimination continues to be a major responsibility for German politics, for the public and private sectors, and for the media.

3.5 Discrimination in the workplace

There is very limited information about discrimination and unfair practices in the workplace. As explained in chapter 4.2.2.2 on mediation or conciliation, a lot of discrimination is dealt with through the work councils and as part of the inner mediation and conciliation mechanisms in the enterprises, and therefore no cases or number of cases are made public. It can be assumed, when talking to stakeholders in the work councils and in trade unions, that there are differences in treatment according to different ethnic/religious minorities and gender groups in contrast to native Germans. The trade unions see it as their duty to challenge this by the means of employer/works council agreements and to bring those agreements alive in the workplace. There are reports which claim that where there are active work councillors of migrant background, direct discrimination and unfair practices, like the promotion on the basis of ethnic origin, can be challenged because the work council has to approve of those promotions. Other evidence of indirect discrimination and of unintentional behaviour or institutional policies resulting in unequal treatment is not yet publicly available.

⁷¹ Uslucan, Haci-Halil and Cem Serkan Yalcin: Wechselwirkung zwischen Diskriminierung und Integration.

⁷² Migazin, <http://www.migazin.de/2012/10/18/drei-monatsgehalter-schadensersatz-fur-diskriminierung-wegen-kopftuch/>, accessed 10.1.2014.

⁷³ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 11. Dezember 2012, accessed 30.9.2013.

⁷⁴ <http://www.islamiq.de/2013/09/12/studie-belegt-diskriminierung-von-frauen-mit-kopftuch/>, accessed 30.9.2013.

⁷⁵ Uslucan, Haci-Halil and Cem Serkan Yalcin: Wechselwirkung zwischen Diskriminierung und Integration.

⁷⁶ Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 12. February 2013, accessed 30.9.2013 & Migazin, <http://www.migazin.de/tag/arbeitsmarkt/>, 24. January 2013, accessed 30.9.2013.

As the data is not desegregated according to ethnic groups, information about unjustified gaps due to discrimination between different migrant groups or ethnic/religious minorities in the working conditions, wellbeing at work, remuneration, career advancement and promotion, mobility, mentoring, professional training opportunities is not available.

Moreover, as most information of practices in the workplace are dealt with confidentially, reports on the failure to comply with religious needs, dietary needs only become public if a victim goes to court or reports his or her case to one of the anti-discrimination mechanisms available. The same is true of reports regarding bad company practices/harassment against minorities and migrants in the workplace.

3.6 Economic sectors

Providing a description of the varying economic sectors, the types of employers, whether they are big, medium or small enterprises, is not possible. The ADS is aware of discrimination in access to the labour market in all sectors.⁷⁷ Industry-specific distribution in the different industries shows clear differences between women and men and people with a migration background or disability. Women are employed mainly in economically sensitive sectors, such as the service and government sector (56 %), healthcare and social services (75 %) or education (68%).⁷⁸ In those economically sensitive sectors women make over 70 % of the workforce.⁷⁹ Men are more likely to work in cyclical industries such as construction (86%), transportation and water / energy / waste (79 %).⁸⁰ For this reason, they are more affected by unemployment, but stay for a shorter period unemployed than women. Women less frequently report unemployment and rarely receive social benefits.⁸¹ In the sectors of trade, manufacturing and hospitality, foreigners and people with a migrant background are overrepresented, while they are under-represented elsewhere in other industries, especially the public administration sector.⁸²

3.7 Geographical areas and relevant actors

After a study of BA-/BIBB in 2010, it was reported that only 28% of adolescent applicants with a migration background, compared to 42% of adolescents without a migration background, got a training place, despite the same qualification. A region dimension can be seen there, but the ADS report does not describe it. Other regional information is not available.⁸³ Information about who mostly commits discrimination, whether it comes from employers themselves or other colleagues is not available and describes a lack of studies and in the way discrimination is recorded.

77 Diskriminierung im Bildungsbereich und im Arbeitsleben. Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages

http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Gemeinsamer_Bericht_2013.pdf?__blob=publicationFile, accessed 30.9.2013.

78 Ibidem, p. 203.

79 Ibidem.

80 Ibidem.

81 Ibidem.

82 Ibidem.

83 BIBB, Berufswünsche junger Migranten liefern keine Erklärung für mangelnde Erfolgschancen, <http://idw-online.de/de/news511859>, accessed 10.1.2014.

4. Tackling the challenges

4.1 Public policies

The general political rhetoric in Germany revolves around equal opportunities, not about reducing discrimination or structural discrimination in employment. A stakeholder in the trade union articulated the most advanced understanding of structural discrimination.⁸⁴ He does not see the structure itself as discriminatory or racist, but instead the effects themselves can be deemed as such. The Federal Anti-Discrimination Body (Anti-Diskriminierungsstelle, ADS), with its report on education and the labour market, has for the first time changed its focus and looked at labour market issues from the angle of discrimination. It therefore depends on which angle policies and public programmes that aim at reducing current discrimination in employment are being looked at. At the moment, it is also not possible to assess the effectiveness and impact of public policies in terms of their specific aims, the budget allocated to their implementation and the stakeholders involved. This becomes quite obvious when reading through the recommendation part of the ADS report on education and the labour market.⁸⁵ Most of the recommendations brought forward by the ADS are relevant, but they are not yet part of any general policy approach and need to be fully implemented. As the ADS, because of the lack of effective powers, cannot effectively stop discriminatory practices in the labour market, it should be granted some power to enforce anti-discriminatory practices.

The labour market related recommendations of the ADS focus interesting aspects in relation to people with migrant background. But, as mentioned above, the lack of power and political will by the whole government to transform those recommendation into public policies and the institutional setup of the ADS, being located in the ministry of families and not being truly independent, has the consequence that such anti-discrimination policies are not mainstreamed and therefore have little effects in other area of policies. Consequently the ADS target its recommendation towards employers, enterprises and social partners, in the hope that they implement anti-discrimination policies voluntarily:

- One focus lies on the **continuous development of diversity concepts and the support of a diverse workforce** by strengthening counselling and complaint mechanisms inside and outside the enterprises⁸⁶.
- The ADS calls for the creation of **transparency in the wage system**. The objective of equal pay has to be strengthened, by providing a legal basis in the General Equal Treatment Act (AGG). Criteria for a discrimination-free and gender-neutral evaluation of the needs of the labour market must be developed.⁸⁷
- The ADS recommends the **implementation of innovative personal recruitment**. New recruitment practices should focus more on the potential and competencies of the applicant, and human resources managers should establish procedures like anonymous applications or applications without photographs. The recognition of qualifications should be standardised all over Germany and quotas, which are not specified, neither in quantity (how high has the quota to be) nor in quality (which ethnic groups) should be introduced to balance out, as is

⁸⁴ Mr. VR, Stakeholder in the Federal Trade Unions (DGB), interviewed May 2013.

⁸⁵ Diskriminierung im Bildungsbereich und im Arbeitsleben. Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages

http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Gemeinsamer_Bericht_2013.pdf?__blob=publicationFile, accessed 30.9.2013.

⁸⁶ Ibidem, p. 299 ff.

