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# Country report

## Non-discrimination

Austria

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# **Country report**

# **Non-discrimination**

# **Austria**

Dieter Schindlauer

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## EXECUTIVE SUMMARY

### 1. Introduction

Austria is a wealthy modern welfare state with a population of about 8 million people. The majority of the population is white and German speaking. Autochthonous and recognised minorities are the Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma. Starting in the late 1960s Austria became a country of immigration, predominantly attracting younger workers from former Yugoslavia and Turkey. These groups still form the majority of immigrants in Austria. During political crisis in neighbouring countries Austria traditionally accepted a considerable number of refugees. Hungary 1956, CSSR 1968, Poland during 1980s, Balkan Crisis early 1990s marked peaks of influx to Austrian territory. During the Balkan Crisis, approximately 150,000 Bosnian de-facto refugees found protection in Austria. At that time, the acceptance of these refugees in the overall population was remarkably high. The humanitarian duty to assist and protect those fleeing from ethnic cleansing and civil war was commonly accepted and perceived natural. At that time, it was not a public concern or even reason for discussion that most of the Bosnian refugees were Muslims. In the beginning and the middle of the 1990s the situation and perception of "foreigners" started to change. The political rise of the FPÖ (Freedom Party) started to dominate the political discourse and changed the political culture. Since that period the public discourse about immigration and integration has been dominated by the populist FPÖ which have openly communicated ideas of "natural" dominance by "true-born" Austrians and open hostility towards immigrants of Islamic faith – this tendency has been severely increased by the current so-called "refugee crisis". Austria is among the three European countries to receive the biggest influx of refugees in this current movement. Regarding the grounds of race and ethnicity (in Austria generally subsumed under "ethnic affiliation") courts have relatively soon recognised that discriminatory reference to "foreignness" is clearly covered by legal protection.<sup>1</sup> Migrants and mainly refugees are still the main target of right-wing hatred and suffer a lot from discrimination in all fields. Legislation and jurisprudence have shown, that the anti-discrimination regulations do work in practice and offer wide legal protection for migrants.

Although Austria is a predominantly Catholic country, other religious communities were well accepted for many years. It has been only in the last decade that this general situation of tolerance is shifting, especially with the Muslim community, which is facing a new atmosphere of increasing hostility. After a period of longstanding acceptance and legal standing as a recognised religious community since 1912 the Islamic Faith Community was suddenly confronted with hostile agitation against them. Although public Anti-Semitism remains a taboo, research still finds a high degree of it in the population. There are 14 different faith communities legally recognised by Austria – the latest being Jehovah's Witnesses, which is only legally recognised since 7 May 2009.

The situation of the lesbian, gay and transsexual community in Austria is ambivalent. On the one hand, during the last two decades, the community has reached a high level of visibility and acceptance in public events like Pride Parades (Regenbogenparade) and the Life Ball as well as in the media. A more recent peak was reached when Austrian singer "Conchita Wurst" won the Eurovision Song Contest in 2014. On the other hand, Austria remains to be a very conservative, predominantly Catholic country where homophobic statements by politicians and high-ranking church officials are still quite common. As a result of several attempts resulting in fruitful negotiations in 2008 and 2009, legally recognised partnership for same-sex couples only was introduced by 1 January 2010.

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<sup>1</sup> Viennese Regional Court for Civil Cases (Landesgericht für Zivilrechtssachen Wien) Hayet B. vs. Ferdinand S., 35R68/07w; 35R104/07i, 30 March 2007 and Supreme Court (Oberster Gerichtshof) ObA40/13t, 24 July 2013.

There are still efforts that might be successful in the near future to grant full and equal marriage to same-sex couples.

It seems that an attempt, supported by the social partners, to “level up” the legal protection against discrimination for all grounds on federal level failed at the last moment due to Catholic fears regarding homosexuals.

Age discrimination in the workplace remains a common experience while public awareness that this is unlawful is very low.

The political will to counteract discrimination on the ground of disability appears to be relatively high. The legal standard of protection against discrimination on this ground is considerably higher than the minimum requirements of the Directive 2000/78/EC. In 2012 many provinces and the Federation set up institutions like monitoring boards in order to implement the UN Convention on the Rights of Persons with Disabilities (Federal and provincial Monitoring Mechanisms for the Rights of Persons with Disabilities (Monitoringausschuss) and the National Disability Action Plan 2012-2020). Concerning the broad scope of protection against discrimination outside employment, Austria seems to be rather advanced. There have been three especially important cases on the subject so far. One was concerning a Bakery in Vienna, where a newly built stair at the entrance was found to be discriminatory.<sup>2</sup> The second case concerned the production of a DVD by the Austrian Broadcasting Corporation (ORF) without subtitles.<sup>3</sup> Here the Court found discrimination of deaf customer. A third case<sup>4</sup> shows the practical limitations of protection. In this case the Court basically stated that moving a public office (here “Service for Citizens”) into a historic building which is not accessible to a user of a wheelchair does not constitute discrimination and not trigger the duty to reasonable accommodation to the extent that accessibility was safeguarded, as “the law only applies to newly built barriers.” Nevertheless, disabled people still face a much higher unemployment rate and especially those with mental disabilities experience a high degree of exclusion. In 2010 the Federal Government (ministries) and most important federal institutions were allowed by law to delay all their efforts to implement measures concerning accessibility (physical barriers) until 2019.

The dialogue with NGOs about anti-discrimination issues is increasing on the level of practitioners, while the involvement of social partners in the political decision-making remains high compared to other European countries.

## **2. Main legislation**

The Republic of Austria is a federal state. According to the Austrian Constitution legal powers are exercised either by the Bund (Federation) or the provinces (Länder). Under the Constitution, neither the Federation nor the provinces have the exclusive power to regulate “anti-discrimination”. This leads to a very scattered legal framework with more than 30 Provincial pieces of legislation and 5 main acts at the Federal level. In 2015 many pieces of legislation on both the federal and the provincial level have been amended but these amendments were mostly of a technical and minor nature and not bringing substantial changes on the content or scope. The most important Federal acts implementing the directives, are:

### Equal Treatment Act (Gleichbehandlungsgesetz)

The Equal Treatment Act covers the private sector and protects against discrimination in employment on the following grounds: gender, ethnic affiliation (ethnische

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<sup>2</sup> Josefstadt District Court, Decision Nr. 4C 707/11 z-14, 14 November 2011.

<sup>3</sup> Viennese Commercial Court, L.H. vs. ORF, Nr. 60R93/10x, 8 September 2011.

<sup>4</sup> Viennese Civil Provincial Court, M.L. vs. The Republic of Austria, Nr. 36 R96/12b, 5 December 2012.



Zugehörigkeit), religion or belief, sexual orientation and age. Protection against discrimination on the ground of ethnic affiliation also extends to social protection, including social security and health care, social advantages, education, access to and supply of goods and services, which are available to the public, including housing.

#### Federal-Equal Treatment Act (Bundes-Gleichbehandlungsgesetz)

It covers (Federal) public employment and protects against discrimination on the following grounds: gender, ethnic affiliation, religion or belief, sexual orientation and age and installs a Federal-Equal Treatment Commission, Officers for Equal Treatment and Contact Women.

#### Act on the Equal Treatment Commission and the National Equality Body (Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft)

It installs and regulates the functions of the Equal Treatment Commission and the National Equality Body.

#### Act on the Employment of People with Disabilities (Behinderteneinstellungsgesetz)

The Act inter alia protects against discrimination on the ground of disability in employment and occupation including the concept of reasonable accommodation. It also contains a compulsory quota regarding the employment of people with disabilities.

#### Federal Disability Equality Act (Behindertengleichstellungsgesetz)

It protects against discrimination on the ground of disability in access to and supply of goods and services, which are available to the public, including housing. This means that the level of protection goes beyond the minimum requirements of the Directive 2000/78/EC.

Provincial level protection most importantly concerns (Provincial) public employment. All the provinces with the exception of Lower Austria expand their protection to all grounds covering not only the employment sphere but also access to and supply of goods and services, housing, social security and benefits and health and thereby exceed the minimum requirements of the directives. Most of the Provincial acts have been amended (and kept up-to-date) in 2013 while there was hardly any new development after that.

### **3. Main principles and definitions**

In general, all major principles of the directives have been incorporated into the Austrian legal framework.

The definitions of direct and indirect discrimination have been quoted literally from the directives. Harassment and victimisation are also covered.

Instruction to discriminate is deemed discrimination and outlawed. Discrimination by association is explicitly mentioned in relation to all grounds and all areas of protection in a very wide definition (on the ground of close relationship).

All grounds mentioned in the directives are covered, but the scope of protection differs between the grounds.

The notion of "race" was taken out of the text in the federal legislation and "race and ethnic origin" are now both represented by the term "ethnic affiliation" (ethnische Zugehörigkeit). This does not change the scope but is an expression of sensitivity regarding language.

The exemption of genuine occupational requirements is also incorporated and it is made clear that it has to be interpreted in a very narrow way.

The concept of reasonable accommodation for people with disabilities has also found its way into the legislation. Employers are obliged to take the appropriate and necessary measures to enable persons with disabilities to enjoy access to employment or occupation, to promotion and to participate in vocational training as well as in-service training, unless such measures would pose a disproportionate burden on the employer. Such a burden shall not be deemed disproportionate if it can sufficiently be compensated by public aid funds according to federal or provincial regulations.

Multiple discrimination or intersectional discrimination is becoming a more and more important issue as the developing practice shows that it is a very widespread phenomenon. The legislation so far recognises the phenomenon and gives rather general guidelines as how to deal with it. Basically, courts are obliged to an "overall assessment" when taking into account multiple grounds based discrimination.

#### **4. Material scope**

The Austrian Federal legislator has implemented legislation covering the complete scope of the directives. In the area of employment (public and private) all the grounds are protected. Ethnic affiliation and disability are further protected grounds in the area of access to and supply with goods and services, while the broadest scope of protection (including education, health and social protection/security) is in place for the ground of ethnic affiliation only.

Provincial legislations have, within the limit of their competences, broadened the scope of protection beyond the workplace for all grounds. So, employment, access to and supply with goods and services, education, health and social protection/security are protected for all grounds there. The provincial competences are especially important in regard to housing, social benefits, health and education.

#### **5. Enforcing the law**

Despite the quite comprehensive legal framework, the enforcement of it is still deficient. There is a couple of reasons for this finding: firstly, there is still an enormous lack of awareness in the overall population – even about the mere existence of the legislation. Another reason is the very complex and scattered legal framework; - more than 40 legal acts could be relevant. Furthermore, the Equality Bodies are also not able to bundle their efforts. More than nine provincial offices, separate structures for the public service – and a completely separate system for disability are operating instead of a strong single body with strong visibility and powers as we see in other Member States. The resources for the Federal Equality Bodies are very limited. The National Equality Body is still understaffed. The members of the Equal Treatment Commission are not being paid for this task but perform their functions in addition to their jobs on a voluntary basis. This delays decisions.

NGOs are not sufficiently integrated into the system and many do not receive extra funding for their new tasks.

Neither the National Equality Body nor the Equal Treatment Commission are responsible for disability cases, but there is a compulsory conciliation process before the Federal Social Service (which will be the Service of the Minister of Social Affairs in the future), which functions comparably well.

Another problem in this phase of implementation is the persisting lack of relevant case law (very few cases). Victims of discrimination cannot be sure of the outcome of their proceedings. In case they bring a lawsuit, they have to bear the full risk and cost of the proceedings. Although NGOs try to accommodate victims in this respect, limited resources and the fear of victims to suffer another setback during court proceedings,

make them shy away from judicial redress. NGO standing in court is limited to the possibility of intervention and this is only granted to the umbrella organisations "Litigation Association of NGOs against Discrimination" for all grounds,<sup>5</sup> while the "Austrian National Council of Disabled Persons" is entitled to intervene in disability cases and has a limited, complicated, and so far, still unused possibility to use group litigation.

One relieving factor for victims of discrimination is the shifted burden of proof provision, which allows them to gain at least some confidence.

The sanctions in principle comprise compensation of material and immaterial damages. It is a very difficult task for the courts to decide on the immaterial damages in an effective and dissuasive but still proportionate way, given the lack of legal tradition in this respect. In order to function as a dissuasive sanction, the existing practice of awarding only very low amounts for compensation for immaterial damage will have to be adjusted and changed by the courts. In regard to harassment, the law fixed minimum levels of compensation (EUR 1.000 for harassment). It is interesting to note that the legislator has seen a need to continuously raise the minimum amount of compensation – from 400 to 720 and then to 1.000. Obviously, the practice of courts to stick very strictly to this minimum has created this need in order to avoid ridiculously low outcomes of proceedings for immaterial damages. A recent decision of the Supreme Court,<sup>6</sup> gives rise to expectations that there will be guidance to the courts in the direction to assess the amount of compensation in discrimination cases in a way more in line with the Directives.

The sanction for discriminatory job advertisements is not at all dissuasive, effective and proportionate (maximum administrative fine of as low as EUR 360 and exclusion of punishment for first-time-offenders [warning only]).

Looking at the existing case law so far, it can be doubted, whether the sanctions applied can be regarded as being proportionate, effective and dissuasive and there is no experience on how the courts will handle evidence in respect to statistical data and the results of situation testing as the plaintiffs have not used such data. The legislation in principle allows the use of such evidence but there is no such practice so far.

At the moment, quite a number of people who faced discrimination tend to initiate a free of cost proceeding before the Equal Treatment Commission before or instead of addressing the courts.

## **6. Equality bodies**

### Equal Treatment Commission

The Equal Treatment Commission (Gleichbehandlungskommission) at the Federal Ministry for Education and Women is divided into three senates, dealing with:

1. equal treatment of men and women in the workplace;
2. equal treatment within the scope of Directive 2000/78/EC (i.e.: ethnic affiliation, religion, Faith, age and sexual orientation in employment) excluding disability;
3. equal treatment within the scope of Directive 2000/43/EC for race and ethnic origin outside employment and Directive 2004/113/EC.

The functions of the chairpersons, who are part of the respective senates, are held by federal civil servants. The other members of the commission are performing their functions on an unsalaried basis. The new structures started to work in May 2005. Upon

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<sup>5</sup> Disability is not explicitly within the mandate given to the Litigation Association by law, but in practice the association has intervened in cases concerning disability without facing questions of admissibility.

<sup>6</sup> Austria, Supreme Court, Decision Nr. 90BA49/16w, 29 September 2016.

request of the National Equality Body (Gleichbehandlungsanwaltschaft), of one of the interest groups represented in the given senates or on its own initiative, the responsible senate of the Commission has to give an expert opinion on questions related to the breach of the principle of equal treatment. These expert opinions on whether a violation of the obligation to equal treatment had occurred have to be made public. The sessions of the senates are confidential and not open to the public.

The Equal Treatment Commission has to act in individual cases upon request of an employer or an employee, a member of a works council, of a representative of those social partners represented in the relevant senate or the National Equality Body. Victims of discrimination can be represented before the Commission. If the senate comes to the conclusion that a violation of the principle of equal treatment has occurred, it has to issue a written proposal to the employer or to the person responsible for the non-employment related discrimination on how the obligation under the act can rightly be fulfilled. The senate has to call upon the person responsible to end the discrimination. In case the addressee does not follow the instructions of the commission, the institutions represented in the senate or the National Equality Body can file a civil action for a declaratory judgment concerning the violation of the obligation to equal treatment. The commission has the right to demand from the alleged discriminator a written report concerning the assumed discrimination. The Commission can also order expert opinions on any company concerned. The Equal Treatment Commission does not provide assistance to victims and does not conduct surveys but publishes its findings and the recommendations therein.

For employment in the public sector an analogous structure, called the Federal-Equal Treatment Commission (Bundes-Gleichbehandlungskommission) has been set up.

National Equality Body (Anwaltschaft für Gleichbehandlungsfragen, Gleichbehandlungsanwaltschaft)

The National Equality Body, which has been set up at the Federal Chancellery is structured similarly to the Commission's senates. The already existing institution, called Office of the Ombud for Equal Employment Opportunities remains responsible for equal treatment of women and men at the workplace. Each of the two other Ombuds for Equal Treatment are responsible for discrimination on the basis of race, ethnic origin, religion, age and sexual orientation in relation to employment on the one hand and for discrimination based on ethnic affiliation outside the working environment on the other hand. The National Equality Body is responsible for counselling and supporting victims of discrimination. To fulfil these functions, the Ombuds can hold consultation hours and consultation days in the whole federal territory. Most importantly, they can conduct independent inquiries and surveys and publish independent reports and recommendations concerning all questions related to discrimination. The body has (almost) no role before the courts and practice shows that they quite often manage to arbitrate between the conflicting parties so that they reach an agreement. This function is not explicitly mentioned in the legislation but often used successfully. Being still understaffed, the body has so far not made full use of its powers to conduct independent inquiries and surveys and publish independent reports as only very few of those exist so far.

For the ground of disability, a separate structure has been set up. The Ombud for Disabled Persons (Behindertenanwalt) is responsible for advice and support of people with disabilities. The Ombud can conduct surveys on the situation of people with disabilities and give and publish statements and opinions on this issue.

