

Dossier

Support from organisations when filing a legal complaint

Filing a legal complaint implies having to adapt to a long trail. Due to this time consuming process, many people who faced discrimination refrain from filing a complaint. As a result, discrimination often remains without legal consequences.

However, the plaintiffs do not need to go through this lengthy process alone, their legal complaints, can for example, be supported by associations.

This dossier will present the different possibilities for associations to support legal complaints in the various legal sectors in Germany.

In addition, we provide a brief overview of the different possibilities to receive support by associations in a European comparison.

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1. The legal situation in Germany

A series of available legal frameworks provide the possibility of legal support by associations, when filing a legal complaint.

On the one hand, associations can provide **assistance** (*Beistandschaft*) for the plaintiff in court. Here the plaintiff always leads the proceedings, the association simply appears before court alongside the plaintiff. In the area of implementation of equal treatment – which is the area of activity of BUG – assistance is the only legal option to accompany a complaint. The assistance in cases of discrimination is regulated by § 23 AGG.

Representative actions (*Prozessstandschaft*) constitute another option for associations to appear in legal proceedings. While in the case of assistance the association can only appear alongside the plaintiff, representative actions allow the association to enforce the right of the plaintiff in its own name.

Finally, there is the possibility of a “*Verbandsklage*”. This allows a competent and registered association to appear as plaintiff in court itself.

1.1 Legal assistance

In proceedings before the court, the plaintiff is usually represented by a lawyer. S/he becomes the plaintiff's attorney, which means s/he represents the plaintiff before the court and performs all legal actions for the person concerned.

In addition, the complaining party may, if so desired, ask an anti-discrimination association for assistance, e.g. in the context of an action under the AGG. This association may occur in the proceedings alongside the plaintiff and her/his attorney, and may, to a certain extent, contribute to the legal proceedings. If the association reports something to court, it is assessed as if the plaintiff had presented these matters (in so far as the statements are not immediately revoked or corrected by the plaintiff). For this reason, the plaintiff needs to be present in person. Moreover, this possibility of assistance serves as a form of moral support. Ideally, the assisting organisation and the lawyer communicate with one another.

Appointing assistance is only possible if it is authorized by law, which is the case in various legal proceedings.

In criminal proceedings, for example, the spouses, or the plaintiffs registered partner is allowed to appear and assist before the court, and to act as an assistant.

In administrative or civil proceedings, associations may also act as assistants. The exact requirements of assistance always depend on the respective legal area.

§ 23 AGG

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(2) Anti-discrimination organizations shall be authorized, under the terms of their statutes to act as legal advisor to a disadvantaged person in the court hearings. Otherwise, the provisions set out in the rules of procedure, in particular those according to which legal advisors may be barred from being heard, shall remain unaffected.

BUG meets the formal requirements to provide assistance in legal proceedings on the basis of § 23 AGG.

1.1.1 Administrative cases

Conditions for assistance in an administrative case are regulated under § 67 Section 7 of the Code of Administrative Court Procedure. Cases of ethnic profiling, for example, fall under this legal framework.

The regulations for assistance cover only the accompaniment of the plaintiff before the court. The applicant must therefore be present at the hearing in order to be able to avail her/himself of assistance.

In administrative court proceedings, anyone may be an assistant who is authorized to represent a party as an attorney in fact by the

“Ethnic profiling” is a form of institutional racism and describes discriminatory actions that consist of using specific attributions (skin colour, origin, ethnic/religious affiliation or language) as a reason for the police to carry out identity checks and searches without any concrete evidence.

administrative court itself. These may, for example, be employees of the person concerned, full-age family members, tax consultants or trade unions and employee associations. However, other persons may also be admitted to assist, insofar as this is relevant and necessary in the individual case. Such persons may be refused only if the court considers that they are not in a position to properly outline the dispute. However, legal practitioners and persons with a qualification for a judicial office must be admitted by the court in any case.