⁸⁷ Ibidem

done to create a gender balance in workplaces, where a quota of 30 per cent has been agreed.⁸⁸

- The ADS suggests the **monitoring of legal barriers**. The prohibition to work for refugees and the prioritisation of German applicants should be re-evaluated with respect to their discriminatory character. The prohibition of religious symbols in some of the Länder should be newly discussed in light of the discrimination of Muslim women wearing the headscarf. The practices of the churches to discriminate on the basis of religion should be stopped until a court decision of the Court of Justice of the EU has been taken on currently litigated cases. After the experience of the first cases, which litigated the so called “church privilege”, meaning that the Christian churches can only select Christian job-application for church run enterprises, lawyers and NGO’s are very cautious in going public too early on those case?⁸⁹
- The ADS recommends taking **specific needs into consideration**. To avoid discrimination of employees with migrant background, specific measures such as dietary requirements or working hours during religious holidays, are necessary to avoid discrimination on grounds of ethnicity, religion or world view.⁹⁰
- The ADS suggests as well providing **Diversity-oriented support when climbing up the hierarchy in the enterprise**. Barriers within the hierarchy of enterprises should be identified. Also vital, is providing equal access to further education, as well as reliable quotas in the enterprise, which are not specified by the ADS.⁹¹
- The ADS calls for the **recognition of discrimination in the termination of a job contract**. Training for members of work councils and employers on discrimination in the termination of employment and the relevant legal procedures.⁹²

Anonymous Applications - Pilot study of the Federal Anti-Discrimination Body (ADS): In September 2010, the ADS tested a new strategy to overcome discrimination in the labour market. Eight major companies in Germany participated in a 12 month pilot project, recruiting staff on the basis of anonymous applications. Application forms were revised to remove criteria such as name, place of birth, nationality, age, gender, family-status, disability and picture.⁹³ An evaluation of the project revealed that a significantly higher number of women and migrants were invited to interview when the application procedure was anonymous.⁹⁴ Since then, the anonymous application became well-known and served as a concrete example to enterprises on how to avoid discriminatory practices. Feedback from the Confederation of German Employers (Bundesvereinigung der Deutschen Arbeitgeberverbände, BDA) however on the anonymous application procedure was negative. They used the same arguments as those aired in the debate surrounding the introduction of the Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG) in 2006.⁹⁵ In spite of the results of the study, they didn't see any positive impact in terms of reducing discrimination and objected to the increased administrative and financial cost for businesses which use anonymous application

⁸⁸ Ibidem

⁸⁹ Ibidem, confidential information of a lawyer and an NGO litigating on current cases.

⁹⁰ Ibidem

⁹¹ Ibidem

⁹² Ibidem

⁹³ For detailed description of the pilot project see Shadow Report 2010: [http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202010-11/10.%20Germany%20\(2\).pdf](http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202010-11/10.%20Germany%20(2).pdf), accessed 31 July 2013.

⁹⁴ Antidiskriminierungsstelle des Bundes, Kurzfassung des Abschlussberichts, http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Kurzfassung-Abschlussbericht-anonymisierte-Bewerbungsverfahren-20120417.pdf?__blob=publicationFile (short version) accessed 31 July 2012. Antidiskriminierungsstelle des Bundes, Abschlussbericht des Pilotprojekts, http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Abschlussbericht-anonymisierte-bewerbungsverfahren-20120417.pdf?__blob=publicationFile (long version), accessed on 6 August 2013.

⁹⁵ BDA, Allgemeines Gleichbehandlungsgesetz verursacht hohe Kosten, http://www.bda-online.de/www/arbeitgeber.nsf/id/DE_Antidiskriminierung, accessed 31 July 2013.

procedures. They denied the need for such anti-discriminatory measures, pointing to already existing diversity-strategies in businesses.⁹⁶ NGOs however have welcomed the pilot. The Turkish Community in Germany (Türkische Gemeinde in Deutschland, TGD) strongly supported the initiative, adding that anti-discrimination measures should be added at all stages of the recruitment process. They recommend diversity-awareness training for senior management and human resources personnel, exchanges with organisations which support victims of discrimination, the establishment of a body for monitoring diversity in companies and governmental departments and an on-going review of the fairness of application procedures.⁹⁷ The Turkish Community of Baden-Württemberg views anonymous applications as a *'reasonable tool to promote equal treatment of migrants in working life'* and calls for its implementation, especially in the public sector.⁹⁸

According to this assessment, the regulations and definitions set down in the national German anti-discrimination Law (AGG) provide legal certainty and send clear signals to those vulnerable to discrimination, those in the legal profession, and in fact to German society as a whole. Statutory regulations written in a transparent way, using neutral language are vital for nurturing a culture in which it is possible to address the issue of discrimination in a factual manner, without trivialisation. This should result in a greater awareness of implicitly discriminatory vocabulary, evidenced by the substitution of terms such as the misleadingly neutral “disadvantage” by “racist discrimination” - an expression with a clearly defined meaning in both European and international law.⁹⁹

On a substantive level, this would mean a consequent and thorough realisation of the horizontal approach of the German General Equal Treatment Act (AGG). Gaps in areas of life vulnerable to discrimination, whether they fall under the scope of the AGG or not need to be closed – in this respect, areas depending on public policy, including the education sector, are of particular importance. Furthermore, it is necessary to abolish the hierarchical approach towards different categories of discrimination which still exists in the current AGG. To use an example, the prohibition of discriminatory practices under civil law is currently restricted to large scale businesses for all “categories” except for discrimination on grounds of race – a practice that does not properly address the reality of people's lives and is an obstacle against adequate legal protection. Similarly, both the prohibition of sexual harassment and the protection from victimisation are still restricted exclusively to the parts of the AGG pertaining to labour law – and rendered less effective as a result.¹⁰⁰

Finally, to establish the principles of equal treatment and non-discrimination in German legal practice, firmly and sustainably, going beyond individual rights, it is necessary to implement specific measures against structural discrimination. The possibility to introduce compensatory measures on a voluntary basis, as sketched in § 5 AGG, is clearly insufficient. Rather, it is advisable to implement proactive approaches such as compulsory diversity mainstreaming, equality and diversity impact assessments and a consideration of diversity competences in staff assessments. Also, public funding and public contracts should be made dependent on the adherence to the standards set down in the AGG.¹⁰¹

⁹⁶ BDA, Arbeitgeber aktuell, [http://www.bda-online.de/www/arbeitgeber.nsf/res/C10FF60C4496503FC1257A28002FEA75/\\$file/Arbeitgeber_aktuell_3_2012.pdf](http://www.bda-online.de/www/arbeitgeber.nsf/res/C10FF60C4496503FC1257A28002FEA75/$file/Arbeitgeber_aktuell_3_2012.pdf), accessed 31 July 2012.

⁹⁷ Türkische Gemeinde in Deutschland, Ein Vorstoß, der zu unterstützen ist, <http://www.tgd.de/2010/08/04/ein-vorstoß-der-zu-unterstützen-ist/>, accessed 31 July 2012.

⁹⁸ Türkische Gemeinde in Baden-Württemberg, TGBW fordert Einführung von anonymisierten Bewerbungen, <http://www.tgbw.de/PM%20anonymisierten%20Bewerbungen.pdf>, accessed 13 August 2012.

⁹⁹ Liebscher, Doris und Alexander Klose, im Auftrag des Büros zur Umsetzung von Gleichbehandlung (BUG e.V.), VORSCHLÄGE ZUR NOVELLIERUNG DES ALLGEMEINEN GLEICHBEHANDLUNGSGESETZES (AGG), Vorläufige Fassung, 2013, http://www.bug-ev.org/fileadmin/user_upload/AGG_Novellierung_vorläufige_Endfassung.pdf, accessed 30.9.2013.