## 7. Key issues

Anti-Muslim resentments have seen a stiff rise in the last few years in Austria. This has been growing enormously during the beginning of a mass-influx of refugees, mainly from Syria and Afghanistan. Austria, together with Germany, Sweden and Hungary received two-thirds of the asylum applications within the EU. After a quite positive beginning, where many volunteers were active to welcome the refugees and help them (mainly to continue their journey to Germany), the overall perception shifted toward a very hostile – or at least very polarized and heated discourse. It created a very complicated situation in which the atmosphere is often poisoned by unmasked racism. Politicians have started to debate about possible bans for face-covering gear worn by Muslim women.

For the LGBT-community one important legal breakthrough was the finding of the Constitutional Court<sup>7</sup> that the exclusion of homosexual couples from the right to adoption was unconstitutional.

As to the legal situation, effective and satisfactory enforcement remains the biggest challenge. Still, not many victims of discrimination dare to come forward with their complaints and lawsuits as the laws are complicated and the outcome of legal action is very often not satisfying their actual needs. Also courts still seem to be uncomfortable with their task to award dissuasive amounts of compensation for non-pecuniary damages. This is surely one of the main reasons why still very few cases are brought to court.

The obligatory attempts to settle discrimination cases regarding disability through mediation, though, seems to be a story of success, as it is used quite frequently and the agreements reached often reflect a learning experience and therefore, a deeper understanding of discrimination of the parties involved.

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<sup>7</sup> Constitutional Court Nr. G 119-120/2014, 11 December 2014.

## RÉSUMÉ

### 1. Introduction

L'Autriche est un État-providence prospère et moderne, qui compte une population de quelque huit millions d'habitants. La majorité de la population est de race blanche et d'expression allemande. Les communautés croate, slovène, hongroise, tchèque, slovaque et rom y constituent des minorités autochtones et reconnues. L'Autriche est depuis la fin des années soixante un pays d'immigration, attirant principalement de jeunes travailleurs venus de l'ex-Yougoslavie et de Turquie. Ces groupes forment encore aujourd'hui la majorité des immigrants en Autriche. Lors des crises politiques vécues par ses pays voisins, l'Autriche a traditionnellement accueilli un nombre considérable de réfugiés: la Hongrie en 1956, la Tchécoslovaquie en 1968, la Pologne dans les années 1980 et la crise des Balkans début des années 1990 ont fait connaître au pays des niveaux record d'afflux de réfugiés sur son territoire. Durant la crise des Balkans, quelque 150 000 réfugiés bosniaques de fait ont trouvé protection en Autriche. Ces réfugiés ont bénéficié à l'époque d'une très large acceptation de la part de l'ensemble de la population. Le devoir humanitaire d'aider et de protéger ceux qui fuyaient le nettoyage ethnique et la guerre civile était communément admis et perçu comme naturel. Le fait que la plupart des réfugiés bosniaques soient musulmans ne constituait pas alors une préoccupation publique ni même un sujet de discussion. La situation et la perception des «étrangers» ont commencé à changer au début et vers le milieu des années 1990. La montée politique du FPÖ (Parti autrichien de la liberté) a peu à peu dominé le discours politique et modifié la culture politique du pays. Depuis, le discours public en matière d'immigration et d'intégration a été dominé par le populiste FPÖ, lequel a ouvertement répandu des idées sur la supériorité «naturelle» des Autrichiens «de souche», ainsi qu'une hostilité non dissimulée à l'égard des immigrés de confession islamique – une tendance fortement amplifiée par l'actuelle «crise des réfugiés», qui fait de l'Autriche l'un des trois pays européens où l'afflux de réfugiés est le plus important. En ce qui concerne les motifs de la race et de l'origine ethnique (généralement assimilée en Autriche à une «appartenance ethnique»), les cours et tribunaux ont admis assez tôt qu'une référence discriminatoire à «l'extranéité» est clairement couverte par une protection juridique.<sup>8</sup> Les migrants et les réfugiés surtout restent la cible principale des extrémistes de droite et se heurtent à une forte discrimination dans tous les domaines. La législation et la jurisprudence ont montré que les réglementations antidiscrimination fonctionnent dans la pratique et offrent une large protection juridique aux migrants.

Bien que l'Autriche soit un pays à prédominance catholique, d'autres communautés religieuses y ont été bien acceptées pendant longtemps. Ce n'est qu'au cours de la dernière décennie que cette situation générale de tolérance a connu un fléchissement, tout particulièrement à l'égard de la communauté musulmane – laquelle se trouve confrontée à un climat nouveau d'hostilité croissante. Après une longue période d'acceptation et de statut juridique en tant que communauté religieuse reconnue depuis 1912, la communauté de confession islamique s'est heurtée soudain à une agitation hostile à son égard. Bien que l'antisémitisme public reste un sujet tabou, des études révèlent qu'il subsiste encore à un degré élevé au sein de la population. Quatorze communautés confessionnelles sont officiellement reconnues en Autriche, la dernière en date étant celle des témoins de Jéhovah, dont la reconnaissance légale remonte au 7 mai 2009 seulement.

La situation de la communauté des lesbiennes, gays et transgenres est ambivalente en Autriche. D'une part, au cours des deux dernières décennies, cette communauté a atteint un haut degré de visibilité et d'acceptation dans le cadre d'événements publics tels que

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<sup>8</sup> Tribunal régional de Vienne pour les affaires civiles (*Landesgericht für Zivilrechtssachen Wien*), Hayet B. c. Ferdinand S., 35R68/07w; 35R104/07i, 30 mars 2007, et Cour suprême (*Oberster Gerichtshof*) ObA40/13t, 24 juillet 2013.

les Pride Parades (Regenbogenparade) et le Life Ball, ainsi que dans les médias – un sommet ayant été plus récemment atteint lorsque le chanteur autrichien «Conchita Wurst» a remporté le concours Eurovision de la chanson en 2014. D'autre part, l'Autriche reste un pays très conservateur, à prédominance catholique, où les déclarations homophobes de politiciens et hauts dignitaires de l'église sont encore assez fréquentes. Par suite de diverses tentatives ayant finalement abouti à des négociations fructueuses en 2008 et en 2009, le partenariat légalement reconnu a été introduit au 1er janvier 2010. Des efforts, qui pourraient être prochainement couronnés de succès, continuent d'être déployés pour qu'un mariage intégral et égal soit accordé aux couples de même sexe.

Il semble qu'une tentative bénéficiant du soutien des partenaires sociaux et visant à «harmoniser à la hausse» au niveau fédéral la protection juridique contre la discrimination quel qu'en soit le motif ait échoué au dernier moment en raison de craintes des milieux catholiques à l'égard des homosexuels.

La discrimination liée à l'âge sur le lieu de travail reste courante et la sensibilisation du grand public quant au caractère illégal de cette pratique est peu développée.

La volonté politique de lutter contre la discrimination fondée sur le handicap semble relativement marquée. La norme juridique de protection contre la discrimination fondée sur ce motif est sensiblement plus stricte que les exigences minimales imposées par la directive 2000/78/CE. En 2012, de nombreuses provinces et la Fédération ont mis en place, chacune à leur niveau, des dispositifs tels que des comités de suivi des droits des personnes handicapées (*Monitoringausschuss*) dans le cadre de l'application de la Convention des Nations unies relative aux droits des personnes handicapées ainsi qu'un Plan d'action national 2012-2020 dans le domaine du handicap. En ce qui concerne le vaste champ de protection contre la discrimination en dehors de l'emploi, l'Autriche apparaît assez avancée. Trois affaires particulièrement importantes ont porté jusqu'ici sur ce point. La première concernait une boulangerie située à Vienne, dont le nouvel escalier construit à l'entrée a été considéré comme discriminatoire.<sup>9</sup> La deuxième concernait la production d'un DVD par l'ORF (chaîne de télévision publique nationale) sans sous-titres<sup>10</sup> – affaire dans laquelle le tribunal a conclu à une discrimination envers un client sourd. Une troisième affaire<sup>11</sup> illustre les limites pratiques de la protection: en l'espèce, le tribunal a essentiellement dit pour droit que le déménagement d'un service public (en l'occurrence un «Service aux citoyens») dans un bâtiment historique inaccessible pour un usager en fauteuil roulant n'est pas constitutif d'une discrimination et ne rend pas applicable l'obligation d'aménagement raisonnable au point de garantir l'accessibilité, étant donné que «la loi s'applique uniquement aux obstacles de construction récente». Il convient d'ajouter que les personnes handicapées connaissent encore un taux de chômage supérieur et que celles atteintes d'un handicap mental sont victimes d'un taux d'exclusion particulièrement élevé. En 2010, le gouvernement fédéral (ministères) et les principales institutions fédérales ont obtenu l'autorisation de postposer jusqu'en 2019 la mise en œuvre des mesures en matière d'accessibilité (obstacles physiques).

Le dialogue avec les ONG sur les questions relevant de la non-discrimination s'intensifie au niveau des praticiens, et la participation des partenaires sociaux aux prises de décisions politiques reste importante par rapport à d'autres pays européens.

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<sup>9</sup> Tribunal cantonal de Josefstadt, arrêt n° 4C 707/11 z-14, 14 novembre 2011.

<sup>10</sup> Tribunal de commerce de Vienne, L.H. c. ORF, n° 60R93/10x, 8 septembre 2011.

<sup>11</sup> Tribunal provincial de Vienne pour les affaires civiles, M.L. c. République d'Autriche, n° 36 R96/12b, 5 décembre 2012.

## 2. Législation principale

La République d'Autriche est un État fédéral. Selon la Constitution autrichienne, les pouvoirs légaux sont exercés soit par la Fédération (Bund) soit par les provinces (Länder). Toujours selon la Constitution, ni la Fédération ni les provinces ne disposent de la compétence exclusive de réglementer l'«antidiscrimination». Il en découle un cadre juridique extrêmement fragmenté comprenant plus de 30 actes législatifs provinciaux et cinq lois principales au niveau fédéral. De nombreux actes législatifs ont été amendés en 2015 tant au niveau fédéral que provincial, mais ces amendements ont été de nature principalement technique ou mineure et n'ont donné lieu à aucune modification substantielle en termes de contenu ou de champ d'application. Les lois fédérales les plus importantes pour la mise en œuvre des directives sont les suivantes:

### Loi sur l'égalité de traitement (Gleichbehandlungsgesetz)

La loi sur l'égalité de traitement couvre le secteur privé et protège contre la discrimination dans l'emploi fondée sur les motifs suivants: le genre, l'appartenance ethnique (ethnische Zugehörigkeit), la religion et les convictions, l'orientation sexuelle et l'âge. La protection contre la discrimination fondée sur l'appartenance ethnique s'étend également à la protection sociale, y compris la sécurité sociale et les soins de santé, les avantages sociaux, l'éducation, et l'accès aux biens et services mis à la disposition du public et leur fourniture, y compris le logement.

### Loi fédérale sur l'égalité de traitement (Bundes-Gleichbehandlungsgesetz)

Cette loi couvre l'emploi public (au niveau fédéral) et protège contre la discrimination fondée sur les motifs suivants: le genre, l'appartenance ethnique, la religion et les convictions, l'orientation sexuelle et l'âge; elle institue une commission fédérale pour l'égalité de traitement, des responsables de l'égalité de traitement et des points de contact pour les femmes.

### Loi portant création et organisation de la commission pour l'égalité de traitement et de l'organisme national de promotion de l'égalité de traitement (Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft)

Cette loi institue et régit les fonctions de la commission pour l'égalité de traitement et de l'organisme national de promotion de l'égalité de traitement.

### Loi régissant l'emploi des personnes handicapées (Behinderteneinstellungsgesetz)

Cette loi protège entre autres contre la discrimination fondée sur le handicap dans le domaine de l'emploi et du travail, y compris le concept d'aménagement raisonnable. Elle prévoit également des quotas obligatoires en matière d'emploi de personnes handicapées.

### Loi fédérale sur l'égalité de statut des personnes handicapées (Behindertengleichstellungsgesetz)

Cette loi protège contre la discrimination fondée sur le handicap en ce qui concerne l'accès et la fourniture de biens et de services mis à la disposition du public, y compris le logement. Son niveau de protection va donc au-delà des exigences minimales imposées par la directive 2000/78/CE.

La protection au niveau provincial a essentiellement trait à l'emploi public (au sein des administrations provinciales). Toutes les provinces, à l'exception de la Basse-Autriche, étendent leur protection à tous les domaines, couvrant non seulement la sphère de l'emploi, mais aussi l'accès aux biens et services, le logement, la sécurité sociale, les avantages sociaux et la santé, allant de ce fait au-delà des exigences minimales fixées par les directives. La plupart des actes législatifs provinciaux ont été modifiés (et actualisés) en 2013 mais aucun développement nouveau n'est réellement à signaler depuis lors.



### 3. Principes généraux et définitions

Tous les grands principes des directives ont, de manière générale, été incorporés dans le cadre juridique autrichien.

Les définitions de la discrimination directe et indirecte ont été reprises textuellement des directives. Le droit autrichien régit également le harcèlement et les rétorsions.

L'injonction de discriminer est assimilée à une discrimination et, partant, interdite. La discrimination par association est explicitement mentionnée pour tous les motifs et tous les domaines de protection, et fait l'objet d'une large définition (le motif étant la relation étroite).

Tous les motifs visés par les directives sont couverts, mais le champ d'application de la protection varie de l'un à l'autre.

La notion de «race» a été retirée du texte de la législation fédérale et les notions de «race et origine ethnique» sont désormais désignées par le terme «appartenance ethnique» (*ethnische Zugehörigkeit*). Cela ne modifie en rien le champ d'application de la législation fédérale, mais traduit une sensibilité linguistique.

L'exemption relative aux exigences professionnelles essentielles est également incorporée, et il est précisé qu'elle doit être interprétée de façon très étroite.

Le concept d'aménagement raisonnable pour les personnes handicapées a également été introduit dans la législation. Les employeurs sont tenus d'adopter les mesures nécessaires et appropriées permettant aux personnes handicapées de bénéficier d'un accès à l'emploi, au travail ou à une promotion et de participer à une formation professionnelle ainsi qu'à une formation continue, sauf si ces mesures imposent une charge disproportionnée à l'employeur. La charge ne sera pas jugée disproportionnée si elle peut bénéficier de fonds suffisants au titre de l'aide publique prévue par les réglementations fédérales ou provinciales.

La question de la discrimination multiple ou intersectionnelle revêt une importance grandissante, la pratique venant démontrer qu'il s'agit d'un phénomène largement répandu. À ce jour, la législation reconnaît le phénomène et fournit des lignes directrices assez générales sur la manière de l'aborder – les tribunaux étant essentiellement obligés de se livrer à une «évaluation globale» lorsqu'ils constatent une discrimination fondée sur plusieurs motifs.

### 4. Champ d'application matériel

Le législateur fédéral autrichien a mis en œuvre une législation couvrant le champ d'application complet des directives. Dans le domaine de l'emploi (public et privé), tous les motifs sont protégés. En ce qui concerne l'accès aux biens et services, la protection s'étend à la fois à l'appartenance ethnique et au handicap. Le champ de protection le plus large – comprenant l'éducation, les soins de santé et la protection/sécurité sociale – est réservé au seul motif de l'appartenance ethnique.

Des législations provinciales ont, dans les limites de leurs compétences, élargi le champ de protection au-delà du lieu de travail pour tous les motifs. L'emploi, l'accès aux biens et services, l'éducation, la santé et la protection/sécurité sociale y sont donc protégés pour tous les motifs. Les compétences provinciales sont particulièrement importantes pour ce qui concerne le logement, la santé et l'éducation.

## 5. Mise en application de la loi

Bien que le cadre juridique soit assez complet, sa mise en application reste déficiente. Plusieurs raisons permettent d'expliquer ce constat: tout d'abord, une forte absence de mobilisation au niveau du grand public, voire une méconnaissance totale de l'existence même de la législation. Une autre raison réside dans le caractère particulièrement complexe et fragmenté du cadre juridique – plus de 40 lois pourraient être concernées. Les organismes de promotion de l'égalité de traitement ne se montrent pas non plus capables d'unir leurs efforts. Au lieu d'un seul organe puissant, bénéficiant d'une forte visibilité et de pouvoirs étendus, tel que l'on en voit dans d'autres États membres, on dénombre actuellement plus de neuf bureaux provinciaux, des structures séparées pour la fonction publique – et un système complètement distinct pour les personnes handicapées. Les ressources accordées aux organismes de promotion de l'égalité de traitement fédéraux sont très limitées. L'organisme national pour l'égalité manque de personnel. Les membres de la commission pour l'égalité de traitement ne sont pas payés pour cette tâche, mais exercent leurs fonctions à titre bénévole en plus de leur emploi, ce qui retarde les décisions.

Les ONG ne sont pas suffisamment intégrées dans le système et beaucoup d'entre elles ne reçoivent pas de fonds supplémentaires pour leurs nouvelles tâches.

Ni l'organisme national pour l'égalité ni la commission pour l'égalité de traitement ne sont en charge des affaires liées au handicap, mais il existe un processus de conciliation obligatoire devant le Service social fédéral (qui sera à l'avenir le Service du ministre des Affaires sociales), lequel fonctionne relativement bien.