1.1.2 Civil proceedings

The regulations for assistance in civil procedures are laid down in the Code of Civil Procedure (ZPO). According to this, assistance is possible in civil procedures. This also applies if a discrimination complaint is submitted on the basis of characteristics specified in the AGG (§ 1 AGG).

1.1.2.1 Code of Civil Procedure (ZPO)

In civil law proceedings, the assistance is generally regulated by § 90 (1) ZPO. As a rule, assistance in civil proceedings is generally possible. The court can decide who to allow as an assistant. Conditions for the appearance of an assistant are that the assistance is materially useful and that the plaintiff is in need for such assistance.

For example, full-aged family members, persons with a qualification to become a judge (fully qualified lawyer), consumer centres in consumer affairs, employees of the plaintiff and legal persons of public law, can appear as assistants before the court. Non-enumerated persons can be declared assistant by the court.

In the case of civil proceedings before the regional court, a lawyer's appointment is compulsory. Assistance is nevertheless possible.

1.1.2.2 General Act of Equal Treatment (AGG)

The Race Equality directive and the Employment directive contain a requirement that associations should be able to advise or act on behalf of plaintiffs within the framework of national equal treatment legislation.

The AGG, however, only provides for assistance, which is regulated in § 23 AGG.

Anti-discrimination associations may, as a matter of principle, act as assistants in cases of discrimination.

The prerequisite is that they

- have at least 75 members or form a grouping of at least seven associations
- have to operate on a non-profit and non-temporary basis.

The benefits of assistance are multiple. The association which offers assistance is mostly generally concerned with the issue of anti-discrimination and can contribute

expertise from this field. The attorney may be less specialized or not at all on the subject of equal treatment and the AGG. In this case, assistance can provide detailed knowledge, thereby aiding the lawyer.

Discrimination always affects the person concerned personally. The self-esteem of a discriminated person can be seriously harmed. This is another reason why assistance by an anti-discrimination organization can be helpful, since such assistance can also provide moral support. In addition, assistance can explain the often complex and technical nature of a complaint and assist the cooperation with the lawyer.

Affected persons usually find the first contact with an anti-discrimination association easier than with a lawyer. The assistance can therefore be the (first) contact person, who then contacts a lawyer.

The assistance, however, does not have the same powers as the lawyer. The assistant has no right to inspect records or files, to question witnesses or to submit applications to the court. Judges, however, have mostly no experience with assistance, and are sometimes flexible when assistants want to submit pleadings or question witnesses.

1.2. Representative actions

Representative actions (Prozessstandschaft) in German law allow associations to claim the right of a person concerned in her/his own name. In addition to determining an infringement, claims for damages can be enforced.

In civil law, a distinction is made between a legal and an arbitrary representative action.

The difference between those two types of representative actions resides in the fact that legal representative action is provided by law, and arbitrary representative action is self-chosen and only possible under rather strict conditions.

However, for the anti-discrimination area, we only concentrate on arbitrary representative actions.

Firstly, the representative must be authorized by the plaintiff. This is because in principle the plaintiff has to assert rights him/herself. Moreover, the representative must also have a legitimate interest in enforcing the rights of the person concerned. There must therefore be vital reasons for a representative action.

In order to avoid conflicts of interest, the representative may not be involved in any form or role in the proceedings him/herself. This does not preclude the acquisition of an advantage in the case of a successful action. The decisive factor is that the interests of the association and the person concerned do not conflict and that they pursue the same objectives. The general rule applies that the party that loses the case has to bear the legal costs. The costs are composed of the court costs and those for legal

The AGG does not provide for representative action. The BUG is committed to the introduction of such a support system.

counselling. Since in representative action, the concerned person is not the plaintiff, but the representative, the latter also bears the risk of litigation.

1.2.1 German Equal Opportunities for People with Disabilities Act (BGG)

In the field of discrimination against people with disabilities, it is possible for recognized associations to file a legal complaint in administrative and social legal proceedings under Section 14 BGG.