¹⁰⁰ Ibidem

¹⁰¹ Ibidem

4.2 Access to effective remedies

4.2.1 Judicial remedies

The Federal Administrative Court - or "Bundesverwaltungsgericht" - was established in 1953 as the supreme instance for general administrative law. It is one of Germany's five Federal Courts.¹⁰² Unlike most other countries, Germany has five different branches of jurisdiction which act completely independent of each other. Besides the general administrative courts there are:

- courts commonly known as "ordinary courts" comprising civil and criminal jurisdiction
- the labour courts
- the fiscal courts
- the social courts

Each branch has its own Federal Court as supreme instance. Furthermore, there is the Federal Constitutional Court which only adjudicates constitutional issues and the validity of parliamentary laws.¹⁰³

Judgments of the Federal Administrative Court are always final between the parties since there is no further legal remedy. The finality of the judgment operates against any proceedings concerning the respective subject-matter, even in other branches of the judiciary. Judgments of the lower courts become final between the parties once all legal remedies have been exhausted or cannot be availed within the time-limit prescribed by law.

Decisions of the Federal Administrative Court can be found in the following publications:

- Official Collection of the Court's decisions (Entscheidungen des Bundesverwaltungsgerichts),
- Buchholz' Reports on the Case-law of the Federal Administrative Court (Buchholz, Sammel- und Nachschlagewerk der Rechtsprechung des Bundesverwaltungsgerichts).¹⁰⁴

A discrimination case has to be made within 2 months after the discrimination happened, the court and lawyer fees have to be paid, but the victim can ask for legal aid.

A combination of proceedings to secure the most effective remedies at the lowest cost is not possible and mediation or conciliation is not a mandatory part of the court proceedings when it comes to discrimination at the work place.

It is difficult to find comprehensive information on how many court complaints on discrimination on the grounds of ethnic origin and/or religion in employment were filed in the last three years. There is little known about the nature of complaints, the profile of the applicants and defendants. This might be, on the one hand, due to the fact that the anti-discrimination legislation is a new type of legislation or on the other hand, that within the German labour legislation, protection against discrimination is somehow already included. As stated by a stakeholder, when comparing Germany with other EU countries, where there are weak labour laws, anti-discrimination legislation takes over the protective mechanism; while where there is strong anti-discrimination legislation in the employment field, this is perceived as a threat to the existing protection levels.¹⁰⁵ Information on the representation of the victim (standing of victims, NGOs and trade unions) is therefore neither available as there are no data available in the field of employment distinguishing between the different types of discrimination (direct, indirect, harassment, instruction, victimisation).

Evidence is collected either by the lawyer or an anti-discrimination NGO. Regarding the average length of proceedings, no information is available.

¹⁰² Wikipedia: Federal Administrative Court of Germany, http://en.wikipedia.org/wiki/Federal_Administrative_Court_of_Germany, accessed 11.1.2014.

¹⁰³ http://www.bverwg.de/informationen/english/federal_administrative_court.php

¹⁰⁴ Ibidem

¹⁰⁵ Mr. VR, Stakeholder in the Federal Trade Unions (DGB), interviewed May 2013.

The Juris-database provides an access to German court decisions. Of the 15.079 court decision related to labour law and the 1.009 decisions related to the Equal Treatment Act (AGG), 157 decisions have been taken in relation to the AGG and the labour law. In the period between March 2012 and June 2013, altogether 28 decisions have been taken. As the decisions are not accessible for free, no further information about the decisions could be found out. A brief summary of the decisions brought to light, that most of them are related to age (8) and disability (7), while all other characteristics are referenced in one to three decisions.¹⁰⁶ The database of the Website “Rechtsindex” provides information on 17 court decisions under all grounds of discrimination for the period under review.¹⁰⁷

4.2.2 Non-judicial remedies

4.2.2.1 Ombudsman or equality body

The self-description of the equality body in Germany, which is called Federal Anti-discrimination Agency (ADS), sounds promising:

*“In an independent manner, the Federal Anti-Discrimination Agency supports persons who have experienced discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual identity. The Agency informs the general public about the General Act on Equal Treatment and the fact that equal treatment is a human right. In addition, the Agency has initiated research on the subject of discrimination and commissions contracts relating to research projects”.*¹⁰⁸

The elimination of prejudice the change in attitudes and views, as well as implementing fully the General Equal Treatment Act (AGG) and its provisions in all aspects of everyday life, are considered core issues. For the ADS, all victims and the organizations fighting to combat discrimination are important stakeholders in achieving societal change. In coordination with the Federal Lander, the local authorities and non-governmental organizations, the ADS wants to ensure that persons affected will be able to obtain quick and competent support in cases of discrimination. The core goal of the ADS is counselling and this objective ranks first among its legal tasks.¹⁰⁹

The AGG is applied to both labour and civil law. In labour law, the AGG applies to all fields of employment, with respect to:

- accessing gainful employment (job advertisement, application procedure, job interview, selection criteria, conditions of recruitment);
- negotiating employment contracts (terms and conditions of employment and working conditions, earnings, fringe benefits, social security benefits);
- vocational training (vocational retraining, initial and continuing vocational training);
- in connection with questions of career advancement (promotion, transfer to another post for a longer period of time or assignment of new functions within the same job, instructions about initial, further and continuing vocational training);
- membership of an employees' union, trade union or professional association;
- the termination of an employment relationship, and even beyond this, for example in occupational pension schemes.

¹⁰⁶ http://www.juris.de/jportal/portal/t/1sma/page/homerl.psml/js_peid/Trefferliste/media-type/html?action=portlets.jw.ResultListFormAction&tl=true&cmsuri=%2Fjuris%2Fde%2Fstartseite%2Fsucheseite.jsp¤tNavigationPosition=1&numberofresults=157&sortmethod=date&eventSubmit_doSkipforward.x=3&eventSubmit_doSkipforward.y=8, accessed 8.10.2013.

¹⁰⁷ <http://www.rechtsindex.de/urteile/diskriminierung>, accessed 30.9.2013.

¹⁰⁸ http://www.antidiskriminierungsstelle.de/SharedDocs/FAQs/EN/3_what_are_the_tasks.html?nn=4194180, accessed 30.9.2013

¹⁰⁹ http://www.antidiskriminierungsstelle.de/EN/Home/home_node.html, accessed 30.9.2013.

The rights stipulated in the AGG apply to the whole labour force – without exception. Employees in the private sector and public sector employees may refer to them in the same way as civil servants or civilian service conscripts and recognised conscientious objectors. For soldiers – women and men alike – there are analogous rules in the Soldiers' Act.¹¹⁰

The assessment of NGOs interviewed for this Report is much more critical. A stakeholder in the trade unions criticised that the ADS is located within the Ministry for Family Affairs. The ADS would be more effective on labour market issues if it was located in the Ministry of Labour and Social Affairs.¹¹¹ From the perspective of the stakeholders, the ADS does not play any real role in the labour market.¹¹² It serves as an individual counselling place where one can obtain initial information, but it does not play a role in the effective implementation of the EU Directive 2000/78 because it does not have the authority or mandate to do so. The ADS can register cases but cannot go further than publishing them and generating awareness in the general public about labour-market discrimination.¹¹³

As already described in section 3.2, the ADS does not bring forward complaints directly, but provides statistics on counselling requests and complaints.¹¹⁴ There are independent anti-discrimination bureaux that can bring forward complaints, but there is not yet a unified reporting system. This showed a study commissioned by the ADS in 2010.¹¹⁵ In 2010, the ADS started a process of developing a concept for data collection on discrimination in consultation with anti-discrimination organisations. An expert recommended three measures: a systematic, homogeneous, one-stop interpretation of discrimination cases; a standardised documentation of court cases on the basis of the Equal Treatment Act (AGG) and intensified research on discrimination.¹¹⁶ Currently, data collection on discrimination differs considerably and makes comparison extremely difficult. While the Federal Anti-discrimination body (ADS) needs aggregated data for political discussions and for the press (only numbers count as an objective), anti-discrimination organisations stress the need for less aggregated qualitative data which reflect single cases in order to expose the phenomena and pattern of discriminatory acts to support their local counselling. To mediate between those differing needs, a continuous consultation between the ADS and the anti-discrimination organisations about data reporting and their interpretation is needed. This collaboration needs to be established as a network process and not a hierarchical command line from above.¹¹⁷ This process was started, but did not produce any tangible results yet. Meanwhile the ADVD, the Association of the Anti-Discrimination

110 http://www.antidiskriminierungsstelle.de/EN/AdviceForIndividuals/ScopeAct/scopeAct_node.html, accessed 30.9.2013.