Le manque persistant de jurisprudence pertinente (rareté du contentieux) pose également problème en cette phase de mise en œuvre. Les victimes de discrimination ne peuvent pas être certaines de l'issue de leurs procédures. Si elles intentent un procès, elles doivent supporter la totalité du risque et des frais de procédure. Bien que des ONG tâchent d'aider les victimes à cet égard, le caractère limité des ressources disponibles et la crainte de devoir subir un autre revers au cours des procédures judiciaires dissuadent les victimes de réclamer réparation en justice. La capacité juridique des ONG se limite à la possibilité d'intervention, laquelle n'est octroyée qu'à l'organisation centrale «Association des litiges des ONG luttant contre la discrimination» (*Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern*) pour tous les motifs<sup>12</sup> sauf celui du handicap; le «Conseil national autrichien des personnes handicapées» est habilité pour sa part à intervenir dans des cas de discrimination fondée sur le handicap et dispose d'une possibilité limitée, complexe et toujours non utilisée à ce jour, de recourir à l'action collective.

La disposition prévoyant le renversement de la charge de la preuve est un facteur de soulagement pour les victimes de discrimination car elle leur permet d'acquérir un minimum de confiance.

Les sanctions comprennent en principe l'indemnisation des dommages matériels et des préjudices moraux. Il s'avère très difficile pour les tribunaux de se prononcer sur ces derniers de manière effective et dissuasive, mais toujours proportionnée, étant donné le manque de tradition juridique à cet égard. Pour fonctionner en tant que sanction dissuasive, la pratique actuelle consistant à n'accorder que des montants très faibles en réparation d'un préjudice moral devra être revue et modifiée par les tribunaux. En ce qui concerne le harcèlement, la loi fixe une indemnisation minimale (1 000 euros). Il est intéressant de noter que le législateur a estimé nécessaire d'augmenter régulièrement le

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<sup>12</sup> Le handicap ne relève pas explicitement du mandat attribué à l'association de traitement des litiges par la loi, mais dans la pratique, cette association est intervenue dans des cas concernant le handicap sans rencontrer de problèmes de recevabilité.

montant minimum de cette indemnisation – laquelle est passée de 400 à 720 puis à 1 000 euros en 2011. C’est manifestement la pratique des tribunaux consistant à se conformer strictement à ce minimum qui a fait naître la nécessité de l’augmenter, afin d’éviter que des poursuites débouchent sur le versement de sommes ridiculement faibles au titre de préjudice moral. Un récent arrêt de la Cour suprême<sup>13</sup> permet d’espérer que les juridictions seront désormais incitées, dans les affaires de discrimination, à déterminer le montant de l’indemnisation de manière davantage conforme aux directives.

La sanction pour annonces d’emploi discriminatoires n’est nullement dissuasive, effective et proportionnée (une amende administrative maximale de 360 euros seulement et une dispense de peine pour ceux qui commettent cette infraction pour la première fois [un avertissement uniquement]).

On peut douter, à l’examen de la jurisprudence à ce jour, du caractère proportionné, effectif et dissuasif des sanctions infligées, et aucun précédent ne permet d’anticiper la façon dont les tribunaux traiteraient des preuves tirées de données statistiques ou de tests de situation, étant donné qu’aucun plaignant n’y a encore eu recours. La législation autorise, en principe, l’utilisation de ce type d’éléments probants, mais la pratique fait encore défaut.

À l’heure actuelle, un nombre non négligeable de personnes ayant fait l’objet d’une discrimination tendent à engager une procédure gratuite devant la commission pour l’égalité de traitement avant ou au lieu de saisir la justice.

## **6. Organismes de promotion de l’égalité de traitement**

### La commission pour l’égalité de traitement

La commission pour l’égalité de traitement (*Gleichbehandlungskommission*), qui se trouve au ministère fédéral de l’Éducation et des femmes, se compose de trois chambres respectivement chargées de:

4. l’égalité de traitement entre hommes et femmes sur le lieu de travail;
5. l’égalité de traitement relevant du champ d’application de la directive 2000/78/CE (à savoir l’appartenance ethnique, la religion, la foi, l’âge et l’orientation sexuelle dans le domaine de l’emploi) à l’exclusion du handicap;
6. l’égalité de traitement relevant du champ d’application de la directive 2000/43/CE pour ce qui concerne la race et l’origine ethnique en dehors du domaine de l’emploi et du champ d’application de la directive 2004/113/CE.

La présidence des différentes chambres est assurée par des fonctionnaires fédéraux. Les autres membres de la commission exercent leurs fonctions à titre gratuit. Les nouvelles structures sont entrées en service en mai 2005. À la demande de l’organisme national pour l’égalité de traitement (*Gleichbehandlungsanwaltschaft*), de l’un des groupes d’intérêts représentés dans les chambres concernées ou de sa propre initiative, la chambre compétente au sein de la commission doit rendre un avis d’expert sur les questions liées au non-respect de l’égalité de traitement. Ces avis d’expert sur le point de savoir s’il y a eu ou non violation de l’obligation d’égalité de traitement doivent être rendus publics. Les sessions des chambres sont confidentielles et non accessibles au public.

La commission pour l’égalité de traitement doit agir dans des cas individuels à la demande d’un employeur ou d’un travailleur, d’un membre d’un comité d’entreprise, d’un représentant des partenaires sociaux représentés au sein de la chambre pertinente ou de l’organisme national pour l’égalité de traitement. Une victime de discrimination peut être

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<sup>13</sup> Autriche, Cour suprême, arrêt n° 90BA49/16w, 29 septembre 2016.

représentée devant la commission. Si la chambre conclut à la violation du principe d'égalité de traitement, elle doit adresser une proposition écrite à l'employeur ou à la personne responsable de la discrimination non liée à l'emploi quant à la façon de se conformer correctement à l'obligation imposée par la loi. La chambre concernée doit inviter la personne responsable à mettre fin à la discrimination. Si le destinataire ne suit pas les instructions de la commission, les institutions représentées à la chambre ou l'organisme national de promotion de l'égalité de traitement peuvent engager une action civile pour obtenir un jugement déclaratoire concernant la violation de l'obligation d'égalité de traitement. La commission est en droit d'exiger de l'auteur présumé de faits discriminatoires un rapport écrit concernant la discrimination alléguée. La commission peut également ordonner des avis d'experts sur toute entreprise concernée. La commission pour l'égalité de traitement n'apporte pas d'assistance aux victimes et ne réalise pas d'études, mais elle publie ses conclusions et les recommandations qu'elles contiennent.

Une structure analogue, appelée commission fédérale pour l'égalité de traitement (Bundes-Gleichbehandlungskommission), a été instituée pour l'emploi dans le secteur public.

L'organisme national de promotion de l'égalité de traitement (Anwaltschaft für Gleichbehandlungsfragen, Gleichbehandlungsanwaltschaft)

L'organisme national de promotion de l'égalité de traitement mis en place au sein de la Chancellerie fédérale est structuré de la même manière que les chambres de la commission. L'institution existante, à savoir le Bureau du médiateur pour l'égalité des chances en matière d'emploi, reste chargé de l'égalité de traitement entre hommes et femmes sur le lieu de travail. Les deux autres médiateurs pour l'égalité de traitement sont respectivement en charge de la discrimination fondée sur la race, l'origine ethnique, la religion, l'âge et l'orientation sexuelle dans le domaine de l'emploi, et de la discrimination fondée sur l'appartenance ethnique en dehors de l'environnement de travail. L'organisme national de promotion de l'égalité de traitement est chargé de conseiller et de soutenir les victimes de discrimination. Les médiateurs peuvent, pour remplir leurs fonctions, assurer des heures de permanence et des journées de consultation sur l'ensemble du territoire fédéral. Ils peuvent surtout réaliser des enquêtes et études indépendantes, publier des rapports indépendants et formuler en toute indépendance des recommandations sur toute question touchant à la discrimination. L'organisme national ne joue (quasiment) aucun rôle devant les tribunaux et la pratique montre qu'il réussit très souvent à arbitrer un conflit entre deux parties de manière à ce qu'elles parviennent à un accord. Cette fonction n'est pas explicitement mentionnée par la législation, mais elle est souvent utilisée avec succès. La persistance d'une pénurie de personnel fait que l'organisme n'a pas encore pleinement exercé ses compétences en termes de réalisation d'enquêtes et d'études indépendantes ni de publication de rapports indépendants, lesquels restent très peu nombreux à ce jour.

Une structure distincte a été mise en place pour ce qui concerne le motif du handicap. Le médiateur pour les personnes handicapées (*Behindertenanwalt*) est chargé de conseiller et de soutenir ces personnes. Il peut réaliser des études sur la situation des personnes handicapées, et formuler et publier des déclarations et des avis sur cette problématique.

## **7. Points essentiels**

L'animosité à l'égard des Musulmans s'est considérablement renforcée en Autriche au cours des quelques dernières années, en particulier depuis le début de l'arrivée massive de réfugiés principalement en provenance de Syrie et d'Afghanistan. Conjuguée à l'Allemagne, la Suède et la Hongrie, l'Autriche a reçu les deux tiers des demandes d'asile au sein de l'UE. Après une période initiale assez positive au cours de laquelle de nombreux volontaires se sont efforcés d'accueillir et d'aider les réfugiés (en vue le plus

souvent de poursuivre leur voyage vers l'Allemagne), le sentiment général à l'égard de ces derniers se traduit aujourd'hui par un discours carrément hostile – ou du moins très focalisé et passionné. Cette évolution a engendré une situation extrêmement complexe et une atmosphère souvent empoisonnée par une attitude ouvertement raciste. Des politiciens ont ouvert le débat sur l'interdiction éventuelle du port par les femmes musulmanes de vêtements couvrant le visage.

En ce qui concerne la communauté LGBT, une avancée juridique majeure a été accomplie avec l'arrêt de la Cour constitutionnelle<sup>14</sup> établissant que l'exclusion des couples homosexuels du droit d'adopter était inconstitutionnelle.

Quant à la situation juridique, c'est une mise en application efficace et satisfaisante qui reste problématique. De nombreuses victimes de discrimination n'osent toujours pas déposer plainte et engager une action en justice en raison de la complexité des lois et du fait que le résultat des poursuites ne répond pas, le plus souvent, à leurs réels besoins. De surcroît, les juridictions saisies semblent être encore mal à l'aise lorsqu'il s'agit d'allouer des montants dissuasifs pour indemniser un préjudice moral. Telle est assurément l'une des raisons principales pour lesquelles le nombre d'affaires portées en justice reste aussi faible.

L'obligation de tenter de régler par la conciliation une affaire de discrimination liée au handicap semble, pour sa part, donner des résultats positifs dans la mesure où il est fréquemment fait recours à ce processus et où les accords trouvés attestent souvent d'une expérience instructive et, dès lors, d'une meilleure compréhension du phénomène discriminatoire par les parties en cause.

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<sup>14</sup> Cour constitutionnelle, n° G 119-120/2014, 11 décembre 2014.

## ZUSAMMENFASSUNG

### 1. Einleitung

Österreich ist ein wohlhabender moderner Wohlfahrtsstaat mit einer Bevölkerung von rund 8 Millionen Menschen. Die Mehrheit der Bevölkerung ist weiß und deutschsprachig. Die Kroaten, Slowenen, Ungarn, Tschechen, Slowaken und Roma des Landes sind autochthone und anerkannte Minderheiten. Seit Ende der 1960er Jahre wandelte sich Österreich zum Einwanderungsland, das vorwiegend junge Arbeitnehmer aus dem ehemaligen Jugoslawien und der Türkei anzog. Noch immer stammt die Mehrzahl der Einwanderer nach Österreich aus diesen Ländern. Bei politischen Krisen in seinen Nachbarländern hat Österreich traditionell eine große Zahl von Flüchtlingen aufgenommen. Ungarn 1956, ČSSR 1968, Polen in den 1980ern und die Balkankrise Anfang der 1990er markieren Daten, in denen die Einwanderung nach Österreich besonders stark war. Während der Balkankrise fanden in Österreich rund 150 000 bosnische De-facto-Flüchtlinge Schutz. Zu diesem Zeitpunkt war die Akzeptanz dieser Flüchtlinge in der Gesamtbevölkerung bemerkenswert hoch. Die humanitäre Pflicht, diese Menschen, die vor ethnischen Säuberungen und Bürgerkrieg flohen, zu unterstützen und zu schützen, schien natürlich und wurde allgemein akzeptiert. Damals gab die Tatsache, dass die meisten bosnischen Flüchtlinge Muslime waren, keinen Anlass zu öffentlicher Besorgnis oder zu Diskussionen. Anfang und Mitte der 1990er änderte sich die Lage und Wahrnehmung von „Ausländern“. Der politische Aufstieg der FPÖ (Freiheitliche Partei Österreichs) dominierte den politischen Diskurs und veränderte die politische Kultur des Landes. Seit dieser Zeit wird der öffentliche Diskurs über Einwanderung und Integration von der populistischen FPÖ dominiert, die offen die Idee einer „natürlichen“ Überlegenheit „echter“ Österreicher und eine offene Ablehnung muslimischer Einwanderer vertritt – eine Entwicklung, die im Zuge der derzeitigen sogenannten „Flüchtlingskrise“ stark zugenommen hat. Österreich gehört zu den drei europäischen Ländern, die in der aktuellen Situation den größten Zustrom an Flüchtlingen aufnehmen. Was die Diskriminierungsgründe rassistischer Ursprung und ethnische Herkunft (in Österreich meist unter dem Begriff „ethnische Zugehörigkeit“ zusammengefasst) betrifft, so haben die Gerichte relativ schnell erkannt, dass der diskriminierende Verweis auf „Fremdländisch-sein“ eindeutig vom gesetzlichen Schutz erfasst wird.<sup>15</sup> Migranten und vor allem Flüchtlinge sind nach wie vor das Hauptziel von rechtsmotiviertem Hass und leiden in allen Bereichen stark unter Diskriminierung. Gesetzgebung und Rechtsprechung haben gezeigt, dass die Antidiskriminierungsvorschriften in der Praxis funktionieren und Zugewanderten umfassenden Rechtsschutz bieten.

Obwohl Österreich ein vorwiegend katholisches Land ist, wurden andere religiöse Gemeinschaften lange Zeit problemlos akzeptiert. Erst in den letzten zehn Jahren nimmt diese allgemeine Toleranz ab, insbesondere gegenüber der islamischen Gemeinschaft, der eine zunehmende feindselige Atmosphäre entgegen schlägt. Nach einer langen Zeit der Akzeptanz, die sich seit 1912 auch in der Anerkennung als Religionsgemeinschaft ausdrückt, ist die islamische Gemeinschaft plötzlich einer feindseligen Stimmungsmache ausgesetzt. Obwohl Antisemitismus in der Öffentlichkeit weiterhin tabu ist, messen Studien bei einem großen Teil der Bevölkerung entsprechende Einstellungen. In Österreich sind 14 Glaubensgemeinschaften rechtlich anerkannt – zuletzt die Zeugen Jehovas, die erst am 7. Mai 2009 ihre Anerkennung erhielten.

Die Situation der LGBT-Gemeinschaft in Österreich ist ambivalent. Einerseits hat die Gemeinschaft in den letzten zwei Jahrzehnten in öffentlichen Veranstaltungen wie der Regenbogenparade und dem Life Ball sowie in den Medien eine starke Sichtbarkeit und Akzeptanz erzielt. In jüngerer Zeit stellte der Sieg der österreichischen Sängerin

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<sup>15</sup> Landesgericht für Zivilrechtssachen Wien, Hayet B. gegen Ferdinand S., 35R68/07w (35R104/07i), 30. März 2007, und Oberster Gerichtshof, ObA40/13t, 24. Juli 2013.

„Conchita Wurst“ beim Eurovision Song Contest 2014 einen neuen Höhepunkt dar. Andererseits ist Österreich weiterhin ein sehr konservatives, katholisch geprägtes Land, in dem homophobe Äußerungen von Politikern und hochrangigen Kirchenvertretern nicht ungewöhnlich sind. Nach mehreren fehlgeschlagenen Anläufen führten fruchtbare Verhandlungen in den Jahren 2008 und 2009 am 1. Januar 2010 zur Einführung eingetragener Partnerschaften von gleichgeschlechtlichen Paaren. Es gibt weiterhin Anstrengungen, die in naher Zukunft erfolgreich sein könnten, gleichgeschlechtlichen Paaren die vollwertige und gleichberechtigte Ehe zu ermöglichen.

Ein von den Sozialpartnern unterstützter Versuch, den rechtlichen Schutz vor Diskriminierung für sämtliche Diskriminierungsgründe auf Bundesebene „nach oben anzugleichen“, scheiterte im letzten Moment an katholischen Bedenken gegenüber Homosexuellen

Altersdiskriminierung am Arbeitsplatz ist weiterhin weit verbreitet, wird von der Öffentlichkeit jedoch kaum als gesetzeswidrig wahrgenommen.