This possibility of representative action only exists in cases with specific legal violations such as if a person with public authority discriminates against a disabled person. § 7 BGG enumerates the different public authority institutions.

A disadvantage exists when disabled and non-disabled people are treated differently without proper justification, in such way that the disabled person experiences impairment. The state is therefore legally obliged to establish i.e. accessibility to buildings and make information accessible to disabled persons in an appropriate manner.

Associations can only file a legal complaint under the representative action if the Federal Ministry of Labour and Social Affairs (BAMF) recognizes them. Recognition shall be granted if the associations meet the conditions provided in § 15 Section 3 BGG.

An association shall therefore:

- According to its statutes, supports the interests of people with disabilities, not only temporarily,
- According to the composition of its members or member associations, be appointed to represent interests of persons with disabilities at the federal level,
- At the time of recognition, exist for at least three years,
- Ensure that tasks are properly completed; taking into account the nature and extent of previous activity, the membership and the performance of the association.

1.2.2 Social Security Code IX

The competences for representative action concerning the rights of persons with disabilities is regulated in § 63 of the Social Security Code (SGB) IX.

An essential prerequisite for representative action is the infringement of rights under SGB IX. It deals in particular with the rights of persons with disabilities in employment and the resulting obligations of employers.

These are, for example, the promotion of people with severe handicaps and the integration into a company or job.

Associations must, according to their statutes, represent disabled persons at federal and Länder level. Only locally working associations are thus excluded. The work of an association does not have to rely exclusively on the representation of people with disability. In addition to classic disabled persons associations, welfare associations, trade unions or anti-discrimination associations can also file a complaint in the framework of a representative action according to § 63 SGB IX.

The Social Security Code IX deals with “the rehabilitation and participation of disabled persons” and is intended to promote self-determination and equal participation of people with disabilities in life, as well as the prevention and counteraction against disadvantages.

1.3 Verbandsklage

A “Verbandsklage” allows a competent and registered association to appear as plaintiff in court itself.

In principle, only those who are themselves in their rights affected are allowed to take legal action. An action by an association – a *Verbandsklage* - is only admissible if a law provides for such a procedure. They may then bring a legal complaint. However, if specific persons are affected, a complaint is usually conducted with the consent of the persons concerned. However, in such a case we speak of a representative action, as explained in the dossier.

In practice, only a few complaints by associations have been carried out so far. Examples can be found in our website’s menu under Topics /Law/ AGG judgments.

In Germany, only a few regulations authorize the filing of a complaint by associations. The regulations are to be found in the German Equal Opportunities for People with Disabilities Act (BGG), in the Federal Nature Conservation Act (BNatSchG), in the Law on injunctions for consumer and other offenses (UKlaG) and in the Law against unfair competition (UWG).

1.3.1 The German Equal Opportunities for People with Disabilities Act (BGG)

The “Verbandsklagerecht” is provided in § 15 BGG.

Accordingly, recognized associations may bring an action, even if they are not themselves concerned by the issue in their own rights and also no other legal action is brought by a specifically concerned person. Thus, no individual impairment is required to file a law suit.

The BGG only applies at federal level. In order to eliminate or prevent discrimination against people with disabilities in the individual Länder, the Länder have their own laws.

Actions brought by associations are directed only to the determination of an unlawful act - the infringement of a provision listed in § 15 BGG.

Object and purpose of the action

The BGG places particular demands on the content and purpose of the action. A legal complaint by an association is only possible if public authorities violate the requirement of accessibility, the provisions of federal law on the use of sign language or other suitable communication aids.

§ 7 BGG enumerates the different public authorities.

Procedural requirements

An action is only admissible if a measure affects a statutory task of an association. This means that the association must also be active in the area in which the occurring problem is settled. In addition, associations cannot take action against measures, which have already been reviewed by social or administrative courts. Furthermore, because of their subordination, an action by an association will only be considered if the case is of general interest. This is the case, if there are a large number of similar cases and a decision could lead to a legal precedent.