111 Mr. VR, Stakeholder in the Federal Trade Unions (DGB), interviewed May 2013.

112 Ibidem

113 http://www.antidiskriminierungsstelle.de/EN/AdviceForIndividuals/ScopeAct/scopeAct_node.html, accessed 30.9.2013.

114 Diskriminierung im Bildungsbereich und im Arbeitsleben. Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Gemeinsamer_Bericht_2013.pdf?__blob=publicationFile, accessed 30.9.2013.

115 Peucker, Mario/Lechner, Claudia (2010): Machbarkeitsstudie: „Standardisierte Datenerhebung zum Nachweis von Diskriminierung!? – Bestandsaufnahme und Ausblick“. Studie im Auftrag der Antidiskriminierungsstelle des Bundes (ADS), Berlin. http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/machbarkeitsstudie.pdf?__blob=publicationFile, accessed 30.9.2013.

116 Antidiskriminierungsstelle des Bundes, *Machbarkeitsstudie: „Standardisierte Datenerhebung zum Nachweis von Diskriminierung!? – Bestandsaufnahme und Ausblick“* (2010), p.3, http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/machbarkeitsstudie.pdf?__blob=publicationFile, accessed 25 August 2011.

117 Antidiskriminierungsstelle des Bundes, *Dokumentation des Fachgesprächs der Antidiskriminierungsstelle des Bundes zu „Standardisierte Datenerhebung zum Nachweis von Diskriminierung!?“* (2010), http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/doku_standardisierte_datenerhebung_2010.pdf?__blob=publicationFile, accessed 25 August 2011

bureaux in Germany, brings forward cases and evaluate how many complaints on discrimination in employment were filed during a given period, the nature of the complaints and what is known about the profile of the victims or defendants. Up to now, only counselling requests and complaints in a combined form are analysed by the ADS. They cover the following areas:

- Labour Law 2511 requests/complaints (40,91 per cent),
- Civil Law 1161 requests/complaints (18,91 per cent),
- Education 270 requests/complaints (4,40 per cent),
- Civil services 998 requests/complaints (16,26 per cent),
- Other areas 1198 requests/complaints (19,52 per cent).¹¹⁸

From those 2511 counselling requests and complaints related to labour law

- 938 were related to the access to the labour market,
- 778 were related employment and working conditions,
- 227 were related to the termination of a job and
- 568 have been without any information.¹¹⁹

Evidence of discrimination is collected by local anti-discrimination offices and the ADS, but information about the average length of proceedings and on how many decisions were favourable to the applicant are not yet available. The 2511 counselling requests and complaints related to labour law covered the following forms of discrimination:

- 98 direct discrimination,
- 1131 indirect discrimination,
- 57 harassment,
- 41 sexual harassment,
- 1184 other areas.¹²⁰

Court decisions are public through different juridical databases, but for non-experts it is hard to obtain an overview.

In August 2013, the seventh anniversary of the Equal Treatment Act (AGG), which up to then was celebrated in a range of press releases by all relevant actors, the Federal Anti-discrimination body (ADS), the anti-discrimination association of Germany (ADVD) and the Confederation of German Employers' Associations, passed unnoticed. While the employers up to 2009 monotonously echoed the arguments of the beginning of the debate in 2001 - that the law is a bureaucratic monster costing enterprises millions of Euros; a view still seconded by the Social Democratic Senator of Social Affairs in Hamburg until 2011 - anti-discrimination policy got a new drive after the last federal elections in 2009 since the appointment of the new director of the ADS. With the different initiatives, among them the establishment of an anti-discrimination infrastructure for Germany (100.00 € each for 10 local networks¹²¹), the ADS wanted to make a reasonable step forward in linking together existing structures and establishing a new structure to bring, what the ADVA calls the "anti-discrimination culture" to the Länder and local level. This however was stopped by budget cuts in 2011 by the government.¹²²

118 Ibidem, p. 47. Percentage of all requests and complaints.

119 Ibidem, p. 183.

120 Ibidem, p. 183.

121 Förderprogramm: Netzwerke gegen Diskriminierung,
http://www.antidiskriminierungsstelle.de/DE/Projekte_ADS/offene_diskriminierungsfreie_gesellschaft/foerderprogramm/foerderprogramm_node.html, accessed 30.8.2013.

122 Antidiskriminierungsstelle muss ihre Arbeit deutlich einschränken,
http://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2011/20111122_Kuerzungen.html, accessed 30.9.2013

Although there have been big steps forward over the last years, recent developments show how shaky this emerging structure is and that it very much depends on the political will of the governing parties and the other actors involved. Anti-discrimination politics in Germany is always in danger of being squeezed between party politics and organisational egoism. Even worse is the situation in Hamburg, where the former Conservative-Green government (2008-2010) established a remarkable pilot-project in the Ministry of Justice, bringing together gender-equality, the fight against right-wing extremism, sexual identity, demographic development and anti-discrimination in one high-level administrative structure. As this was a coalition compromise, which the Conservatives never wanted and the Greens never saw as important enough as to challenge the coalition partner, the “working group diversity” (“Arbeitsstelle Vielfalt”) in its one year of existence never had internal backing in the administration nor external backing from civil society, because it got entangled too much with the internal bureaucratic procedures than reaching out to civil society.

These examples show that, although there is a civil society lobbying locally for an anti-discrimination infrastructure and there is an opportunity to have political partners who politically are able to establish such an infrastructure, there still is a great need for a strong civil society movement to support such infrastructures becoming sustainable. Moreover, relying solely on the political parties to implement such a structure into the existing administration seems to be depending always on the political “zeitgeist” and therefore other options of independent civil society solutions, in cooperation with the local administration, seem to be much more favourable.

The ADS is currently not active in the field of preventing discrimination, nor does it support individuals who want to go to court, because it is not in its remit. Publicly there is no information available which shows that the ADS has intervened in discrimination in employment cases.

4.2.2.2 Mediation or conciliation

There is an internal mechanism, where work councils are involved, which are based on the Works Council Constitution Act (das Betriebsverfassungsgesetz, BetrVG). Employer/works council agreements (Betriebsvereinbarung), which regulate the internal peace, serve as a clear signal against discrimination in the workplace or in public services. Trade unionists are asked by their unions to intervene in cases of bullying, discrimination and racism, and provide a template to negotiate an agreement which ensures legal certainty when acting against racism at the workplace.¹²³ Those complaints however are not public. Solutions and interventions which both the enterprise and the employees can benefit from are searched for. It is often used as an internal conflict resolution mechanism. Taking this into account, the stakeholder said that the number of discrimination cases in the labour market must be estimated much higher than the official number of the ADS implies.¹²⁴

4.2.2.3 Labour inspectorate

A stakeholder in the trade unions explained that there is no European system of labour inspection.¹²⁵ Instead, what is available is a cooperation of national structures which control employment. In Germany, the customs inspection control work permits and illegal labour. Up to 2010 it used to be the “FKS” (Finanzkontrolle Schwarzarbeit/Finance Control illegal labour), but the Finance Minister dissolved it and moved the 5000 employees to the customs inspection and intensified their duties. In the perspective of the stakeholder, stringency was lost and the whole labour inspection was weakened as a result.¹²⁶ Additionally a minimum wage needs to be introduced and the situation of employees coming from outside of Germany needs to be monitored. Although they work in Germany,

¹²³ <http://aktiv-gegen-diskriminierung.info/betriebsvereinbarungen>, accessed 30.9.2013.