Der politische Wille zur Bekämpfung von Diskriminierung aufgrund von Behinderung ist recht stark. Der rechtliche Schutz vor dieser Art von Diskriminierung geht weit über die Mindestanforderungen der Richtlinie 2000/78/EG hinaus. 2012 riefen viele Länder und auch der Bund Einrichtungen wie z. B. Monitoring Boards ins Leben, um die UN-Konvention über die Rechte von Menschen mit Behinderungen umzusetzen (Überwachungsmechanismen für die Rechte von Menschen mit Behinderungen auf Bundes- und Länderebene (Monitoringausschuss) und Nationaler Aktionsplan Behinderung 2012-2020). Was den umfassenden Schutz vor Diskriminierung außerhalb der Beschäftigung betrifft, scheint Österreich ziemlich weit fortgeschritten zu sein. Zu diesem Thema gab es bisher drei besonders wichtige Fälle. In einem ging es um eine Bäckerei in Wien, wo eine neu errichtete Treppe am Eingang als diskriminierend eingestuft wurde.<sup>16</sup> Im zweiten Fall ging es darum, dass der Österreichische Rundfunk (ORF) eine DVD ohne Untertitel angefertigt hatte.<sup>17</sup> Hier befand das Gericht auf Diskriminierung gehörloser Kunden. Ein dritter Fall<sup>18</sup> verdeutlicht die praktischen Einschränkungen des Schutzes. Im Wesentlichen stellte das Gericht in diesem Fall fest, dass die Verlegung einer Dienststelle (hier des „Bürgerbüros“) in ein historisches Gebäude, das für Benutzer von Rollstühlen nicht zugänglich ist, keine Diskriminierung darstelle und nicht mit der Verpflichtung verbunden sei, angemessene Vorkehrungen in einem Maße zu treffen, dass der freie Zugang gewährleistet sei, da „das Gesetz nur für neu errichtete Barrieren gilt“. Dennoch liegen die Arbeitslosenquoten bei Menschen mit Behinderung wesentlich höher als beim Rest der Bevölkerung und insbesondere Menschen mit geistiger Behinderung werden in vielen Bereichen ausgegrenzt. Im Jahr 2010 wurde die Frist der Bundesregierung (Ministerien) und der wichtigsten Bundesbehörden zur Umsetzung von Maßnahmen zum barrierefreien Zugang gesetzlich bis 2019 verlängert.

Der Dialog mit NROs über Gleichbehandlungsthemen nimmt auf praktischer Ebene zu und die Sozialpartner werden vergleichsweise häufiger an politischen Entscheidungsprozessen beteiligt als in anderen europäischen Ländern.

## **2. Wichtigste Gesetze**

Die Republik Österreich ist ein Bundesstaat. Nach der österreichischen Verfassung liegen staatliche Befugnisse beim Bund oder den Ländern. Verfassungsrechtlich liegt die Zuständigkeit für „Antidiskriminierung“ weder ausschließlich beim Bund noch ausschließlich bei den Bundesländern. Dies führt zu einem sehr komplexen Rechtsrahmen

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<sup>16</sup> Bezirksgericht Josefstadt, Urteil Nr. 4C 707/11 z-14, 14. November 2011.

<sup>17</sup> Handelsgericht Wien, L.H. gegen ORF, Nr. 60R93/10x, 8. September 2011.

<sup>18</sup> Landesgericht für Zivilrechtssachen Wien, M.L. gegen Republik Österreich, Nr. 36 R96/12b, 5. Dezember 2012.

aus über 30 Ländergesetzen und 5 wichtigen Gesetzen auf Bundesebene. 2015 wurden sowohl auf Bundes- als auch auf Länderebene zahlreiche Vorschriften geändert; dabei handelte es sich jedoch überwiegend um geringfügige Änderungen technischer Art, die keine substantiellen Veränderungen des Inhalts oder Geltungsbereichs mit sich brachten. Die wichtigsten Bundesgesetze zur Umsetzung der Richtlinien sind:

#### Gleichbehandlungsgesetz (GIBG)

Das Gleichbehandlungsgesetz gilt für den privaten Sektor und schützt vor Diskriminierung in der Arbeitswelt wegen der folgenden Gründe: Geschlecht, ethnische Zugehörigkeit, Religion oder Weltanschauung, sexuelle Orientierung und Alter. Der Schutz vor Diskriminierung aufgrund der ethnischen Herkunft gilt zusätzlich beim Sozialschutz, einschließlich der sozialen Sicherheit und der Gesundheitsdienste, bei sozialen Vergünstigungen, bei der Bildung und beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich Wohnraum.

#### Bundes-Gleichbehandlungsgesetz (B-GIBG)

Dieses Gesetz gilt für Bedienstete des Bundes, schützt vor Diskriminierung aufgrund von Geschlecht, ethnischer Zugehörigkeit, Religion oder Weltanschauung, sexueller Orientierung und Alter und regelt die Einrichtung der Gleichbehandlungskommission, des Gleichbehandlungsbeauftragten und der Kontaktfrauen.

#### Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungs-anwaltschaft (GBK/GAW-Gesetz)

Dieses Gesetz regelt Einrichtung und Funktionen der Gleichbehandlungskommission und der Nationalen Gleichbehandlungsstelle, der Anwaltschaft für Gleichbehandlung.

#### Behinderteneinstellungsgesetz (BEinstG)

Das Gesetz schützt unter anderem vor Diskriminierung aufgrund einer Behinderung in Beschäftigung und Beruf und führt eine Verpflichtung zu angemessenen Vorkehrungen ein. Außerdem legt es eine verbindliche Quote für die Beschäftigung von Menschen mit Behinderung fest.

#### Behindertengleichstellungsgesetz (BGStG)

Das Gesetz schützt vor Diskriminierung aufgrund von Behinderung beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich von Wohnraum. Das heißt, das Schutzniveau geht über die Mindestanforderungen der Richtlinie 2000/78/EG hinaus.

Der Schutz auf Länderebene bezieht sich vor allem auf die (Länder-)Beschäftigten im öffentlichen Dienst. Alle Bundesländer mit Ausnahme von Niederösterreich schützen vor Diskriminierung aus den in den Richtlinien genannten Gründen, nicht nur im Arbeitsleben, sondern auch beim Zugang zu Gütern und Dienstleistungen, einschließlich von Wohnraum, bei der sozialen Sicherheit und Vergünstigungen und den Gesundheitsdiensten und gehen damit über die Mindestanforderungen der Richtlinie hinaus. Die meisten Ländergesetze wurden 2013 überarbeitet (und aktualisiert), während es danach kaum neue Entwicklungen gab.

### **3. Wichtigste Grundsätze und Begriffe**

Im Wesentlichen wurden alle wichtigen Grundsätze der Richtlinien in österreichisches Recht umgesetzt.

Die Definitionen von unmittelbarer und mittelbarer Diskriminierung wurden wörtlich aus den Richtlinien übernommen. Auch Belästigung und Viktimisierung sind verboten.



Anweisung zur Diskriminierung gilt als Diskriminierung und ist ebenfalls verboten. Diskriminierung durch Assoziierung wird in Bezug auf alle Diskriminierungsgründe und alle geschützten Lebensbereiche mit einer sehr weit gefassten Formulierung (aufgrund eines Naheverhältnisses) ausdrücklich erwähnt.

Alle in den Richtlinien genannten Diskriminierungsgründe sind abgedeckt, jedoch ist der Rechtsschutz bei den einzelnen Gründen unterschiedlich stark.

Der Begriff „Rasse“ wurde aus allen Bundesgesetzen entfernt und „Rasse und ethnische Herkunft“ wurden gemeinsam durch den Begriff „ethnische Zugehörigkeit“ ersetzt. Dies hat keine Auswirkungen auf den Geltungsbereich, sondern ist Ausdruck einer gewissen sprachlichen Sensibilität.

Ausnahmeregelungen für wesentliche berufliche Anforderungen sind im Gesetz enthalten, wobei die Formulierung deutlich macht, dass dieser Begriff sehr eng ausgelegt werden muss.

Auch das Konzept von angemessenen Vorkehrungen für Menschen mit Behinderungen hat seinen Weg in die Gesetzgebung gefunden. Arbeitgeber sind verpflichtet, geeignete und erforderliche Maßnahmen zu ergreifen, um Menschen mit Behinderungen den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten. Diese Belastung gilt nicht als unverhältnismäßig, wenn sie durch Förderungsmaßnahmen nach bundes- oder landesgesetzlichen Vorschriften ausreichend kompensiert werden kann.

Mehrfachdiskriminierung oder intersektionelle Diskriminierung wird zu einem immer dringenderen Problem, weil die Praxis zeigt, dass dieses Phänomen weit verbreitet ist. Die Rechtsvorschriften erkennen dies an, bieten jedoch nur grobe Leitlinien für den Umgang mit diesem Problem. Gerichte sind grundsätzlich verpflichtet, über Klagen wegen Diskriminierung aus mehreren Gründen in einem „einzigen Verfahren“ zu entscheiden.

#### **4. Sachlicher Geltungsbereich**

Der österreichische Bundesgesetzgeber hat Rechtsvorschriften verabschiedet, die den Anwendungsbereich der Richtlinien vollständig abdecken. Im Bereich Beschäftigung (öffentlich und privat) sind alle Diskriminierungsgründe geschützt. Ethnische Zugehörigkeit und Behinderung sind weitere geschützte Gründe beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen, wobei der Diskriminierungsgrund ethnische Zugehörigkeit in einem noch weiteren gefassten sachlichen Anwendungsbereich geschützt ist (z. B. Bildung, Gesundheitsdienste und Sozialschutz bzw. soziale Sicherheit).

Die Ländergesetze haben, im Rahmen ihrer Zuständigkeit, den Schutz vor Diskriminierung für sämtliche Merkmale über den Arbeitsplatz hinaus ausgedehnt. Daher ist in den Ländern Diskriminierung in den Bereichen Beschäftigung, Zugang zu und Versorgung mit Gütern und Dienstleistungen, Bildung, Gesundheit und Sozialschutz bzw. soziale Sicherheit aus allen Gründen verboten. Die Kompetenzen der Länder sind in den Bereichen Wohnraumversorgung, Sozialleistungen, Gesundheit und Bildung von besonderer Bedeutung.

#### **5. Rechtsdurchsetzung**

Trotz des sehr umfassenden Rechtsrahmens gibt es bei der Rechtsdurchsetzung weiterhin Probleme. Dafür gibt es mehrere Gründe: zum einen ist der Kenntnisstand in der Bevölkerung immer noch erschreckend gering – selbst über die bloße Existenz der Gesetze. Ein weiterer Grund ist der sehr komplexe und aus vielen Vorschriften

bestehende Rechtsrahmen; für Diskriminierungsfälle können über 40 Rechtsvorschriften relevant sein. Auch den Gleichbehandlungsstellen ist es bisher nicht gelungen, ihre Anstrengungen zu bündeln. Anstelle einer übergreifenden Stelle mit hohem Bekanntheitsgrad und vielen Befugnissen, die wir aus anderen Mitgliedstaaten kennen, gibt es in Österreich mehr als neun Regionalbüros, eigene Strukturen für den öffentlichen Dienst und ein völlig eigenständiges System für Menschen mit Behinderungen. Die Mittel für die Gleichbehandlungsstelle des Bundes sind sehr begrenzt. Die Anwaltschaft für Gleichbehandlung verfügt nicht über genug Mitarbeiter. Die Mitglieder der Gleichbehandlungskommission werden für diese Funktion nicht bezahlt, sondern erfüllen diese Aufgabe neben ihrer regulären Arbeit auf freiwilliger Basis. Dies verlängert die Bearbeitungsdauer.

NROs sind nicht ausreichend in das System integriert und viele von ihnen erhalten keine zusätzlichen Mittel für ihre neuen Funktionen.

Weder die Gleichbehandlungsanwaltschaft noch die Gleichbehandlungskommission ist für Behindertendiskriminierung zuständig, es gibt jedoch ein obligatorisches Schlichtungsverfahren beim Dienst des Sozialministeriums (früher Bundessozialamt), das vergleichsweise gut funktioniert.

Ein weiteres Problem während der Umsetzungsphase ist das Fehlen einschlägiger Rechtsprechung (nur sehr wenige Fälle). Opfer von Diskriminierung können sich daher nicht sicher sein, ob ihre Klage Erfolg hat. Sie müssen aber in jedem Fall die vollen Risiken und Kosten eines Verfahrens tragen. Obwohl einige NROs versuchen, Opfer in diesem Bereich zu unterstützen, scheuen viele Opfer den Rechtsweg, weil ihnen die nötigen Mittel fehlen und sie eine Niederlage im Prozess fürchten. Vor Gericht dürfen NROs nur Streithilfe leisten und dies gilt auch nur für den Dachverband „Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern“, der für alle Diskriminierungsgründe zuständig ist,<sup>19</sup> wogegen die „Österreichische Arbeitsgemeinschaft für Rehabilitation“ sich an Klagen wegen Behindertendiskriminierung beteiligen kann und ein beschränktes, kompliziertes und bisher noch nie genutztes Recht auf Sammelklagen hat.

Entlastend wirkt sich für die Opfer von Diskriminierung die Verlagerung der Beweislast aus, die eine gewisse Erleichterung vor Gericht mit sich bringt.

Zu den möglichen Sanktionen gehören grundsätzlich Schadensersatz und Schmerzensgeld. Weil einschlägiges Fallrecht bisher kaum vorliegt, fällt es den Gerichten nicht leicht, die Höhe des Schmerzensgeldes so festzulegen, dass die Sanktionen wirksam und abschreckend, aber auch verhältnismäßig sind. Um die abschreckende Wirkung der Sanktionen zu verbessern, müssten die Gerichte ihre bestehende Praxis ändern, bei der nur sehr niedrige Beträge als Schmerzensgeld für immateriellen Schaden zugesprochen werden. In Fällen von Belästigung gilt ein gesetzlicher Mindestbetrag für Schmerzensgeld (1000 Euro). Dabei ist interessant, dass der Gesetzgeber es für nötig befunden hat, diesen Mindestbetrag schrittweise von 400 auf 720 und dann 1000 Euro anzuheben. Offensichtlich wollte der Gesetzgeber damit die Praxis der Gerichte ausgleichen, sich sehr streng an diese Mindestbeträge zu halten, und so verhindern, dass Klägern nur ein lächerlich geringes Schmerzensgeld zugesprochen wird. Eine kürzliche Entscheidung des Obersten Gerichtshofs<sup>20</sup> lässt erwarten, dass die Gerichte in Zukunft dahingehend orientiert werden, den Entschädigungsbetrag in Diskriminierungsfällen stärker in Übereinstimmung mit den Richtlinien zu bemessen.

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<sup>19</sup> Behinderung wird im gesetzlichen Mandat des Klagsverbands nicht ausdrücklich erwähnt, in der Praxis lassen die Gerichte eine Beteiligung des Verbands an Klagen wegen Behindertendiskriminierung jedoch zu.

<sup>20</sup> Österreich, Oberster Gerichtshof, Beschluss Nr. 90BA49/16w, 29. September 2016.

Die Sanktion für diskriminierende Stellenausschreibungen ist weder abschreckend, noch wirksam oder verhältnismäßig (Geldbußen von höchstens 360 Euro und Straffreiheit für Ersttäter (diese werden nur verwahrt)).

Angesicht der bisherigen Rechtsprechung muss bezweifelt werden, ob die verhängten Strafen verhältnismäßig, wirksam und abschreckend sind. Zur Zulässigkeit von statistischen Daten und Situationstests als Beweise kann noch keine Aussage getroffen werden, weil bisher noch kein Kläger entsprechende Beweise vorgelegt hat. Das Recht erlaubt diese Art von Beweisen grundsätzlich, es gibt aber noch keine Rechtspraxis.

Derzeit ziehen die meisten Menschen, die Opfer von Diskriminierung wurden, ein kostenloses Verfahren bei der Gleichbehandlungskommission einer Klage vor Gericht vor.

## **6. Gleichbehandlungsstellen**

### Gleichbehandlungskommission

Die Gleichbehandlungskommission beim Bundesministerium für Bildung und Frauen besteht aus drei Senaten mit den folgenden Zuständigkeiten:

7. Gleichbehandlung von Frauen und Männern in der Arbeitswelt;
8. Gleichbehandlung im Geltungsbereich der Richtlinie 2000/78/EG (ethnische Zugehörigkeit, Religion, Konfession, Alter und sexuelle Ausrichtung in der Beschäftigung) ausgenommen Behinderung;
9. Gleichbehandlung im Geltungsbereich der Richtlinie 2000/43/EG ungeachtet von Rasse und ethnischer Zugehörigkeit in sonstigen Bereichen und im Geltungsbereich der Richtlinie 2004/113/EG.

Die Funktionen der Vorsitzenden der einzelnen Senate nimmt ein Beamter wahr. Die anderen Mitglieder der Kommission übernehmen diese Aufgabe unentgeltlich. Die Kommission wurde zum Mai 2005 umstrukturiert. Auf Bitte der Gleichbehandlungsanwaltschaft oder eines der im jeweiligen Senat vertretenen Interessenverbände oder auf eigene Initiative muss der zuständige Senat der Kommission ein Gutachten über mögliche Verstöße gegen den Gleichbehandlungsgrundsatz erstellen. Diese Gutachten über mögliche Verstöße gegen das Diskriminierungsverbot sind öffentlich zugänglich zu machen. Die Sitzungen der Senate sind vertraulich und finden unter Ausschluss der Öffentlichkeit statt.