Qualified organisations

In order for an association to be allowed to file a complaint, it has to be registered as “recognized organisation” in the BGG list (§ 15 BGG).

The recognition takes place by the Federal Ministry of Labour and Social Affairs (BAMS).

The Advisory Council for the Interests of Disabled Citizens proposes which associations shall be recognized and the BAMS then decides whom to recognize. The BAMS is, however, not obliged to grant recognition.

Associations shall be granted recognition if:

- According to its statutes, supports the interests of people with disabilities, not only on a temporary basis,
- According to the composition of its members or member associations, be appointed to represent interests of persons with disabilities at the federal level,
- At the time of recognition, exist for at least three years,

- Ensure that tasks are properly completed.

1.3.2 Federal Nature Conservation Act (BNatSchG)

In environmental law, the need for a case brought by an association is particularly obvious. Often it is not an individual person whose rights have been violated. If, for example, a motorway is to be built through a nature conservation area, this affects the nature itself, which cannot file a legal complaint.

Therefore, recognized nature conservation associations can bring violations of the Nature Conservation Act to court (§ 64 BNatSchG).

The regulations have been greatly extended by the so-called Aarhus Convention. Environmental associations may now complain if, for example, the mandatory environmental impact assessment has not been carried out properly or has not been carried out correctly in the construction of industrial plants. (§ 2 German environmental Appeals Act).

The European Court of Justice also reinforced the standing of associations in the legal case C-115/09. It has clarified that a complaint is possible even if the injured environmental law is "only" intended for the general interest and not for the individual interest of persons.

Object and purpose of the action

Associations with legal standing may bring complaints against decisions without being infringed in their own rights. This is possible in cases involving the drafting of regulations or laws in the field of environmental law or the granting of exemptions from bans and prohibitions for the protection of marine areas (§ 64 BNatSchG).

It is also necessary to provide the relevant associations with the opportunity to comment on and inspect relevant expert opinions in the process of drafting regulations in the field of environmental law.

Qualified organisations

According to the BNatSchG, the right to bring a complaint is only possible for associations recognized by § 3 of the Environmental Appeals Act (UmwRG). Organisations shall therefore:

- Exist for at least three years
- Have environmental protection purposes in their statutes which is not only temporary
- Provides guarantees for an appropriate performance of its duties
- And enables everybody to join the association

1.3.3 Act on injunction suits in the case of breaches of consumer protection and other laws (UKlaG)

The consumer protection law provides a complaint lead by an association, which is regulated in the Act on Applications for Injunctions (UkLaG). Since individual complaints are normally insufficient to enforce customer protection, UKlaG created an independent right for associations to take action, to better guarantee customer protection.

1.3.3.1 Object and purpose of the complaint

In cases where the general terms and conditions (GTC) are contrary to the protection of consumers, associations can enforce the interests of consumers. In doing so, an omission or revocation may be asserted pursuant to § 1 UKlaG.

According to UKlaG, a complaint by an association is also possible if the GTC violate any rights stipulated in the AGG. However this means that if an anti-discrimination association would like to file a legal complaint, advice and consumer support would have to be part of their statutory objectives.

1.3.3.2 Procedural requirements

The complaint must be brought before the regional court in the district where the defendant has her/his commercial branch, or in the absence of such a place, her/his residence.

In practice, the associations usually send a warning letter before the complaint is brought to court. Even though, this is not an obligation, it can be an advantage. If a warning letter has been omitted and during trial, the opposing party directly admits her/his own guilt, then the plaintiff has to bear the costs (§ 93 ZPO). With a previous warning, legal proceedings would not have been necessary.

1.3.3.3 Qualified associations

Association can claim for an omission or revocation in court, if invalid general terms and conditions (GTC) are used for ineffective individual complaints or in case of commercial practices which violate consumer protection laws.

However, this shall only apply to consumer associations which are listed on the "list of qualified entities" (§ 4 UKlaG section 2).