¹²⁴ Mr. VR, Stakeholder in the Federal Trade Unions (DGB), interviewed May 2013.

¹²⁵ Ibidem

¹²⁶ Ibidem

they fall under the labour legislation their home countries (Entsendestaaten) which mostly protects them to a much lesser extent.

The labour inspectorate (Zoll and Gewerbeaufsicht) controls workplaces via random sampling but discrimination is not looked for there, the stakeholder said.¹²⁷ He suggests agreeing on a common EU-objective of labour inspection mechanisms targeting discrimination and including the interest of the victim. In certain areas, the state should be obliged to involve NGOs and civil society in questions of discriminatory wages and other work-related issues.

There is also another type of Labour Inspectorate (*Gewerbeaufsichtsamt*) which is the official public body responsible for the supervision of the adherence to labour regulations and regulations concerning worker protection (§ 139b GewO), as well as environmental and consumer protection. It is also responsible for the grant of permissions to operate business premises.¹²⁸ In some individual *Bundesländer*, instead of a general *Gewerbeaufsichtsamt*, there are a number of more specific individual institutions, such as the *Amt für Arbeitsschutz* (*Office for Occupational Safety*) or the *Staatliches Umweltamt* (*State Environmental Agency*) whose responsibility is restricted to specific fields. Works Councils cooperate with these institutions, providing advice and support (§ 89 BetrVG).¹²⁹

4.3 Civil society initiatives

4.3.1 Trade Unions

There are a whole range of good practices by trade unions to tackle discrimination in employment. Most of them tackle right-wing extremism in the enterprise, but there are a small number of them dealing with an adaption of their own structures. The NGO 'Mach meinen Kumpel nicht an' (Don't touch my buddy) has a database of the 240 best practices against right-wing extremism, racism and discrimination in the labour market, as well as examples of the commitment of employees with a migrant background to equality. The association is one of the oldest anti-racist organisations in Germany and was founded 25 years ago by the editor of the trade magazine "Ran" and the Trade Union Youth. The origins of the association go back to "SOS racism", which was founded in France in the 1980s. Members of the association are representatives of the Federation of German Trade Unions (DGB), the DGB member unions and other trade union organisations.¹³⁰

Topics: Anti-discrimination, anti-racism, anti-Semitism, labour migration, general xenophobia, equal integration, intercultural opening, right-wing extremism.

Target groups: workers and operating staff, workers councils, shop stewards, general public, youth/trainees/students, teachers, companies/administrations, multipliers, associations/NGO.

Nature of the projects: activities in operation (including operation agreements), counselling, training (workshops, educational material) conferences/meetings, networks and cooperation (working groups, alliances), projects, anniversaries and exhibitions, presence on streets and squares (demonstrations and counter-demonstrations, public actions), other publications and materials, websites, competitions.

Reach: local, regional, nationwide, across borders.¹³¹

¹²⁷ Ibidem

¹²⁸ <http://de.wikipedia.org/wiki/Gewerbeaufsicht>.

¹²⁹ Springer Gabler Verlag (Herausgeber), Gabler Wirtschaftslexikon, Stichwort: Gewerbeaufsicht, online im Internet: <http://wirtschaftslexikon.gabler.de/Archiv/5209/gewerbeaufsicht-v7.html>. 30.9.2013.

¹³⁰ http://www.gelbehand.de/cms/index._cGkPTixOA_.html

¹³¹ http://www.gelbehand.de/practice_all_X19pbml0PTEmYW1wO3BpZD0yMjU_.html, accessed 30.9.2013.

The database contains 47 employer/works council agreements (Betriebsvereinbarung) among them are big, medium and small enterprises.

Examples: RPC WIKO GmbH and Co KG, Petrofer Chemicals, Steelworks Bremen GmbH, Technical University Munich, administration of the city of Bremen.

The database also contains 11 best practices of networks and cooperations.

Examples: Working group on Anti-fascism-Anti-discrimination in ver.di Cologne and in the youth organisation of ver.di. Ver.di is the trade union in the service sector. The migrant working group of ver.di Thuringia, Working group REX giving information about right-wing extremism in the Youth organisation of the DGB in the region Ruhr-Mark, the initiative against racism, anti-Semitism and right-wing extremism of the DGB district Berlin/Brandenburg, the cooperation agreement between the DGB and the Land Brandenburg, the network for democracy and courage in Rhineland-Palantine, ZAKO – Central working group on an offensive against racism and right-wing extremism in ver.di.¹³²

Workers Councils: As already mentioned in the section on the labour inspectorates, the Workers Councils cooperate with the different institutions involved in the inspection of labour and the workplace, providing advice and support (§ 89 BetrVG).¹³³ Additionally, trade unions and work councils have the possibility to file a suit against employers in cases of gross violation of the AGG. In fact, this is a measure designed to ensure the compliance of employers with the law – regardless whether the employees concerned actually file a suit against them or not. Works councils and trade unions are also entitled to request that certain actions (depending on circumstances) are performed, tolerated or discontinued, in case they violate the regulations in the AGG. However, this only applies in companies with a minimum of five statutory staff members, of whom a minimum of three have to be elected to the works council. If no works council has been elected in the company concerned, a law suit may also be conducted by a trade union.¹³⁴

The importance of diversity management has been stressed by a stakeholder in the Industrial Union for Mining, Chemistry and Energy (Industriegewerkschaft Bergbau Chemie Energie, IGBCE). The IGBCE emphasised the importance of qualifications rather than appearance, religious belief, gender etc. and organised a survey of existing diversity-strategies within their sector in the autumn of 2012. The stakeholder in the IGBCE considers the labour council and the relevant labour legislation to be one of the strongholds of practical anti-discrimination work.¹³⁵

As already mentioned, there is a civil society assessment and critique regarding the efforts of the government to combat labour market discrimination and racism, which was brought forward by the Bureau for the Implementation of Equal Treatment (BUG), an NGO active in litigation in the anti-discrimination sector. The BUG developed concrete reform proposals concerning the Equal Treatment Act (AGG), which have been taken on board by the German national platform of ENAR (NgR) for further discussion.¹³⁶

¹³²

http://www.gelbehand.de/practice_all_seq_cXVlcnlucC5wcmFidGJlZS5za2lwPTAmYW1wO2Rvc2VhcmNoPTEmYW1wOyZhbXA7Zm9ybS5wcmFjc2VhcmNoPSZhbnXA7JmFtcDtwYWdlLnN0aWNod29ydD0mYW1wOyZhbXA7Zm9ybS52ZXJhbnN0YWx0ZlI9MCZhbnXA7JmFtcDtodz0mYW1wOyZhbXA7cGkPTlYNSZhbnXA7JmFtcDtm3JtLnRoZW1hPSZhbnXA7JmFtcDtm3JtLnppZWxncnVwGU9JmFtcDsmYW1wO2ZvcuYXJ0X2Rlc19wcm9qZWt0cz01JmFtcDsmYW1wO2ZvcuUcmVpY2h3ZWl0ZT0mYW1wOw_.html, accessed 11.1.2014.