Die Gleichbehandlungskommission muss auf Antrag von Arbeitgebern, Arbeitnehmern, Betriebsratsmitgliedern oder Vertretern der im jeweiligen Senat vertretenden Sozialpartner oder der Gleichbehandlungsanwaltschaft einzelne Fälle untersuchen. Diskriminierungsopfer können sich im Verfahren vor der Kommission vertreten lassen. Wenn der Senat zu dem Schluss kommt, dass der Gleichbehandlungsgrundsatz verletzt wurde, muss er dem Arbeitgeber bzw. der verantwortlichen Person außerhalb des Arbeitslebens eine schriftliche Empfehlung erstellen, wie die gesetzliche Gleichbehandlungspflicht erfüllt werden kann. Der Senat fordert die verantwortlichen Personen auf, die diskriminierende Handlung zu beenden. Sofern dieser die Empfehlungen der Kommission nicht umsetzt, können die im Senat oder in der Gleichbehandlungsanwaltschaft vertretenen Institutionen eine Zivilklage einreichen, um eine Verurteilung wegen Verstoßes gegen den Gleichbehandlungsgrundsatz zu erreichen. Die Kommission hat das Recht, von der Person, von der die mutmaßliche Diskriminierung ausgeht, eine schriftliche Stellungnahme zu dem Fall anzufordern. Außerdem kann die Kommission Rechtsgutachten zu den betroffenen Unternehmen in Auftrag geben. Die Gleichbehandlungskommission bietet keine Unterstützung für Diskriminierungsopfer und führt keine Befragungen durch. Allerdings veröffentlicht sie ihre Prüfergebnisse und die entsprechenden Empfehlungen.

Für Beschäftigte im öffentlichen Dienst wurde eine entsprechende Struktur aufgebaut, die so genannte Bundes-Gleichbehandlungskommission.

#### Nationale Gleichbehandlungsstelle (Anwaltschaft für Gleichbehandlungsfragen, Gleichbehandlungsanwaltschaft)

Die Gleichbehandlungsanwaltschaft, die beim Bundeskanzleramt angesiedelt ist, hat eine ähnliche Struktur wie die Senate der Kommission. Eine bereits bestehende Institution, die Anwaltschaft für Gleichbehandlung in der Arbeitswelt, ist weiterhin für die Gleichbehandlung von Frauen und Männern am Arbeitsplatz zuständig. Die beiden anderen Anwaltschaften sind zuständig für Diskriminierung aufgrund von Rasse, ethnischer Herkunft, Religion, Alter und sexueller Orientierung in der Arbeitswelt bzw. für Diskriminierung aufgrund der ethnischen Zugehörigkeit in sonstigen Bereichen. Die Gleichbehandlungsanwaltschaft berät und unterstützt Diskriminierungsopfer. Im Rahmen dieser Funktion können die Anwaltschaften im gesamten Bundesgebiet Beratungsstunden und -tage anbieten. Vor allem können sie unabhängige Studien und Befragungen durchführen, unabhängige Berichte veröffentlichen und Empfehlungen zu allen Gleichbehandlungsfragen aussprechen. Die Anwaltschaft tritt (fast) nie in Gerichtsverfahren auf, sondern führt Schlichtungsverfahren durch, die in der Praxis häufig zu einer Einigung der Parteien führen. Diese Funktion wird in der Gesetzgebung nicht ausdrücklich erwähnt, jedoch oft erfolgreich ausgeübt. Aufgrund der weiterhin ungenügenden personellen Mittel konnte die Anwaltschaft ihre Befugnis zur Durchführung unabhängiger Untersuchungen und Befragungen und zur Veröffentlichung unabhängiger Berichte noch nicht voll nutzen; bisher liegen erst einige wenige Berichte der Anwaltschaft vor.

Für den Diskriminierungsgrund Behinderung wurde eine eigene Struktur aufgebaut. Der Behindertenanwalt ist für die Beratung und Unterstützung von Menschen mit Behinderungen zuständig. Der Anwalt kann Befragungen zur Situation von Menschen mit Behinderungen durchführen und Gutachten und Empfehlungen zu diesem Thema erstellen.

## **7. Schlüsselprobleme**

Antimuslimische Ressentiments haben in den letzten Jahren stark zugenommen. Mit Beginn eines Massenzustroms von Flüchtlingen, vor allem aus Syrien und Afghanistan, nahm dieses Phänomen enorme Ausmaße an. Österreich verbuchte, zusammen mit Deutschland, Schweden und Ungarn, zwei Drittel der Asylanträge in der EU. Nach einer recht positiven Anfangsphase, in der sich viele Freiwillige engagierten, um die Flüchtlinge zu begrüßen und ihnen (vor allem bei der Weiterreise nach Deutschland) zu helfen, veränderte sich die Gesamtstimmung in Richtung eines sehr feindseligen – zumindest sehr polarisierten und erhitzten – Diskurses. Dieser schuf eine sehr komplizierte Situation, in der die Atmosphäre häufig von offenem Rassismus vergiftet ist. Politiker haben begonnen, über ein mögliches Verbot gesichtsbedeckender Kleidung muslimischer Frauen zu diskutieren.

Ein wichtiger juristischer Durchbruch für die LGBT-Gemeinschaft war die Feststellung des Verfassungsgerichtshofs,<sup>21</sup> dass der Ausschluss gleichgeschlechtlicher Paare vom Adoptionsrecht verfassungswidrig sei.

Rechtlich bleibt die wirksame und ausreichende Rechtsdurchsetzung das größte Problem. Aufgrund der komplizierten Rechtslage und weil die verhängten Urteile nicht den konkreten Bedürfnissen der Opfer entsprechen, schrecken immer noch viele Diskriminierungsopfer davor zurück, Beschwerden oder Klagen einzureichen. Auch die Gerichte haben sich noch nicht an ihre Aufgabe gewöhnt, Schmerzensgeld in einer Höhe

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<sup>21</sup> Verfassungsgerichtshof, Nr. G 119-120/2014, 11. Dezember 2014.

zuzusprechen, die für den Täter abschreckend wirkt. Dies ist sicher einer der Hauptgründe, warum weiterhin nur wenige Fälle vor Gericht gebracht werden.

Das bei Diskriminierungsfällen obligatorische Schlichtungsverfahren ist dagegen eine Erfolgsgeschichte. Es wird häufig genutzt und die erzielten Schlichtungsergebnisse sind Ausdruck eines gemeinsamen Lernprozesses, der das Verständnis des Problems Diskriminierung auf beiden Seiten verbessert.

## INTRODUCTION

### The national legal system

The Republic of Austria is a federal state. According to the Austrian Constitution, first enacted in 1920, legal powers are exercised either by the *Bund* (Federation) or the *Länder* (provinces, namely: *Burgenland, Kärnten, Oberösterreich, Niederösterreich, Salzburg, Steiermark, Tirol, Vorarlberg, and Wien*). Legislative powers are divided between the federal parliament called Nationalrat (acting together with the Bundesrat) and provincial parliaments called Landtage. Legislative powers are - in principle - clearly defined by the Constitution: matters due to be regulated by the Nationalrat (federal parliament) are explicitly listed in the Constitution. With regard to these matters, provincial parliaments do not have legislative power. Matters not explicitly designated by the Constitution as federal matters belong to the jurisdiction of the Landtage (provincial parliaments).

Under the Constitution, neither the Federation nor the provinces have the exclusive power to regulate "anti-discrimination". The Federation may — and has done so in 1997 regarding disability — introduce a new clause to the constitutional catalogue of human rights prohibiting discrimination. Amending the Federal Constitution is strictly a federal matter. The Federation may also implement the anti-discrimination clause if and insofar as implementation is linked to matters coming within the legislative powers of the Federation (such as important issues like labour law, public transport law and civil law).

Civil law is a competence in principle held by the Federation, the provinces can only act in a rather small "window of competence" opened by Art. 15 (9) *B-VG* (Federal-Constitutional Law), which states: "*Within the field of their legislation, the provinces are competent to adopt the provisions necessary for the regulation of subject also in the field of criminal and civil law.*"

Labour law legislation falls into the competency of the Federation (Art. 10 par. 1 lit. 11 Federal-Constitutional Law [*Bundes-Verfassungsgesetz*], *B-VG*). Just in the area of labour law of agricultural workers the legislative powers are divided between the federation and the provinces: legislation of principles by the federation and implementing legislation by the provinces (Art. 12 *B-VG*). Legislation in respect of employees (civil servants) of the nine provinces and of local authorities rests exclusively with those provinces alone (Art. 21 *B-VG*); with the notable exceptions of teachers at public compulsory schools (Art. 14 par. 2 *B-VG*) and of teachers at certain agricultural schools and educators at certain agricultural students' hostels (Art. 14a par. 2 lit. e and Art. 14 a par. 3 lit. b *B-VG*). Legislative power regarding self-employment, education/training and workers/employers/occupational organisations is divided between the provinces and the Federation; the provinces hold legislative power, for instance, in areas such as social benefits, *kindergartens* and juvenile educational institutions, hospitals, nursing homes, ambulance services, funeral-services, fire-brigades and chambers<sup>22</sup> of agricultural workers/employers (Art. 10 – 15 *B-VG*), they are very important landlords.

International human rights treaties have to be incorporated into national law to come to effect, in principle. The actual effect of those international obligations is varying widely, although in general, Austria has a quite good reputation for reacting and actively participating in international instruments. The European Convention on Human Rights forms an integral part of the Austrian Constitution. In reaction to the UN Convention on the Rights of Persons with Disabilities there has been a lot of activity going within several provinces as the pressure for the provinces has increased to fulfil their duties regarding the establishment of a mechanism similar to the Federal Monitoring Board

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<sup>22</sup> Chambers are public law entities established by statute and involving compulsory membership of all workers/employers in the respective field.

(Monitoringausschuss) for the Monitoring of the UN-Convention on the Rights of Persons with Disabilities. This issue was one of those identified as a gap in implementation, the Concluding Observations of the CRPD on Austria, issued in September 2013.<sup>23</sup>

### **List of main legislation transposing and implementing the directives**

The federal legal framework basically consists of:<sup>24</sup>

- Equal Treatment Act, Gleichbehandlungsgesetz, Federal Law Gazette I Nr. 66/2004 last amended by BGBl. I Nr. 34/2015]; Abbreviation: GIBG/ ETA, adopted 26.06.2004, in force since 01.07.2004. Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation. Most important law, covering private employment, access to goods or services, education; defining principle legislation for provinces.
- Federal-Equal Treatment Act,<sup>25</sup> Bundes-Gleichbehandlungsgesetz, BGBl. I Nr. 65/2004, Federal Law Gazette I Nr. 65/2004, last amended by BGBl. I Nr. 65/2015, Abbreviation: B-GIBG/ F-ETA, adopted 23.06.2004, in force since 01.07.2004. Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation. Covering federal public employment.
- Act on the Equal Treatment Commission and the National Equality Body, Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, BGBl. I Nr. 66/2004, Federal Law Gazette I Nr. 66/2004 last amended by BGBl. I Nr. 107/2013. Abbreviation: GBK/GAW-G, adopted 23.06.2004, in force since 01.07.2004. Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation. Covering the establishment of and rules of procedure for national equality bodies.
- Act on the Employment of People with Disabilities, Behinderteneinstellungsgesetz, Federal Law Gazette Nr. 22/1970, last amended by BGBl. I Nr. 62/2016. Abbreviation: BEinstG, adopted 10.08.2005, in force since 11.08.2005. Grounds covered: disability. Covering public and private employment of persons with disabilities.
- Federal Disability Equality Act, Behindertengleichstellungsgesetz, BGBl. I Nr. 82/2005, Federal Law Gazette I Nr. 82/2005, last amended by BGBl. I Nr. 59/2014. Abbreviation: BGStG, adopted 10.08.2005, in force since 11.08.2005. Grounds covered: disability. Covering access to goods and services for persons with disabilities.
- Federal Disability Act, Bundesbehindertengesetz, BGBl. Nr. 283/1990, last amended by Federal Law Gazette I Nr. 62/2016. Abbreviation: BEinstG, adopted 10.08.2005, in force since 01.01.2006. Grounds covered: disability. Establishing the Ombud for People with Disabilities.

List of most important provincial acts:

- Styrian Equal Treatment Act, Steiermärkisches Gleichbehandlungsgesetz, LGBl. Nr. 66/2004 ala 130/2014;
- Styrian Disability Act, Steiermärkisches Behindertengesetz, LGBl. 26/2004 ala LGBl. Nr. 130/2014;
- Styrian Agricultural Labour Relations Act, Steiermärkische Landarbeitsordnung, Landesgesetzblatt Nr. 39/2002 ala LGBl. 117/2015;

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<sup>23</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUT%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUT%2fCO%2f1&Lang=en).

<sup>24</sup> In 2016 there have been no important legislative amendments. The amendments on federal level concerned some adaptations of language and terms used in connection with other legislation or with the establishment of monitoring mechanisms related to the CRPD.

<sup>25</sup> Nota bene: it is easy to confuse the Equal Treatment Act and the Federal-Equal Treatment Act, especially as they are both federal laws.

- Viennese Anti-Discrimination Act, Wiener Antidiskriminierungsgesetz, Landesgesetzblatt für Wien Nr. 35/2004 ala LGBL Nr.53/2014];
- Viennese Service Order, Wiener Dienstordnung, ala LGBL. Nr.42/2006 ala Nr. 37/2016];
- Viennese Agricultural Labour Equal Treatment Act, Wiener Land-und forstwirtschaftliches Gleichbehandlungsgesetz, LGBL. 25/1980, ala LGBL. 13/2016;
- Lower Austrian Equal Treatment Act, Niederösterreichisches Gleichbehandlungsgesetz, LGBL Nr. 69/1997 ala 109/2011;
- Lower Austrian Anti-Discrimination Act, Niederösterreichisches Antidiskriminierungsgesetz, LGBL. Nr. 45/2005 ala Nr. 113/2011;
- Lower Austrian Agricultural Labour Relations Act, Niederösterreichische Landarbeitsordnung, LGBL. Nr. 185/1973 ala 102/2016;
- Carinthian Anti-Discrimination Act, Kärntner Antidiskriminierungsgesetz, LGBL. Nr. 63/2004 ala Nr. 18/2013;
- Carinthian Agricultural Labour Relations Act, Kärntner Landarbeitsordnung, LGBL. Nr. 97/1995 as of 60/2006 ala Nr. 13/2016;
- Upper Austrian Anti-Discrimination Act, ÖO Antidiskriminierungsgesetz, LGBL. Nr. 50/2005 ala Nr. 90/2013;
- Upper Austrian Agricultural Labour Relations Act, Oberösterreichische Landarbeitsordnung, LGBL. Nr. 25/1989 ala LGBL. Nr. 84/2016];
- Salzburg Equal Treatment Act, Salzburger Gleichbehandlungsgesetz, LGBL. Nr. 31/2006 ala Nr. 49/2016;
- Salzburgian Agricultural Labour Relations Act, Salzburger Landarbeitsordnung, LGBL. Nr. 7/1999 ala Nr. 60/2015;
- Tyrolian Equal Treatment Act, Tiroler Landes-Gleichbehandlungsgesetz, LGBL. Nr. 1/2005 ala Nr. 81/2016;
- Tyrolian Anti-Discrimination Act, Tiroler Anti-Diskriminierungsgesetz, LGBL. Nr. 25/2005 ala Nr. 114/2013;
- Tyrolian Equal Treatment Act for Municipalities, Tiroler Gemeinde-Gleichbehandlungsgesetz, LGBL. Nr. 2/2005 ala Nr. 81/2016;
- Tyrolian Agricultural Labour Relations Act, Tiroler Landarbeitsordnung, LGBL. Nr. 27/2000 ala 61/2005 ala 106/2015;
- Tyrolian Provincial Teachers Employment Act, Tiroler Landeslehrer-Diensthoheitsgesetz, LGBL. Nr. 74/1998, ala LGBL. 75/2014;
- Vorarlbergian Anti-Discrimination Act, Vorarlberger Antidiskriminierungsgesetz, LGBL. Nr. 17/2005 ala Nr. 45/2014];
- Burgenlandian Anti-Discrimination Act, Burgenländisches Antidiskriminierungsgesetz, LGBL. Nr. 84/2005 ala LGBL 82/2016;
- Burgenlandian Agricultural Labour Relations Act, Burgenländische Landarbeitsordnung Burgenländisches Landesgesetzblatt Nr.37/1977, ala LGBL. Nr. 26/2016.



## **1 GENERAL LEGAL FRAMEWORK**

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The constitution of Austria includes the following articles dealing with non-discrimination:

General clauses establishing equality before the law:

- Art. 2 of the Basic Law of the State 1867 ['Staatsgrundgesetz', StGG];
- Art. 7 of the Federal-Constitutional Act 1929 ['Bundes-Verfassungsgesetz', B-VG];
- Art 14 European Convention of Human Rights, as a part of the constitution by BGBl 1964/59.

Grounds explicitly covered: birth, sex, social status, class, religion, and disability.

This list is merely a demonstrative one, as the general clause stipulates a full equal treatment obligation.

The state is bound by the constitution and the fundamental rights enshrined therein in all its activities, also when it acts as an employer.

Specific constitutional provisions:

Austrian constitutional law contains some special provisions banning discrimination on the basis of race, language or religion (Art. 66 & 67 Treaty of St. Germain 1919) and race, colour, descent or national or ethnic origin (Art. I Federal Constitutional Act for the Implementation of the Convention on the Elimination of all Forms of Racial Discrimination 1973).