Only legal associations are eligible to register, if they:

- have made their statutory duty to pursue the interests of consumers through non-commercial information-sharing and advice

- have at least 75 natural persons as members or consist of at least three associations active in the same field
- Have existed for at least one year
- On the basis of their activities, ensure an appropriate performance of their duties.

If all these conditions are met, then the association is entitled to be registered in the list of qualified institutions. The list is managed by the Federal Office of Justice and currently contains 78 associations (as of 01.07.2016).

1.3.4 The German Act against Unfair Competition (UWG)

The professional association of legal journalists has recently published a guide regarding the UWG which ought to help laymen and laywomen understand the complexity of the law.

The Law against Unfair Competition (UWG) also knows the possibility of an association, taking a complaint to court.

It serves to protect competitors, consumers and other market participants. According to § 3 UWG, those acts are not permitted which are likely to significantly affect competition to the detriment of the competitors, consumers and other participants on the market. For example, one cannot disparage the goods of a competitor, obscure the advertising character of a competition, specifically hinder competitors or exploit the commercial inexperience of children and adolescents (§ 4 UWG).

1.3.4.1 Object and purpose of the complaint

The purpose of the complaint is usually the elimination or the omission of an act. When activities with competitive disadvantages are carried out and profit is made to the detriment of a large number of customers, § 10 UWG provides the skimming of excess profit. This means that associations, competitors and consumers can demand the surrender of this profit. If the competitor has suffered damage, s/he can claim compensation.

1.3.4.2 Procedural requirements

Prior to initiating court proceedings, parties should give a written warning to admonish the debtor and should give her/him the opportunity to resolve the dispute by incurring the obligation to cease and desist subject to a reasonable contractual penalty (§ 12 Abs. 1 UWG). The warning procedure is not obligatory but it is quite usual in practice.

If a warning letter has been omitted and during trial, the opposing party directly admits her/his own guilt, then the plaintiff must bear the costs (§ 93 ZPO). A court hearing would have not been necessary if a previous warning had been given.

Through a prior warning letter, many disputes in the area of unfair competition can actually be settled without resorting to the courts.

1.3.4.3 Qualified organisations

The special feature of the UWG is that an affected consumer cannot use this law to enforce any rights himself. He/she can only turn to a consumer centre which has the capacity to bring proceedings.

Economic associations, consumer associations, chambers of industry and commerce, as well as the Chamber of Crafts, can be authorized to bring a case to court (§ 8 UWG). But also anti-discrimination associations can use this possibility under the UWG. To this end, they have to have (included) consumer protection in their statutes. Actions under the UWG in connection with the AGG would, for example, be conceivable in the case of discriminatory advertising.

2. European situation

In other European countries, there are also regulations in the field of anti-discrimination that allow for legal support from organizations.

For comparison, we would like to provide you with information on the available forms of support in the UK, Sweden, Switzerland, Italy and Austria.

2.1 Great Britain

British law allows associations and individual persons to submit legal pleadings (amicus curiae) at the various legal levels. These offer legal analyses and assessments from third parties. In Great Britain, this is called "third party intervention". Compared to Germany, this option is only a subcomponent of the right of an association to file a complaint. The "third party intervention" focuses on the legal analysis and not on the support of the plaintiff.

The "third party intervention" has been a legal component since the late 1990s and is increasingly used by NGOs and companies, in cases where the rights of the general public have been violated. It is possible in all legal areas.

In court proceedings, all persons and associations can request permission to submit a "third party intervention". For this purpose, an application letter must be submitted to the respective court. The request will be reviewed and it shall be determined to what extent and why the applicant wishes to participate in the hearing.

For a "third party intervention" a fee of £ 200 to £ 500 is charged. This fee sometimes constitutes a barrier to NGO participation.

Although there are no formal requirements, the applicant for the "third party intervention" should seek approval from the complaining party. Without such consent, the court may refuse contribution.

Similar forms of "third party intervention" are also practiced in Australia, New Zealand and South Africa.