¹³³ Springer Gabler Verlag (Herausgeber), Gabler Wirtschaftslexikon, Stichwort: Gewerbeaufsicht, online im Internet: <http://wirtschaftslexikon.gabler.de/Archiv/5209/gewerbeaufsicht-v7.html>. 30.9.2013.

¹³⁴ <http://www.aktiv-gegen-diskriminierung.de/de/nationale-rechtsdurchsetzung/rechte-und-beteiligungsmoeglichkeiten/verfahren-nach-dem-agg/rechte-fuer-verbaende-nach-dem-agg.html#c10536>

¹³⁵ Interview with Giovanni Pollice, (IGBCE department head of the administrative center) on 26 April 2012.

¹³⁶ http://www.bug-ev.org/fileadmin/user_upload/AGG_Novellierung_vorläufige_Endfassung.pdf, accessed 19.9.2013

4.3.2 NGOs activities

The Anti-Discrimination Association of Germany (advd), an umbrella association of independent German anti-discrimination organisations, has been following the progress of the policy of the Federal Anti-discrimination body (ADS) since its outset. Having been very disaffected until the change of the director in February 2010, the advd since then has approved the new focus of the ADS, but still expresses differences in conceptions and demands in the public discussion.¹³⁷ The ADVD supports the ADS in its intension to create a nationwide network of local and low-threshold helpdesks, and stresses the need that besides the cross-sectional helpdesks (like parenting support centres, debt counselling or social services), a specialised and particular anti-discrimination counselling by independent and qualified anti-discrimination organisations is needed. In six of the sixteen capitals of the lander, neither a governmental nor an independent anti-discrimination counselling service is available.¹³⁸ Underfunding is also a problem. The ADVD is member of the ENAR platform Germany, the Network against racism, which involves all major actors in the field of anti-discrimination and anti-racism in Germany.

NGOs work together with national, regional and local governments. The "Forum against Racism" has been established in 1998 to enable a dialogue between the government and NGOs. The Ministry of the Interior is the partner of the "Forum against Racism" on the government side and approximately 80 NGOs represent the civil society¹³⁹. Over the years, the people and administrative units responsible for the Forum changed on the government side several times. Since 2005, the Forum appeared to be very inactive, but NGO's reactivated it and it got a new drive after 2011 through working on a common position paper, which strives towards a common understanding of discrimination and racism.

4.3.3 Employers' organisations

The German Diversity Charter was launched by Daimler, the BP Europa SE (formerly German BP), Deutsche Bank and Deutsche Telekom in December 2006. More than 1,600 companies and public institutions have already signed the Diversity Charter and new signatories are continuously being added. In a database, 1627 best practices have been collected.¹⁴⁰

Deutsche Bank, "*Bankamiz - Culturally sensitive financial advice*": A financial consultant with Turkish background gave the impetus to a new target group-focused service from Deutsche Bank - Bankamiz (Turkish: our bank). It is aimed at ethnic Turkish customers and provides culturally sensitive counseling and customized offers. In addition to the business' success through significant customer growth, Bankamiz increased the diversity of the workforce and therefore the acceptance of diversity in the company.¹⁴¹

Senate of the Free and Hanseatic City of Hamburg, "*We are Hamburg! Are you in?*": Starting from a very low proportion of students with an immigrant background in the administration, the Senate of

137 See Shadow Report 2009/2010: Hieronymus, Andreas and Fögen, Ines and Meheroglu, Yücel and Kröger, Justin, *ENAR Shadow Report 2009/2010 – Racism in Germany* (Hamburg: Institut für Migrations- und Rassismusforschung, 2007), p. 32.

138 No anti-discrimination counselling is available in Magdeburg (Saxony-Anhalt), Wiesbaden (Hesse), Stuttgart (Baden-Württemberg), Saarbrücken (Saarland), Dresden (Saxony) and Erfurt (Thuringia). Findings from an enquiry of the Institut für Migrations- und Rassismusforschung at the website of the ADS (heading "Beratungsstellensuche"), http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html, accessed 24 August 2013.

139 Forum gegen Rassismus, <http://www.bmi.bund.de/SharedDocs/Standardartikel/DE/Themen/PolitikGesellschaft/PolBilGesZus/forum.html?nn=271448>, accessed 30.9.2013.

140 <http://www.charta-der-vielfalt.de/unterzeichner/best-practice/beispiele.html>, accessed 30.9.2013.

141 Deutsche Bank, "Bankamiz", http://www.bankamiz.de/tr/tr_index.html, accessed 11.1.2014.

the Free and Hanseatic City of Hamburg started the campaign in 2006. The goal of reaching 20 percent in the training of the Hamburg administration was set to be reached by 2011. The measures were effective and resulted in the first year in doubling the share to over 10 percent. A further significant increase of 16.4 per cent was achieved by 2011, although the target of 20 percent was missed.¹⁴²

Klintsaris, "*Intercultural Tax Counselling- Promoting bilingual competence*": Klintsaris is an owner run tax advice office and has a customer base with a lot of entrepreneurs with an immigrant background. In response, Mr. Klintsaris became aware of employees with a migration background in his staff and adjusted their professional trainings and now uses bilingual communication strategically, which resulted in a higher customer loyalty.¹⁴³

These examples of initiatives share something in common; they all stand for an adjustment of both sides and adapt an organisation to provide a more customer-oriented approach in order to serve a diverse society.

5. Conclusions and recommendations

5.1 Political and societal developments related to racism and discrimination

A critical assessment of the developments in anti-discrimination in the labour market in Germany for the period under review would be one of «stagnation». There have been no major legal, social and political changes in Germany that would indicate new developments or any changes in regard to the communities most vulnerable to discrimination and racism. There is a record of continuity in the shaping of Germany as a Migrant Society. This continuity is the defence character of German national legislation, which is best understood by the change in the asylum- seekers and contract workers policies in 1993 after the breakdown of the former Communist bloc.

In the Berlin district of Marzahn-Hellersdorf, an information event about the settlement of asylum-seekers in a nearby school on the 9th of July 2013 in Hellersdorf, was escalated by activists of the NPD, the German Nationalist Party, disguised as sceptical neighbours. The discourse on asylum seekers developed dynamically and gained international coverage as the federal elections came closer.¹⁴⁴ According to the media, a number between 750 to 1000 people, declared as inhabitants, participated and were portrayed as “loudly shouting” against the proposed asylum centre. Marzahn-Hellersdorf functions as a symbol for the «ugly, racist German».¹⁴⁵

On the other side, as the position paper on the immigration from Romania and Bulgaria of the German Association of Cities (Deutscher Städtetag) shows, the reproduction of stereotypes and racist discourses can easily destroy all positive efforts.¹⁴⁶ This is often due to the fact that there are few recent studies which demonstrate evidence of discrimination or discriminating mechanisms and thereby giving the false impression that there is no discrimination.

¹⁴² Wir sind Hamburg! Bist du dabei? <http://www.hamburg.de/bist-du-dabei/2385460/kampagne.html>, accessed 11.1.2014.

¹⁴³ Steuerberater Klintsaris, <http://www.klintsaris.de>, accessed 11.1.2014

¹⁴⁴ Hieronymus, Andreas. (2014). *Engaging Marginalised Majority Populations*: Berlin. London: Open Society Foundation.

¹⁴⁵ Ibidem

¹⁴⁶ Deutscher Städtetag: "Armutszuwanderung aus Südosteuropa braucht Lösungen durch Bund, Länder und EU", <http://www.staedtetag.de/presse/mitteilungen/064517/index.html>, accessed 11.1.2014.