These provisions do not apply to all areas covered by the directives. Their material scope is somewhat broader than those of the directives as it also includes protection against hate speech.

The provisions are directly applicable. The equal protection clause of the Constitution is legally binding for legislative powers as well as law enforcement agencies. Affected individuals can file a complaint with the Constitutional Court against discriminatory legal provisions while decisions of law enforcement and administrative structures can be appealed against by invoking the constitutional equality clause.

The constitutional equality clauses cannot be enforced against private actors as they bind the State only.

## **2 THE DEFINITION OF DISCRIMINATION**

### **2.1 Grounds of unlawful discrimination explicitly covered**

The following grounds of discrimination are explicitly protected by national law:

#### Federal level:

Gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation, part time employment, disability; additional in Constitution: class, estate or property, birth, social standing. In penal law (§ 283 Penal Code): race, colour, language, religion or belief, citizenship, descent or national or ethnic origin, gender, disability, age, or sexual orientation

So called "recognised national minorities" (Volksgruppen: Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma) are protected according to the state treaties of 1919 and 1955, their legal status and rights are guaranteed by various constitutional provisions and partly implemented by the National Minorities Act of 1976 [Volksgruppengesetz].

#### Provincial level:

Lower Austria: gender, ethnic affiliation, religion or belief, disability (only in employment related fields) age, sexual orientation.

Carinthia: gender (explicitly including pregnancy and maternity), ethnic affiliation, religion or belief, disability, age, sexual orientation (translated as "sexuelle Ausrichtung" - the different wording doesn't in any way affect the scope or meaning, it is just a little linguistic incoherence with other provinces).

Styria: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation and sexual identity.

Vienna: gender, ethnic affiliation, religion, belief, disability, age, sexual orientation, sexual identity, pregnancy and parenthood.

Burgenland: gender, ethnic affiliation, religion, belief, disability, age, sexual orientation.

Upper Austria: gender, racial or ethnic origin, religion, belief, disability, age, sexual orientation.

Tyrol: gender, ethnic affiliation, religion, belief, disability, age, sexual orientation.

Vorarlberg: gender, ethnic affiliation, religion, belief, disability, age, sexual orientation.

Salzburg: gender, ethnic origin, religion, belief, disability, age, sexual orientation.

#### **2.1.1 Definition of the grounds of unlawful discrimination within the directives**

Most grounds are not defined by law. The only legal definitions given by law exist for the ground of disability. Several fields of law include lengthy definitions of the term "**disability**".

The Act on the Employment of People with Disabilities [Behinderteneinstellungsgesetz] defines in its § 3:

"Disability is the result of a deficiency of functions that is not just temporary and based on a physiological, mental, or psychological condition or an impairment of

sensual functions which constitutes a possible complication for the participation in the labour market. Such a condition is not deemed temporary if it is likely to last for more than 6 months.”

§ 3 of the Federal Disability Equality Act [Behindertengleichstellungsgesetz] defines:

“For the purposes of this Act, disability is the result of a deficiency of functions that is not just temporary and based on a physiological, mental, or psychological condition or an impairment of sensual functions which constitutes a possible complication for the participation in society. Such a condition is not deemed temporary if it is likely to last for more than 6 months.”

At provincial level disability is dealt with in the implementing legislation. For example, the Styrian Provincial Equal Treatment Act [Steirisches Landes-Gleichbehandlungsgesetz], contains a definition of disability:

“§ 4 (4) People with disabilities are persons whose corporal functions, mental ability or psychological condition will - presumably for a period longer than six months - diverge from a condition typical for their specific age; and whose participation at the life in society is therefore restricted.”

While these definitions (given the specific context of the respective areas of application) are even considerably broader than ECJ case C-13/05, Chacón Navas, the Ring/Werge CJEU decision is not yet directly reflected in them. The regulations still put a focus on the “Impairment” itself and deduce “disability” from that while, following the spirit of the UNCRPD, the CJEU in Ring/Werge is putting more emphasis onto barriers. Nevertheless, it can be presumed that courts could easily apply the existing definitions completely in line with the case law of the CJEU as these definitions do not in any way block this possibility.

For the other grounds, there are no legal definitions but some hints or case law on their interpretation:

## **Race**

The notion of “race” was removed from the text in the federal legislation and “race and ethnic origin” are now both represented by the term “ethnic affiliation” (ethnische Zugehörigkeit). This was strongly supported by many NGOs as the German term “Rasse” was one of the most misused expressions under the Nazi regime. This does not change the scope but is an expression of sensitivity regarding language.

Nevertheless, a legal definition of these terms does not exist in national law.

## **Ethnic origin**

Also ethnic origin is not directly translated into the legislation but merged into “ethnic affiliation”. It seems that courts have no problem with putting a broad range of racist incidents under this ground.

In an early case, The Viennese Independent Administrative Senate decided<sup>26</sup> that a placement company [Arbeitsvermittler] was guilty of discriminatory job advertisement by placing an ad looking for an unskilled kitchen assistant while demanding for “excellent proficiency in German” and EU-citizenship. The Senate found that both requirements were racially discriminatory (not stating whether directly or indirectly) and set the fine to EUR 100.

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<sup>26</sup> Austria, UVS Wien, Nr. 06/42/318/2008, 11 March 2008.

Another landmark case was ruled by the Viennese Regional Court for Civil Cases.<sup>27</sup> In this case the Court, acting as court of appeal, ruled in a case of a woman of Tunisian origin who had been physically kicked out of a fashion store with the words “we do not sell to foreigners” in Vienna. The court held that this constituted discrimination and harassment on the ground of ethnic affiliation and awarded EUR 800 (vs. EUR 400 in the first instance) in compensation for immaterial damages. It stated that it was irrelevant whether the claimant was in fact a foreigner or an Austrian citizen of Tunisian origin.

*The Supreme Court*,<sup>28</sup> in its decision of July 2013 reasoned that, referring to an employee’s “foreignness” in a harassing way is constituting harassment on the basis of ethnic affiliation. It stated that the requirement of a harassing activity being linked to a “protected characteristic” may not be interpreted too narrowly. It also stated that the connection to a characteristic of “ethnic affiliation” is not depending on the existence of any real differences – the attribution by the harasser is enough. So discrimination against a person because he/ she is perceived as a “migrant” is in principle covered by the definition of “ethnic affiliation”. Another Viennese case<sup>29</sup> also dealt with discrimination on grounds of “visible migration background” (erkennbarer Migrationshintergrund) and the court clearly stated that this was covered by “ethnic affiliation”.

So, in an attempt to summarize these cases, it can be stated that the case law provides for a broad protection against discrimination on this ground. Even elements like first language, appearance and national origin as well as “migrant background” are clearly covered by “ethnic affiliation”.

Protection of recognized national minorities (Volksgruppen): Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma)<sup>30</sup> is provided according to the state treaties of 1919 and 1955, their legal status and rights is guaranteed by various constitutional provisions and partly implemented by the Federal National Minorities Act of 1976 [Volkstgruppengesetz].<sup>31</sup>

A national minority is defined by the National Minorities Act as an ethnic group that comprises Austrian citizens with a non-German mother tongue and a common autonomous cultural heritage who have their residence and home in a part of the Austrian federal territory. Everyone is free to declare his/her affiliation with an ethnic group. The law explicitly states that no one belonging to an ethnic group must be put at a disadvantage as a result of the assertion or non-assertion of their rights as members of that ethnic group. Moreover, nobody can be forced to provide evidence of his or her affiliation with an ethnic group.

The National Minorities Act in its § 8f provides for specific measures to ensure the continuing existence of the ethnic minority group, their characteristics and rights by means of financial contribution, education and assistance.

The National Minorities Act also provides for the establishment of National Minority Advisory Councils (Volkstgruppenbeiräte) to be located at the Federal Chancellery, who must be heard prior to the adoption of legal rules and general assistance policies affecting the interests of their ethnic groups, may submit proposals for the improvement of the situation of their ethnic group and must submit a plan on requested aid measures

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<sup>27</sup> Austria, Landesgericht für Zivilrechtssachen Wien, Nrs. 35R68/07w; 35R104/07i, Hayet B. vs. Ferdinand S, 30 March 2007.

<sup>28</sup> Austria, Oberster Gerichtshof, Nr. 9ObA40/13t, 24 July 2013.

<sup>29</sup> Austria, Regional Civil Court of Vienna, Nr. 36 R 292/15f, 10.12.2015.

<sup>30</sup> In December 1993 Austrian Roma and Sinti were recognised as an ethnic minority (autochthonous Roma), but there is an undefined number of immigrant Roma mostly from ex-Yugoslavia.

<sup>31</sup> Austria, Federal National Minorities Act (Bundesgesetz über die Rechtsstellung von Volkstgruppen in Österreich). 5 August 1976.

including a list of expected costs for the following calendar-year to the Federal Chancellery.

## **Religion**

The Austrian legal framework does not contain a legal definition of religion or belief. The explanatory notes of the amended Equal Treatment Act state:<sup>32</sup>

‘Also the terms “religion and belief” are not defined by European law. Regarding the aims of the “framework-directive” they must be interpreted in a broad manner. Especially “religion” is not restricted to churches and officially recognised religious communities. Nevertheless, it has to be noted that for a religion there are minimum requirements concerning a statement of belief, some rules for the way of life and a cult. Religion is any religious, confessional belief, the membership of a church or religious community. Brockhaus<sup>33</sup> defines Religion formally as a system to address in its dogma, practice and social manifestations the last questions of human society and individual life and to find answers to these. According to the respective basic philosophy of salvation and in relation to the respective “experience of mischief” every religion has got its own goal of salvation and its way to salvation. This exists in close relation to the “unavailability” which is perceived as a personal (god, gods) and impersonal (rules, cognition, knowledge) transcendence. Also the wearing of religious symbols and clothes is covered by the scope of protection, as the membership to a specific religion can be assumed by these or these are perceived as an expression of a certain religion. It constitutes an infringement of the prohibition of discrimination, if the employer acknowledges the wishes of a specific group while not acknowledging those of another group.<sup>34</sup> The term “belief” is tightly connected with the term “religion”. It is a classification for all religious, ideological, political and other leading perceptions of life and of the world as a construction of sense, as well as for an orientation of the personal and societal position for the individual understanding of life.’

## **Belief**

The explanatory notes of the amended Equal Treatment Act state:

‘In the context of this law, “belief” means non-religious belief as the religious part is fully covered by the term “religion”. Belief is a system of interpretation consisting of personal convictions concerning the basic structure, modality and functions of the world; it is not a scientific system. As far as beliefs claim completeness, they include perceptions of humanity, views of life, and morals. In regard to recruitment conditions it must not be regarded as important whether a (potential) employee is, for example, atheist, as long as there is no justification for this stated by law.’

## **Age**

Although there is no legal definition of age, case law has shown that this definition is not complicated – it is understood as referring to the lifetime spent. Age is a protected ground if people are discriminated against on the basis of the fact that they are perceived too young or too old for certain circumstances without justification.

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<sup>32</sup> Austria, Parliamentary materials, Nr. 307 of the appendices XXII GP, 26 November 2003, [https://www.parlament.gv.at/PAKT/VHG/XXII/I/I\\_00307/fname\\_010536.pdf](https://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00307/fname_010536.pdf).

<sup>33</sup> Brockhaus, Die Enzyklopädie, Zwanzigste (20.) überarbeitete und aktualisierte Auflage, Leipzig Mannheim, 1996-1999.

<sup>34</sup> This is not in any way relating to any duty for reasonable accommodation but clarifying that no faith might be treated more favourably than another is.

## **Sexual Orientation**

Is commonly understood as referring to heterosexuality, homosexuality, bi-sexuality only. Transsexuality is seen as covered by gender. Case law does not raise questions of definition in this regard.

### **2.1.2 Multiple discrimination**

In Austria, prohibition of multiple discrimination is included in the law.

The Austrian legislation does not contain a provision explicitly prohibiting multiple discrimination – nonetheless, it is clearly prohibited by applying the “argumentum a minori ad maius principle”, implying that by way of illustration if discrimination on the ground of sex is prohibited and discrimination on the ground of age is prohibited then discrimination on the grounds of sex and age is prohibited as well.

The law does provide some specific rules on how to deal with cases of multiple discrimination. § 19a Federal-Equal Treatment Act and §§ 12/13, 26/13, and 51/10 Equal Treatment Act state:

“In a case of multiple discrimination this fact has to be considered when assessing the amount of the immaterial damages.”

The explanatory notes state that these regulations clarify that cases of discrimination based on multiple grounds need to be assessed in an overall view and that the claims cannot be separated or cumulated by grounds.

§ 9 (4) of the Federal Disability Equality Act and §7o of the Act on the Employment of People with Disabilities also give a hint in stating:

“In assessing the amount of the immaterial damages, the duration of the discrimination, the gravity of guiltiness, the relevancy of the adverse effect and multiple discrimination have to be taken into account.”

In Austria, there is not a lot of case law dealing explicitly with multiple discrimination. In case Nr. 80bA63/09m from 22 September 2010 the Supreme Court explicitly points to multiple discrimination (in this case gender and ethnicity) but does not give many hints on how courts should deal with that phenomenon. Although, the court raises the question, whether, in cases of multiple discrimination, the court has to scrutinize every incident and every ground of discrimination to assess the amount of compensation for immaterial damages, it does not answer it for formal procedural questions.

### **2.1.3 Assumed and associated discrimination**

#### **a) Discrimination by assumption**

In Austria, the following national law (including case law) prohibits discrimination based on perception or assumption of what a person is:

Although assumed discrimination is not explicitly included in the legislation, the explanatory notes to the Gleichbehandlungsgesetz (Equal Treatment Act) are very clear in stating:

“The principle of equal treatment is applicable irrespective of the fact whether the reasons for the discrimination (e.g. race or ethnic origin) are factually given or only assumed.”

This is also reflected in case law like (most importantly) in Supreme Court decision Nr. 9ObA40/13t from 24 July 2013. In its decision, the Court reasoned that referring to an employee's "foreignness" in a harassing way, is constituting harassment on the basis of ethnic affiliation. It stated that the requirement of harassing activity being linked to a "protected characteristic" may not be interpreted too narrowly and that the characteristic of "ethnic affiliation" is not depending on the existence of real differences – the attribution by the harasser is enough. So discrimination on grounds of assumed characteristics is prohibited on federal level.

The wording of the Viennese Anti-Discrimination Act seems to possibly exclude assumed discrimination as its § 3 (1) defines direct discrimination: (...), *when a person – on the ground of one of the attributes listed - is put on a disadvantage in a comparable situation compared to another person to whom this attribute does not apply, did not apply or would not apply*. By inclusion of a hypothetical application of an attribute (arg: "would not") the scope might extend to assumed discrimination, nevertheless.

§ 3 of the Styrian Equal Treatment Act is quite inconsistent in its wording as it prohibits direct discrimination of a person "*on grounds of his/her gender, his/her ethnic affiliation, his/her religion or the faith, a disability, age or sexual orientation*". So one could interpret the use of possessive pronouns here as a differentiation regarding the grounds of gender, ethnicity and religion on the one hand and the other grounds on the other hand. It is rather sure that the legislator did not intend such differentiation but it might lead to the interpretation that discrimination based on assumed criteria might not be protected regarding certain grounds.<sup>35</sup>

#### b) Discrimination by association

In Austria, the following national law (including case law) prohibits discrimination based on association with persons with particular characteristics:

Discrimination by association is explicitly covered in:

- Equal Treatment Act (§§ 5/4, 6/4, 19/4, 21/4, 32/4, 35/3, 44/4, 46/4, 47/4);
- Federal-Equal Treatment Act §§ 4a/5 and 13a/4;
- Act on the Employment of People with Disabilities (§ 7b/5);
- Federal Disability Equality Act (§ 4/2).

In all those paragraphs the norm reads:

"It is also to be deemed discrimination if a person is discriminated against on the ground of a close relation (or association) [Naheverhältnis] with a person on the ground of his/her (according to the respective context of the law: sex, ethnic affiliation, disability, religion or belief, age, sexual orientation)."

With these amendments the federal legal situation is clearly in line with the requirements of the judgment in Case C-303/06 *Coleman v Attridge Law and Steve Law*. Provincial legislators are required **to amend** their laws according to §§ 44/4 and 47/4 Equal Treatment Act.

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<sup>35</sup> E.g.: if a person of Iraqi origin is refused entry into a governmental canteen with the words 'No Turks in here!', the defendant could argue that the basis of the denial was not the claimants ethnic affiliation as he is not Turkish. The problem here is mainly that it is one principle/assumption of legal interpretation that the lawmakers do not use different wording for no reason.

In a first case of discrimination by association<sup>36</sup> regarding access to a club in the company of “migrants”, the courts of two instances had no problem whatsoever with detecting this form of discrimination and apply the law accordingly.

In the Viennese Anti-Discrimination Act protection remains restricted to relatives only. As relatives the law defines: the spouse, all relatives in direct line, the collateral relatives of second degree, even if the relation is illegitimate, brothers and sisters-in-law, adoptive parents and adopted children as well as common law spouses and their children and registered or non-registered same-sex partnerships.