2.2 Sweden

The Swedish Anti-Discrimination Act was reformed in 2007. Since then, persons who have been discriminated against have been given the opportunity to be represented and supported by associations and/or organizations in court. The representation, however, depends on the consent of the applicant and the willingness of the organization to support the complaint. Plaintiffs decide whether they would like to be represented by an ombudsman or an organization in court.

Since 2015, due to the aggravation of the law in Sweden, a lack of accessibility is already considered discrimination according to the anti-discrimination law.

In order to be able to appear as a representative in court, there are legal requirements which must be fulfilled. These criteria include a fixed number of members of the organization and relevant and specialized expertise in the area of discrimination. The law allows assistance only if the subject-matter of the complaint is within the scope of the association's work. The association or the organization shall not act against the plaintiff's will.

Only one association can be added per complaint. Parents or legal representatives must consent to underage plaintiffs. This is intended to ensure that complaints are extensively and appropriately supported by the organization.

The association has the right to express itself before the court, to submit documents and to provide information on the case. This basically provides the association with the same rights as a lawyer.

2.3 Switzerland

Since 1981, the Federal Constitution of Switzerland has guaranteed equal pay for equal work between men and women. Since 1996, the Equal Opportunities Act (GIG) has defined the most important instruments and procedures for association to take legal action in this area. In Switzerland, complaints can be made if, for example, women and men are paid differently.

Associations which, according to their statutes, promote equality between men and women may bring actions against wage discrimination, where more than one person is affected. No court costs will be charged. A dispute resolution procedure must be carried out before an association suit can be held. Only when this has failed, the legal complaint can be initiated.

In 2004/2005, the case of the Transport Club of Switzerland (VCS) against a stadium in Zurich, which was combined with a shopping mall, caused public debate about the association's right of appeal.

Such complaints by associations are always declaratory complaints, which mean that discrimination is merely established. Compensation cannot be claimed. The remuneration of the salaried person must be remunerated by a further action brought by the individual concerned. So far, most of the lawsuits have been in the public sector.

In Switzerland, the Environmental Protection Act (USG) and the Federal Law on Nature Conservation and Nature Protection (NHG) allow conservation organizations, home organizations and environmental organizations to bring complaints against construction projects.

2.4 Italy

In Italy, associations have the power to file an action in the name and on behalf of the person concerned in the case of discrimination on grounds of disability, race or ethnic origin and sex, as well as discrimination in the area of work. A notarized warrant of the discriminated person must be present.

In the case of discrimination in the work area, or because of the "racial" or ethnic origin, it is also possible that associations can complain independently in cases where the discriminated persons are not clearly identifiable. A power of attorney is not necessary in these cases.

In 2004, the National Office against Discrimination on the grounds of Race (UNAR) was set up in Italy. It supports the promotion of equality and the fight against ethnic discrimination. UNAR offers legal assistance to victims of discrimination by, for example, finding associations which are entitled to represent the person concerned in court.

In order to be entitled to bring such a complaint, associations must be officially registered at the Ministry of Equal Opportunities with the approval of the Ministry of Labour and Social Policy. Conditions for registration

are that the associations must have existed for at least one year and have the fight against discrimination as one of their statutory objectives. The list of eligible associations has been updated in 2013 and currently includes more than 550 organizations.

2.5 Austria

In Austria, the Consumer Protection Act (KSchG), which entered into force on 1 October 1979, serves to protect consumers from discrimination. According to § 29 KSchG, associations are able to bring complaints, demanding the observance of the Consumer Protection Act, even though they are not personally affected.

Furthermore, the association can join a lawsuit as a so-called secondary intervener, to support the enforcement of the rights of discriminated victims (§ 63 of the Austrian Equal Treatment Act (GIBG)).

The secondary intervener may her/himself conduct procedural steps, as long as they are not inconsistent with the actions of the plaintiff.

The exact procedure is regulated in § 17 of the Civil Procedure Code (ZPO) and in § 19 ZPO.