As research carried out within the last ten years suggests, the most relevant issues are the insecure work and life situation of so-called «Illegals», meaning undocumented migrants, and the continuous discrimination against Muslims, Turks and Germans with a Turkish background. This has something to do with an emerging migrant middle class in Germany. By comparison, highly-qualified professionals with a migrant background are markedly less likely to find suitable employment than migrants with lower or no formal qualifications. However, a growing number of people have started to take legal action against discrimination in the employment sector and increasingly with success, resulting in companies having to pay compensation.

Although there is very little known about discrimination and unfair practices in the work place, things often happen which go unnoticed by, for example, the workers councils, which directly act in the workplace using mediation and conciliation. Structural discrimination still prevails in Germany and there is a gap between the sectors of trade, manufacturing and service industries, where foreigners and people with a migrant background are over-represented in contrast to the public administration sector, where there is an under-representation of migrants. The general political rhetoric in Germany concerns equal opportunities, but not about reducing discrimination or structural discrimination in employment.

Interestingly, and this might be interpreted as a sign of normalisation, the seventh anniversary of the Equal Treatment Act (AGG) in 2013, passed quite unnoticed. Up until then, it was celebrated by a range of press releases by all relevant actors. Although big steps forward have been taken over the last few years, recent developments also show how unstable this emerging anti-discrimination structure is and that it very much depends on the political will of the governing parties and the other actors involved, to sustain it or even to develop it further. Anti-discrimination rhetoric in Germany is always in danger of being squeezed between party politics and organisational egoism.

Although there is a civil society lobbying locally for an anti-discrimination infrastructure and there is an opportunity to have political partners who are able politically to establish such an infrastructure, there is still a need for a strong civil society movement to support its sustainability. Relying solely on the political parties to implement such a structure makes anti-discrimination policies dependant on the political 'zeitgeist'. Therefore NGOs need to look at other options and partners to remain politically independent, like for example, cooperating with local administration and enterprises. This way NGO's can strive not for neutrality, but for relative independence. Additionally they can diversify their funding and find new partners for the complex interplay of the different power levels of the German federal state. Existing best practices share the common element, in that they stand for an adjustment of both sides and adapt an organisation's approach to a more customer-oriented one because they have to serve a diverse society.

5.2 Conclusions and recommendations

In general, a positive outlook for the situation of vulnerable groups at the German labour market is possible, although things often take a long time until they generate results. This is the case with the Federal Employment Agency in Germany, which has for the first time reported on developments in the employment market taking into consideration migrant backgrounds in the compilation of labour market statistics. Now it is possible to make a distinction between different backgrounds, although disaggregated data collection by ethnicity is still not permitted in Germany. The same is true for a statistical overview of religious diversity in Germany because data on religion is generally not collected, although the census 2011 asked for the voluntary disclosure of information on the major religions. Reports now consistently show that migrants have more problems in the employment market than non-migrants.

Legally, the Residence Act governs access to the German labour market for employees from abroad. In Germany the “Race Directives” have been implemented containing specific regulations concerning employment that complement the General Civil Law. Additional anti-discrimination provisions can be found in specific labour laws. In the specific model of “social partnership”, which developed in Germany after WW2, the social partners, employers, workers and their representatives are requested, within the framework of their tasks and possibilities of action, to implement the objectives of the AGG. In companies, the Works Council or a Trade Union can take legal action, and as a result, discrimination cases are being handled without ever coming to the attention of the general public. Therefore the following recommendations are structured around the German General Equal Treatment Act (AGG), state actors and German politics, the German Equality Body (ADS), German Social partners, civil society and NGO's and finally, the EU Parliament.

The German General Equal Treatment Act (AGG)

- Abolish the hierarchical approach towards different categories of discrimination still present in the current AGG;
- Substitution of terms such as the misleadingly neutral “disadvantage” with “racist discrimination” - an expression with a clearly defined meaning in both European and international law;
- A systematic, homogeneous, one-stop interpretation of discrimination cases; a standardised documentation of court cases on the basis of the AGG and intensified research on discrimination;
- Close regulation gaps in areas of life vulnerable to discrimination, whether they fall under the scope of the AGG or not – in this respect, areas depending on public policy, including the education sector, are of particular importance;
- Consequent and thorough realisation of the horizontal application¹⁴⁷ of the AGG;
- Bring provisions of the AGG in line with European law (e.g. independence of the anti-discrimination body, implementation of the AGG to the Länder-level)¹⁴⁸ and reflect the emerging case-law;
- Find solutions for the problem that the religious privilege in § 9 AGG does not conform with EU legal standards;
- Clarify the principles of social consideration and the anti-discrimination regulations stated in the AGG in dismissal cases. EU Regulations (EU2000/43 and EU2000/48) do not permit exempting dismissal cases from being covered in anti-discrimination regulations, as § 2 Abs. 4 AGG seems to suggest.
- Clarify the principle of the shift of burden of proof;
- Provide for longer deadlines to report discrimination;
- Strengthen equal pay by providing a legal guarantee in the AGG;
- Abolish regulation 4.3. § 2 Abs. 4 of the AGG which states that dismissals are covered exclusively by the general and special dismissal protection regulation.
- Apply the restriction of discriminatory practices under civil law to large scale businesses for all “categories” and include racial discrimination in its scope.

State actors and German Politics

- Transfer the Equality body (ADS) from the Ministry of Family Affairs to the Ministry of Labour and Social Affairs, so that they can be responsible in the effective implementation of the EU Directive 2000/78;

¹⁴⁷ In the German context „horizontal approach“ means, that anti-discrimination is tackled across all grounds of discrimination (instead of only tackling one ground e.g. ethnic discrimination) and across all areas (e.g. housing, employment, etc.).

¹⁴⁸ Further recommendation see BUG, p. 13.

- The recognition of qualifications should be standardised all over Germany and quotas should be introduced to balance out, like it is done with Gender quotas;
- Monitoring legal barriers. The prohibition on refugees being able to work and the prioritisation of German applicants should be evaluated in respect to their discriminating potential;
- Enable equal access to further education, through establishing effective complaints mechanism in the education system, as well as reliable quotas;
- The prohibition of religious symbols in some of the Länder should be newly discussed in light of the discrimination of Muslim women wearing the headscarf;
- More financial support for anti-discrimination associations;
- Public funding and public contracts should be made dependent on the adherence to the standards set down in the AGG;
- In certain areas, the state should be obliged to involve NGOs and civil society in questions of discriminating wages and other work-related issues.

German Equality Body (ADS)

- The recommendations in the ADS report on education and the labour market do not concern policy or the implementation of policy measures. As the ADS, because of the lack of effective powers, cannot effectively stop discriminatory practices in the labour market, it should be granted some power to enforce anti-discriminatory practices;
- Find ways to assess effectiveness and impact of budgets in terms of their specific aims, focussing on budget allocation, implementation and the stakeholders involved;
- Compensatory measures on a voluntary basis, as expressed in § 5 AGG, are clearly insufficient. Implement proactive approaches, such as compulsory diversity mainstreaming, equality and diversity impact assessments and a consideration of diversity competences in staff assessments;
- Establish a unified system and practice of reporting cases of discrimination.