## **2.2 Direct discrimination (Article 2(2)(a))**

### **a) Prohibition and definition of direct discrimination**

In Austria, direct discrimination is prohibited in national law. It is defined in line with the directives in all special laws against discrimination. These are:

- §§ 17/1, 18, 31/1 of the Equal Treatment Act;
- § 13 of the Federal-Equal Treatment Act;
- § 7b/1 of the Act on the Employment of People with Disabilities;
- and § 4/1 of the Federal Disability Equality Act.

### **b) Justification of direct discrimination**

In general, direct discrimination cannot be justified but for the exceptions provided by the directives (genuine and determining occupational requirement, exceptions for the age ground, ethos-based enterprise and positive measures). See:

- §§ 20, 22, 34 of the Equal Treatment Act;
- §§ 1/2, 13b of the Federal-Equal Treatment Act;
- §§ 7c/3, 7c/9 of the Act on the Employment of People with Disabilities;
- and § 7 of the Federal Disability Equality Act.

However, the regulation on “discrimination-free advertising of housing” in § 36 Equal Treatment Act allows for a justification of differentiation regarding ethnicity and gender if this is *“justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Especially, it is not deemed discrimination if the provision of housing constitutes a specially close or intimate relationship of the parties or their relatives”*. While this might be in line with the Directive 2004/113/EC (recital 16 and Art. 4 fig. 5) in regard to the gender ground and have some legitimate aspects in regard to Art. 8 ECHR, it constitutes a breach of Directive 2000/43/EC concerning ethnic affiliation as it introduces an additional justification even for direct discrimination on that ground.

§ 4/6 of the Vorarlbergian Anti-Discrimination Act and § 2/7 of the Viennese Anti-Discrimination Act allow justification of indirect as well as direct discrimination regarding access to and provision of goods and services and all the fields except employment for all grounds. The formula for this was taken from the justification of indirect discrimination (*...if justified by a legitimate aim and the means of achieving that aim is appropriate and necessary*). As a result, even direct discrimination (including ethnic affiliation) can be justified that way in Vorarlberg and Vienna. This constitutes a breach of Directive 2000/43/EC.

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<sup>36</sup> Austria, Regional Civil Court of Vienna (Landesgericht für Zivilrechtssachen Wien), Nr. 36 R 292/15f, 10 December 2015.



### 2.2.1 Situation testing

#### a) Legal framework

In Austria, situation the law is silent about the question whether testing is permitted in national law. There is, nevertheless, a provision in § 272 Civil Procedure Code generally allowing the judge to assess freely all the evidence there is to come to his/her judgment on the case.

#### b) Practice

In Austria, situation testing is (rarely) used in practice.

Situation testing has so far only been used by NGOs and only in relation to prove racist “entrance policies” in bars and restaurants. It has not been used for litigation purposes mainly, but for awareness raising in cooperation with media. So there is no case law available on this practice. One recent study<sup>37</sup> used a form of situation testing (sending standardized job applications) in recruitment procedures for the purpose of their study and found significant and widespread discrimination.

### 2.3 Indirect discrimination (Article 2(2)(b))

#### a) Prohibition and definition of indirect discrimination

In Austria, indirect discrimination is prohibited in national law. It is defined. Indirect discrimination is prohibited and defined in line with the directives in all laws aiming to implement those. These are:

- §§ 17/1, 18, 31/1 Equal Treatment Act;
- § 13 Federal-Equal Treatment Act;
- § 7b/1 Act on the Employment of People with Disabilities;
- § 4/1 Federal Disability Equality Act.

For example, the Equal Treatment Act defines in its § 19/2:

“Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of an ethnic origin or persons with a particular religion or belief, a particular age or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

The laws dealing with disability also state that inaccessibility (barriers) can constitute indirect discrimination (e.g. § 7 c/ 2 Act on the Employment of People with Disabilities and § 5/2 Federal Disability Equality Act).

#### b) Justification test for indirect discrimination

The justification test is compatible with the directives and their application by the CJEU. Case law is scarce on indirect discrimination (mostly gender related) but so far the application seems not problematic.

#### c) Comparison in relation to age discrimination

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<sup>37</sup> Helmut Hofer, Gerlinde Titlbach, Doris Weichselbaumer, Rudolf Winter-Ebmer *Diskriminierung von MigrantInnen am österreichischen Arbeitsmarkt (Discrimination of migrants at the Austrian labour market)*, Institute for Advanced Studies, Vienna 2013.

National law does not explicitly state how a comparison has to be made. The law quotes the directive only in this respect. There is developing case law on age discrimination mainly in the areas of unfair dismissal and equal pay. At least, case law assured that the comparator can be a hypothetical one.<sup>38</sup>

### **2.3.1 Statistical evidence**

#### **a) Legal framework**

In Austria, there are national rules permitting data collection.

In general, data can be used in court. There are certain restrictions to collect data, though.

The Austrian Act on Data Protection<sup>39</sup> [Datenschutzgesetz] defines in its § 4/2 as “sensitive data” the following: racial and ethnic origin, political opinion, membership of a trade union, religious or philosophic belief, health and sexual life (implicitly including sexual orientation).

These data can only be collected after undergoing a detailed special procedure and assessment by the Data Protection Office (Datenschutzbehörde). So we can say that it is not completely prohibited by law to collect these data, but employers will generally not be able to prove any sufficient justification for being allowed to collect these data of their employees. They will nevertheless have records on the number and the classification of their disabled employees, as this is important information in regard to their specific labour law position (dismissals protection, quota limits). It is possible to collect data on country of birth, citizenship (employers have to have records on citizenship) and language.

In Austria, some information of this kind is collected by nationwide censuses (at intervals of 10 years, the most recent in 2011). The census contains questions about: county of birth, citizenship, colloquial language, age, marital status and religious faith; questions directly concerning ethnic origin, disability or sexual orientation are not included. Hints about nationally recognised ethnic minorities are included via the question about the colloquial language used in everyday conversation.

The laws do not give any new possibility to claimants of discrimination cases to gain additional information from the respondent. So this data will still be primarily used by respondents to prove that discrimination has not occurred. The case is different for the “National Equality Body” which can obtain any kind of information from employers or administrative bodies they find useful. These data will nevertheless not be given to any individual complainants for use in court, as the bodies are bound by confidentiality rules.

There is a whole set of different definitions of disability throughout the country due to the federalist structure<sup>40</sup>. In regard to people with disabilities in the workforce there is a legal system to determine whether someone is disabled (resulting in a percentage classification; e.g. 75% disabled) according to the Act on Employment of People with Disabilities. As there is an obligation for all companies with more than 25 employees to employ at least one disabled person, this data is also collected and kept by the Service Office of the Ministry of Social Affairs (Sozialministeriumservice).

Most other issues concerning disability are dealt with by the provinces, records and files are kept in the respective offices and not administered centrally.

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<sup>38</sup> See Supreme Court, Case 9ObA113/12a, 25 June 2013.

<sup>39</sup> Austria, Act on Data Protection, 2000, BGBl I Nr. 165/1999, last amended by BGBl I Nr. 132/2015.

<sup>40</sup> See in more detail in section 2.1.1. of this report.

Only statistics on disability are used for designing positive action measures. In regard to the specific rights of recognised national minorities the results of the census might be relevant to determine whether a certain municipality has to enact special measures in relation to members of the minority community (e.g. put up bilingual sign-posts).

In Austria, statistical evidence is permitted by national law in order to establish indirect discrimination. It follows the general and very broad admissibility conditions of evidence in court.

b) Practice

In Austria, statistical evidence in order to establish indirect discrimination is not used in practice.

There is a general lack of awareness about indirect discrimination and the possibility or necessity to use statistical data as evidence. There is no developed tradition to use examples from other jurisdictions in court. This can traditionally be changed by a ruling of the CJEU or ECHR.

## **2.4 Harassment (Article 2(3))**

a) Prohibition and definition of harassment

In Austria, harassment is prohibited in national law. It is defined.

In Austria, harassment does explicitly constitute a form of discrimination. Harassment is dealt with in the workplace and beyond – for the whole material scope of Directive 2000/43/EC.

Harassment is prohibited in the following norms:

- §§ 17/1, 18, 31/1 Equal Treatment Act;
- § 13 Federal-Equal Treatment Act;
- § 7b/1 Act on the Employment of People with Disabilities;
- § 4/1 Federal Disability Equality Act.

Harassment is defined in the following norms:

- §§ 21/1, 21/2, 35/1 Equal Treatment Act;
- § 16 Federal-Equal Treatment Act;
- § 7d Act on the Employment of People with Disabilities;
- § 5/4 Federal Disability Equality Act.

So protection against harassment is provided for, when a person at the workplace is harassed by the employer himself/herself or if the employer is guilty not to use appropriate means given by legal act, collective agreements or the employment contract, to take remedial action when the employee is harassed by any third person, even beyond a workplace relationship.

§ 21 (2) of the Equal Treatment Act defines:

“Harassment is unwanted conduct related to one of the grounds listed in §17 with the purpose or effect of infringing a person’s dignity, is unacceptable, undesirable and offensive (indecent) to the person affected and with the purpose or effect of creating an intimidating, hostile or humiliating environment for the person affected.”

Harassment is seen as always targeting individuals, or groups of individuals who are actually targeted and/or affected by the harassing activity.  
The provisions protecting against harassment on the ground of disability as well as the respective provincial provisions use the same wording.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Austria the employer and the employee are liable.

Generally, employers or service providers can be held liable for the actions of employees according to the general norms in civil law in cases where a contractual relationship already exists between the service-provider and the client. For cases of an employment relationship § 21 of the Equal Treatment Act states in sub.para. (1) fig. 2 that it is deemed a form of discrimination if the employer culpably neglects to produce relief in cases of harassment through third persons (including co-workers and clients). The individual harasser or discriminator can be held liable in any case. The employer is always liable for discriminatory decisions of superiors affecting their subordinates.

## **2.5 Instructions to discriminate (Article 2(4))**

a) Prohibition of instructions to discriminate

In Austria, instructions to discriminate are prohibited in national law. Instructions are not defined. The prohibition can be found in the following norms:

- §§ 17/1, 18, 31/1 Equal Treatment Act;
- § 13 Federal-Equal Treatment Act;
- § 7b/1 Act on the Employment of People with Disabilities;
- § 4/1 Federal Disability Equality Act.

Instruction to discriminate is described as being deemed to be discrimination just as the directives demand. Instruction to harassment is also seen as discrimination in the federal laws as well as by respective provincial laws. The definitions can be found here:

- §§ 21/3, 32/3 *Equal Treatment Act*;
- § 13a/3 Federal-Equal Treatment Act;
- § 7c/8 Act on the Employment of People with Disabilities;
- § 5/5/1 Federal Disability Equality Act.

The legislation does not go beyond the minimum requirements set out in the directives. There is a separate provision penalising incitement (§ 283 Criminal Code) but this requires definitely a more intense and dangerous behaviour than instructions to discriminate in the sense of the Directives.

In Austria, instructions do explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Austria, the instructor and the discriminator are liable.

In general, employers or service-providers can be held liable for the actions of employees according to the general norms in civil law in cases where a contractual relationship already exists between the service-provider and the client. For cases of an employment relationship § 21 of the Equal Treatment Act states in sub.para. (1) fig. 2 that it is deemed a form of discrimination if the employer culpably neglects to produce relief in cases of harassment through third persons (including co-workers and clients). The

individual direct harasser or discriminator (employee or third person) can be held liable in any case. The employer is always liable for discriminatory decisions of superiors affecting their subordinates.

## **2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)**

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Austria, the duty to provide reasonable accommodation is included in the law. It is defined in specific laws on federal level and in the provincial legislation accordingly. The duty defined in the directive – referring to employment - is implemented by:

§ 6 of the Act on the Employment of People with Disabilities, which states:

“Employers are obliged to take the appropriate and according to individual cases the necessary measures to enable persons with disabilities to enjoy access to employment or occupation, to promotion and to participate in vocational training as well as in in-service training, unless such measures would pose a disproportionate burden on the employer. Such burden shall not be deemed disproportionate if it can sufficiently be compensated by public aid funds according to federal or provincial regulations.”

A failure to meet this obligation is deemed indirect discrimination unless the removal of conditions which constitute the disadvantage, especially of barriers would be illegal or would pose an unreasonable and disproportionate burden on the employer.

§ 7c of the Act on the Employment of People with Disabilities states:

“It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers<sup>41</sup> would be illegal or would pose an unreasonable and disproportionate burden on the employer. When testing whether a burden is disproportionate, the following has to be taken into account in particular:

- the necessary effort to eliminate the conditions constituting the disadvantage;
- the economic capacity of the employer;
- public financial assistance available for the necessary improvements;
- the time span between the coming into force of this Act and the alleged discrimination (this aspect meaning that by time passing since the enactment it is becoming less likely to qualify an act as a disproportionate burden)

In case the removal of conditions which constitute the disadvantage turns out to be a disproportionate burden in this sense it shall still be deemed discrimination if the employer failed to improve the situation of the affected person at least in a considerable way in order to reach the best possible approximation to equal treatment.

When assessing whether certain circumstances constitute indirect discrimination it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent it has been complied with. Premises or other facilities, means of transport, technical equipment, information systems or other dedicated spheres of life shall be deemed accessible [barrierefrei] if they can be

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<sup>41</sup> The term 'barriers' is not defined or specified by law, it nevertheless seems that the legislator wants it to be interpreted in a broad sense, to include physical, technological barriers and daunting procedures.

accessed and used by people with disabilities in a customary way, unassisted and without extra difficulty.”

b) Practice

Under the Act on the Employment of People with Disabilities, employers (or people with disabilities) may apply for grants or loans compensating for special costs related to the employment of people with disabilities (technical appliances, personal assistance, training, creation of suitable jobs, wage). The decision whether or not grants, loans, or wage subsidies are eventually accorded, lies in the unfettered discretion of a specific fund (Ausgleichstaxfonds) administered by the Minister for Labour Social Affairs and Consumer Protection.

The idea of reasonable accommodation is not completely new to the Austrian legal system. Even without specific legislation, over the last decades, however, courts have developed guidelines involving aspects of “reasonable accommodation”, at least in the context of dismissal. When ruling upon the lawfulness of a dismissal, the Administrative High Court as well as the Supreme Court<sup>42</sup> has consistently held that an employer may not dismiss instantaneously if the employee has lost the physical or mental aptitude necessary to carry on with the job.<sup>43</sup> The employers’ duty to care for the employees (Fürsorgepflicht) demanded — so the courts ruled — otherwise.

Under that duty, employers must first try to adjust the employee’s duties (adjustments with regard to physical requirements of the job, stress factors, time, place, working environment, colleagues, technical appliances, etc.).

Dismissal ought to be regarded as a last resort: “Dismissal on account of incompetence must take place only if the employee has lost the ability to do his or her former job and the ability to perform well in another position that is reasonable and adequate, both from the perspective of the employer and the employee.”

The employers’ duty to care (Fürsorgepflicht) is activated only when employees can be expected (if necessary: after re-training) to be able to fulfil the new terms of their contract.<sup>44</sup> The larger the number of employees is, the stricter is the employer’s duty to make reasonable adjustments.<sup>45</sup> Dismissal must never be pronounced solely on account of an employee’s disability.<sup>46</sup> If (suitable) other positions are in principle at hand the employer must even consider assigning a post that gives title to an increased rate of pay.<sup>47</sup>

Allowances and grants available under the Act on the Employment of People with Disabilities are to be taken into account when the “reasonableness” of adjustments is to be judged.<sup>48</sup> However:

The employer is not obliged to create a “new” post in the company, specifically tailored to meet the needs of the employee. A respective case decided by the Administrative High Court is clearly in line with this strait of case law. In this case the employment of a person who became unable to fulfil the duties of his post was discontinued and the court

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<sup>42</sup> It is up to the Administrative High Court (*Verwaltungsgerichtshof*) to decide upon the lawfulness of a dismissal if the employee is covered by the *Behinderteneinstellungsgesetz*; otherwise the decision lies with the Supreme Court (*Oberster Gerichtshof*).

<sup>43</sup> See, e.g., Supreme Court (*Oberster Gerichtshof*) (*OGH*) 9 ObA 18/92, 29 March 1992; *OGH* 8 ObA 188/00f 11 January 2001; Administrative High Court (*VwGH*) 89/09/0147, 22 February 1990; *VwGH* 90/09/0139, 25 March 1991; *VwGH* 97/08/0469, 4 October 2001.

<sup>44</sup> *OGH* 9 ObA 18/92, 29 April 1992.

<sup>45</sup> *OGH* 9 ObA 18/92, 29 April 1992.

<sup>46</sup> *VwGH* 89/09/0147, 22 February 1990.

<sup>47</sup> *OGH* 9 ObA 18/92, 29 April 1992.