The German Social partners

- The establishment of a body for monitoring diversity in companies and in government departments;
- Further developing diversity concepts and supporting a diverse workforce;
- Strengthening counselling and complaint mechanisms inside and outside the enterprises;
- Create transparency in the wage system, which reflects unintended and indirect discriminatory effects and provides measure to counter those indirect effects (e.g. pay-gap women-men or migrant-non-migrant)
- Development of criteria for a discrimination-free and gender-neutral evaluation of labour;
- Diversity oriented support when climbing up the social ladder. Barriers within the hierarchy of enterprises should be identified;
- Use employer/works council agreements (Betriebsvereinbarung) which regulate the internal peace to set a clear message against discrimination in the workplace or in the public services;
- Implement innovative personal recruitment: new recruitment practices should focus more on the potential and competencies of the applicant and HR managers should establish procedures, like anonymous applications or application without photographs;
- On-going review of the fairness of application procedures;
- Anti-discrimination measures should be adhered to at all stages of the recruitment process (e.g. measuring the share of migrants reacting to job-announcements, applying for a job, being invited to an interview, being selected and duration of stay in the enterprise);
- Diversity-awareness training for senior management and human resources personnel, exchanges with organisations which support victims of discrimination;

- Recognise discrimination in the termination of a job contract: training for members of work councils and employees on discrimination in the termination of jobs and legal procedures, particularly regarding age discrimination;
- The practices of the churches to discriminate on the basis of religion should be stopped until a court decision of the Court of Justice of the EU has been issued on cases currently being litigated through the German juridical system;
- Take specific needs into consideration: to avoid discrimination of employees, specific measures are necessary because of age, disability (specific health measure), gender (flexible working hours, child care), ethnicity, religion or world views (dietary requirements) or sexual orientation should be implemented.

Civil society and NGOs

- Establish qualified counselling services, equipped with skills and resources, to improve law enforcement;
- Implement specific measures against structural discrimination in cooperation with the ADS (e.g. collecting equality data, litigating for the use of statistics in German courts, raise awareness on the concept of indirect discrimination);
- Use the different models of the German Labour Inspectorate (Zoll, Gewerbeaufsicht) for the supervision of the implementation of anti-discriminatory measures, policies and legislation, in addition to what is already laid down in the labour regulations and the regulations concerning worker protection (§ 139b GewO).

EU Parliament

- Establish a European system of labour inspection which goes beyond the cooperation of national structures, ensuring that the combating of discrimination is targeted specifically and includes a focus on the interests of the victim.

6. Bibliography

International organisations

ENAR - Fact sheet on structural discrimination in employment, working paper. (ENAR, Brussels, 2014).

Governmental sources

Antidiskriminierungsstelle des Bundes: *Kurzfassung des Abschlussberichts zu anonymisierten Bewerbungsverfahren*. (ADS, Berlin, 2012).

Antidiskriminierungsstelle des Bundes: *Diskriminierung im Bildungsbereich und im Arbeitsleben. Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages*. (ADS, Berlin, 2013).

Antidiskriminierungsstelle des Bundes: *Dokumentation des Fachgesprächs der Antidiskriminierungsstelle des Bundes zu „Standardisierte Datenerhebung zum Nachweis von Diskriminierung!“* (ADS, Berlin, 2010).

Benecke, Martina: *Rechtsvergleich der europäischen Systeme zum Antidiskriminierungsrecht*. (ADS, Berlin, 2010).

BIBB: *Berufswünsche junger Migranten liefern keine Erklärung für mangelnde Erfolgchancen* (BIBB, Bonn, 2013).

Bundesagentur für Arbeit, *Press Info 029*. (BA, Berlin, 2013).

Bundesamt für Migration und Flüchtlinge: *Muslimisches Leben in Deutschland*. (BAMF, Nurember, 2009).

Bundesministerium des Innern, *Die nationalen Minderheiten in Deutschland*. (BMI, Berlin 2013).

Deutscher Städtetag: *"Armutszuwanderung aus Südosteuropa braucht Lösungen durch Bund, Länder und EU"*. (Deutscher Städtetag, Berlin, 2013),

Deutscher Städtetag: *Positionspapier des Deutschen Städtetags zu Fragen der Zuwanderung aus Rumänien und Bulgarien*. (Deutscher Städtetag, Berlin, 2013).

Peucker, Mario/Lechner, Claudia: *Machbarkeitsstudie: „Standardisierte Datenerhebung zum Nachweis von Diskriminierung!? – Bestandsaufnahme und Ausblick“*. Studie im Auftrag der Antidiskriminierungsstelle des Bundes (ADS, Berlin, 2010).

Uslucan, Haci-Halil and Cem Serkan Yalcin: *Wechselwirkung zwischen Diskriminierung und Integration – Analyse bestehender Forschungsstände*. Expertise des Zentrums für Türkeistudien und Integrationsforschung (ZfTI) im Auftrag der Antidiskriminierungsstelle des Bundes. (ZfTI, Essen, 2012).

Zensus 2011, *Ergebnisse dynamisch und individuell*. (Bundesamt für Statistik, Berlin, 2011).

National legislation and case law

Arbeitsgericht Berlin: *Diskriminierung einer Muslima im Bewerbungsverfahren (Kopftuchurteil)*. (Arbeitsgericht Berlin, 2012).

Bundesarbeitsgericht/Federal Labour Court: (BAG) 6.11.2008, NZA 2008, 1285. (Bundesarbeitsgericht, 2008).

Europäischer Gerichtshof: EuGH, Rs. C 13/05, NZA 2006, 839 (Navas).

Non-governmental organisations

Bund der Arbeitgeber (BDA): *Allgemeines Gleichbehandlungsgesetz verursacht hohe Kosten*. (BDA, Berlin, 2007).

Bund der Arbeitgeber (BDA): *Arbeitgeber aktuell 3/12*. (BDA, Berlin, 2012).

Evangelische Kirche in Deutschland (EKD): *Statistik über die Äußerungen des kirchlichen Lebens in den Gliedkirchen der EKD im Jahr 2010* (EKD, Berlin, 2010).

Hieronymus, Andreas and Fögen, Ines and Meheroglu, Yücel and Kröger, Justin: *ENAR Shadow Report 2009/2010 – Racism in Germany* (Institut für Migrations- und Rassismusforschung, Hamburg, 2007).

Hieronymus, Andreas: *Engaging Marginalised Majority Populations: Berlin*. (Open Society Foundation, London, 2014).

Liebscher, Doris und Alexander Klose: *VORSCHLÄGE ZUR NOVELLIERUNG DES ALLGEMEINEN GLEICHBEHANDLUNGSGESETZES (AGG)*, im Auftrag des Büros zur Umsetzung von Gleichbehandlung. (BUG, Berlin, 2013).

Netz gegen Rassismus (NgR): *Positionpaper of ENAR platform Germany - Integration und Partizipation statt Stigmatisierung - Zuwanderung aus EU-Staaten nach Deutschland Anforderungen an die künftige Bundespolitik*. (NgR, Berlin, 2013).

Türkische Gemeinde in Baden-Württemberg: *TGBW fordert Einführung von anonymisierten Bewerbungen*. (TGBW, Stuttgart, 2012).

Türkische Gemeinde in Deutschland: *Ein Vorstoß, der zu unterstützen ist*. (TGD, Berlin, 2012).

Media reports

Die Tageszeitung (taz): *Diskriminierung bei der Jobsuche. Das Foto macht den Unterschied*. (TAZ, Berlin, 2010).

Universität Konstanz: Press Release No. 30. *Im Teufelskreis der Diskriminierung*. (Universität Konstanz, Konstanz, 2010).

Other sources

Springer Gabler Verlag (ed.), *Gabler Wirtschaftslexikon*. (Springer Gabler, Wiesbaden, 2013)

List of experts interviewed

Mr. SB and Mrs. VE, confidential telefon interview with stakeholders litigating on the “Church privileges”.

Mr. VP, Stakeholder in the mining union (IGCE), interviewed in 2012.

Mr. VR, Stakeholder in the Federal Trade Unions (DGB), interviewed May 2013.



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