<sup>48</sup> *VwGH* 99/11/0246, 14 December 1999.

found no discrimination, considering that redeployment to another post was not possible.<sup>49</sup>

And if dismissal seems necessary to prevent the company's bankruptcy or other grave disturbances, the employee's interests are usually outweighed by the interests of the employer.<sup>50</sup>

The Act on the Employment of People with Disabilities explicitly demands that support available under § 6(2) Act on the Employment of People with Disabilities (grants, loans) is to be taken into account when the employers' and the employees' interests are to be balanced. The Act on the Employment of People with Disabilities also provides that an employer cannot reasonably be expected to continue employment if

- the work formerly allotted under contract becomes redundant and assigning a new position involved a heavy burden (erheblicher Schaden);
- the person with disabilities is no longer able to fulfil the contract and assigning a new position involved a heavy burden;
- the person with disabilities persistently breaches the terms of the contract and continuing employment undermined work discipline.

c) Definition of disability and non-discrimination protection

The definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Austria, there is a duty to provide reasonable accommodation in areas other than employment for people with disabilities.

The Federal Disability Equality Act provides for protection against direct and indirect discrimination in the following fields:

- The whole administration of the Federation including the exertion of fiscal rights of the Federation (the Federation as bearer of private rights). [§ 2/1 Federal Disability Equality Act];
- The access to and supply of goods and services which are available to the public as far as the matter is covered by Federal competence covering all legal relationships including their initiation and conclusion as well as the claiming or assertion of benefits outside a legal relationship. [§ 2/2 Federal Disability Equality Act].

Indirect discrimination is defined in the Federal Disability Equality Act as:

Indirect discrimination shall be taken to occur where apparently neutral provisions, criterions or practices or characteristics of constructed areas [Merkmale gestalteter Lebensbereiche]<sup>51</sup> would put people with disabilities at a particular disadvantage compared with other persons, unless that provisions, criterions or practices or characteristics of constructed areas is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary [§ 5(2) Federal Disability Equality Act].

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<sup>49</sup> See Administrative High Court (VwGH), 2006/12/0223, 17 December 2007.

<sup>50</sup> See, e.g., Administrative High Court (VwGH) 89/09/0147, 22 February 1990; 2000/11/0096, 11 June 2000; 97/08/0469, 4 October 2001.

<sup>51</sup> This rather obscure wording obviously tries to be as broad as possible including physical barriers and technical equipment.

So, generally, the right to reasonable accommodation is combined with the requirement not to indirectly discriminate, as we see specified in § 6 Federal Disability Equality Act, which states:

- (1) It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers<sup>52</sup> would be illegal or would pose a disproportionate burden on the provider of goods or services. When testing whether a burden is disproportionate, the following has to be taken into account in particular:
  - the necessary effort to eliminate the conditions constituting the disadvantage;
  - the economic capacity of the person denying the discrimination;
  - public financial assistance available for the necessary improvements;
  - the time span between the coming into force of this Act and the alleged discrimination;
  - the effect of the disadvantage in regard to the general interests of the persons protected by this act;
  - concerning access to housing: the need of the person for the particular accommodation. This need has to be demonstrated by the person claiming access.
- (2) In case the removal of conditions which constitute the disadvantage turns out to be a disproportionate burden in this sense it shall still be deemed discrimination if the provider failed to improve the situation of the affected person at least in a considerable way in order to reach the best possible approximation to equal treatment.
- (3) When assessing whether certain circumstances constitute indirect discrimination it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent it has been complied with.
- (4) Premises or other facilities, means of transport, technical equipment, information systems or other dedicated spheres of life shall be deemed accessible [barrierefrei] if they can be accessed and used by people with disabilities in a customary way, unassisted and without extra difficulty."

So generally, the protection is broad as it covers the whole direct competence of the Federation in regard to the services the Federation provides. It seems quite clear that this includes the areas of social security and healthcare, education, access to and supply of goods and services which are available to the public, housing, public spaces and infrastructures within Federal competence.

When assessing the practical interpretation of the scope of protection the outcome of some confidentially concluded dispute resolution processes seem to show that the Federation accepts this wide scope of protection while one case<sup>53</sup> shows the practical limitations of it. In this case the Court basically stated that moving a newly introduced public office (here "service for citizens") into a historic building which is not accessible to a user of a wheelchair does not constitute discrimination and not trigger the duty to reasonable accommodation to the extent that accessibility was safeguarded, as "the law only applies to newly built barriers."

One specific problem of protection lies in the Federal structure of the Austrian legal order where the competences in the areas of social security and health care, education and infrastructure are split between the Federation and the provinces. In all provinces but Lower Austria full protection including reasonable accommodation is provided for in all the areas mentioned. So, for example, in a primary school maintained by the province of Lower Austria or a local community of Lower Austria, no protection against discrimination

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<sup>52</sup> The term 'barriers' is not defined or specified by law, it nevertheless seems that the legislator wants it to be interpreted in a broad sense, to include physical, technological barriers and daunting procedures.

<sup>53</sup> Viennese Civil Provincial Court, M.L. vs. The Republic of Austria, Nr. 36 R96/12b, 5 December 2012.



in regard to disability and no duty to provide reasonable accommodation in the field of education exist whereas in other institutions of the same kind in other provinces a full protection is guaranteed. This is an important problem as the provinces are important operators of pre-school education institutions (kindergartens), schools, hospitals and infrastructure and largely competent for matters of social security.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Austria, failure to meet the duty of reasonable accommodation does count as indirect discrimination.

Courts cannot order actual measures regarding reasonable accommodation – only financial compensation can be requested for the failure to meet this duty. This corresponds to the general decision the Austrian Lawmaker made for all discrimination claims outside an existing work-relationship<sup>54</sup> by allowing only financial compensation but no restitution in natura and no further sanction are allotted. The idea behind that is to not force someone to conclude a contract with anyone by law (apart from existing duties to contract; like for monopolists, etc.). The shift of the burden of proof is applied to reasonable accommodation as it is to indirect discrimination (§ 7p Act on the Employment of People with Disabilities and § 12 Federal Disability Equality Act).

f) Duties to provide reasonable accommodation in respect of other grounds

In Austria, there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

Only the Viennese Anti-Discrimination Act includes the concept of “disproportionate burden” for all grounds (§ 3a), by that the law implicitly introduces the duty to reasonable accommodation for all grounds. In its § 3a/3 states:

“Indirect discrimination shall be deemed to occur when the complete removal of conditions which led to the disadvantage qualifies as disproportionate burden as stated in sub para 2 but there is a failure to implement reasonable measures in order to achieve at least significant improvement of the situation of the respective person in the sense of a maximally possible approximation to equal treatment.”

There is no case law on this provision so far. Apart from this, reasonable accommodation does not explicitly exist as a concept for grounds other than disability within the Austrian legal framework.

g) Accessibility of services, buildings and infrastructure

In Austria, national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

The Federal Disability Equality Act provides for protection against direct and indirect discrimination (which includes inaccessibility as a possible means of discrimination) in the following fields:

- The whole administration of the Federation including the exertion of fiscal rights of the Federation (the Federation as bearer of private rights). [§ 2/1 Federal Disability Equality Act];

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<sup>54</sup> The only exception to this rule is that in a case of discriminatory termination of the employment the claimant can choose whether to maintain the employment relationship or opt for compensation. Still, concrete measures regarding reasonable accommodation cannot be ordered by court.

- The access to and supply of goods and services which are available to the public as far as the matter is covered by Federal competence covering all legal relationships including their initiation and conclusion as well as the claiming or assertion of benefits outside a legal relationship. [§ 2/2 Federal Disability Equality Act].

Step by step improvement:

§ 19 of the Federal Disability Equality Act contains important restrictions in regard to time and cost of removal of barriers.

Sections 2 and 3 of § 19 state that until December 31st 2015 a physical barrier in a building or in a traffic facility or rail vehicle does not constitute discrimination if the building or facility has been constructed according to a permission issued before January 1st 2006.

Section 4 states that that until December 31st 2008 a physical barrier in a means of public transport (except rail vehicles) does not constitute discrimination if the facility has been constructed according to a permission issued before January 1st 2006.

Section 5 states that notwithstanding the above sections, there might be discrimination in case,

- the removal of the barrier does not cost more than EUR 1000; or
- regarding buildings, traffic facilities and rail vehicles, if the alleged discrimination happens after January 1st 2010 and the removal of the barriers does not cost more than EUR 3000; or
- the alleged discrimination happens after January 1st 2013 and the removal of the barriers does not cost more than EUR 5000.

By the end of 2010 the federal lawmaker introduced an important setback in this development. By Federal Law Gazette I Nr. 111/2010 an addition to § 8/2 was enacted (which entered into force on 1 January 2011) stating that: All federal ministries, the presidents of the Constitutional Court, the Administrative High Court, the Court of Auditors, the National Council, the Federal Council (Bundesrat) as well as the National Ombudsman Institution have to publish their plans for improvement of accessibility on their respective websites. When the plan is published, indirect discrimination by physical barriers in buildings utilised by the Federation is only deemed to occur, when the removal of these barriers is scheduled in that plan and when this has not been implemented until 31 December 2019.

By this, basically, the Federal Government and some federal institutions have reached a status of impunity in discrimination issues connected with physical barriers until 2020.

There have been three important cases on the subject so far. One was concerning a Bakery in Vienna, where a newly built stair at the entrance was found to be discriminatory.<sup>55</sup> The second case concerned the production of a DVD by the Austrian Broadcasting Corporation (ORF) without subtitles.<sup>56</sup> Here the Court found discrimination of deaf customer. A third case<sup>57</sup> shows the practical limitations of protection. In this case the Court basically stated that moving a public office (here "Service for Citizens") into a historic building which is not accessible to a user of a wheelchair does not constitute discrimination and not trigger the duty to reasonable accommodation to the extent that accessibility was safeguarded, as "the law only applies to newly built barriers."

<sup>55</sup> Josefstadt District Court, Decision Nr. 4C 707/11 z-14, 14 November 2011.

<sup>56</sup> Viennese Commercial Court, L.H. vs. ORF, Nr. 60R93/10x, 08 September 2011.

<sup>57</sup> Viennese Civil Provincial Court, M.L. vs. The Republic of Austria, Nr. 36 R96/12b, 05 December 2012.

In Austria, national law does not contain a general duty to provide accessibility by anticipation for people with disabilities. The ratification of the Convention on the Rights of Persons with Disabilities CRPD does include some duties in that respect, though.

A first complaint (under the Optional Protocol to CRPD) was brought before the Committee for the Rights of Persons with Disabilities by Mr F. a blind citizen of Linz/ Upper Austria and the Litigation Association of NGOs Against Discrimination. The claimant is visually impaired and uses some stops of the extended railway network of tramline no. 3 in Linz both for private and business purposes. As the city of Linz has stopped to equip its tram stops with digital audio systems, which reproduce the written text of the digital information displays by pressing a button of a hand-held transmitter, information for passengers is not available and accessible for the claimant as it is to passengers without visual impairment. The complaint was brought after all available domestic remedies had been exhausted.

In its communication,<sup>58</sup> the Committee saw that the State party has failed to fulfil its obligations under article 5, paragraph 2, and article 9, paragraph 1 and paragraph 2, (f) and (h) of the Convention. In that sense, it made the following recommendation: "the State party is under an obligation to remedy the lack of accessibility for the complainant to the information visually available in all lines of the tram network."

Further, the CRPD stated that the State party is under an obligation to take measures to prevent similar violations in the future, including:

- Ensuring that the existing minimum standards for accessibility of public transport guarantee the access of all persons with visual and other types of impairments to the live information visually available to other users of the tram and of all other forms of public transport. In this context, the Committee recommends that the Austria creates a legislative framework containing concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and the necessary adjustments to enable access by persons with visual impairment to the information that is visually available. The State party should also ensure that all newly procured tram lines and other public transport networks are fully accessible for persons with disabilities;
- Ensuring that appropriate and regular training on the scope of the Convention and its Optional Protocol, including on accessibility for persons with disabilities, is provided to all service providers involved in the design, construction and equipment of public transport networks, to guarantee that future networks are built and equipped in compliance with the principle of universal design;
- Ensuring that disability rights laws concerned with non-discriminatory access in areas such as transport and procurement include access to ICT and the many goods and services central to modern society that are offered through ICT. The Committee recommends that the review and adoption of these laws and regulations are carried out in close consultation with persons with disabilities and their representative organizations (article 4, paragraph 3), as well as all other relevant stakeholders, including members of the academic community and expert associations of architects, urban planners, engineers and designers. Legislation should incorporate and be based on the principle of universal design, and it should provide for the mandatory application of accessibility standards and for sanctions for those who fail to apply them.

#### h) Accessibility of public documents

There are no general rules on these subjects beyond the duty to provide reasonable accommodation. Many services are provided under the title of "personal assistance". For

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<sup>58</sup> CRPD Communication Nr. 21/2014, 04 September 2015.

example deaf persons can apply for the provision of sign language interpreters for their use up to a certain contingent and blind people can get funds to acquire a personal computer to make most of their correspondence readable for them. It remains subject to judicial interpretation whether and how the lack of generally available information in an accessible way (easy language, sign language, braille or audible texts etc.) may be seen as barriers in the context of the legislation and whether this might lead in the long run to a de facto accessibility by anticipation in this regard.

The Federation offers sign language interpretation to all deaf students at tertiary level education.

### **3 PERSONAL AND MATERIAL SCOPE**

#### **3.1 Personal scope**

##### **3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)**

In Austria, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

##### **3.1.2 Natural and legal persons (Recital 16 Directive 2000/43)**

###### **a) Protection against discrimination**

In Austria, the personal scope of anti-discrimination law covers natural persons for the purpose of protection against discrimination. Whether legal persons are covered on federal level is to be decided by judicial review as the legislation is silent on the matter.

The main provisions can be found in:

- §§ 17, 18, 31 Equal Treatment Act, (for gender, ethnic affiliation, religion, belief, age, and sexual orientation);
- § 4 Federal Disability Equality Act (for disability).

Two provincial legislations are also explicitly protecting legal persons,<sup>59</sup> if the discrimination is directed against its members, partners or organs on one of the protected grounds in connection with their activities for the legal person. It is unclear whether a general formula<sup>60</sup> used in all other provincial pieces of legislation is only clarifying the liability of legal persons for discriminatory acts or also extends to their protection.

###### **b) Liability for discrimination**

In Austria, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination.

The main provisions on liability can be found in:

- §§ 17, 18, 31 Equal Treatment Act, (for gender, ethnic affiliation, religion, belief, age, and sexual orientation);
- § 4 Federal Disability Equality Act (for disability).

Both, natural and legal persons can be held liable for offences in all involved laws.

##### **3.1.3 Private and public sector including public bodies (Article 3(1))**

###### **a) Protection against discrimination**

In Austria, the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination. The main provisions can be found here:

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<sup>59</sup> § 24/3 Burgenlandian Anti-Discrimination Act; Burgenland LGBl. Nr. 84/2005 ala Nr. 82/2016; § 1/2 Upper Austrian Anti-Discrimination Act, Upper Austria LGBl. Nr. 50/2005 ala Nr. 90/2013.

<sup>60</sup> "This prohibition of discrimination applies to other natural or legal persons in as far as their activities are regulated by provincial legislation." (e.g. in § 28/1 Salzburgian Anti-Discrimination Act, Salzburg LGBl. Nr. 31/2006 ala Nr. 49/2016.

- §§ 16-18, 21, 23/1, 25, 27, 30, 31, 35, 36, 39 Equal Treatment Act (private sector);
- §§ 13, 16 Federal-Equal Treatment Act (public sector);
- §§ 7f-7i Act on the Employment of People with Disabilities;
- §§ 2/1, 4, 8 Federal Disability Equality Act (public sector);
- §§ 2/2, 4 Federal Disability Equality Act (private sector).

b) Liability for discrimination

In Austria, the personal scope of anti-discrimination law covers private and public sector including public bodies for the purpose of liability for discrimination. The main provisions regarding liability can be found here:

- §§ 24, 26, 37, 38, Equal Treatment Act (private sector);
- §§ 2, 13, 16a, 17 - 19 Federal-Equal Treatment Act (public sector);
- §§ 7f -7i Act on the Employment of People with Disabilities;
- § 9 Federal Disability Equality Act.

## 3.2 Material scope

### 3.2.1 Employment, self-employment and occupation

In Austria, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds.

### 3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In Austria, national legislation prohibits discrimination in the following areas: conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds, in both private and public sectors, as described in the directives.

For the private sector, this is covered by the Equal Treatment Act. For the public sector access to employment is covered by the Federal-Equal Treatment Act and by respective provincial acts for the public employment in provinces and municipalities.

The national anti-discrimination legislation does very clearly and explicitly cover these areas. The protection regarding self-employment was even broadened and adapted to the requirement set out in Directive 2010/41/EU (regarding equal treatment between men and women in regard to self-employment).

The main provisions can be found here:

- §§ 16, 17, Equal Treatment Act (private sector);
- § 13 Federal-Equal Treatment Act (public sector);
- § 7b Act on the Employment of People with Disabilities.

### **3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))**

In Austria, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals, for all five grounds and for both private and public employment.

For the private sector, this is covered by the Equal Treatment Act (§ 17/1/6). For the public sector employment it is covered by the Federal-Equal Treatment Act (§ 13/1/6) and by respective provincial acts for the public employment in provinces and municipalities. For the ground of disability both sectors are covered by the Act on the Employment of People with Disabilities (§ 7b/1).

#### **3.2.3.1 Occupational pensions constituting part of pay**

Occupational pensions can be either seen as falling under pay or voluntary social benefits (depending on the system used) and both are included in the scope of protection.

### **3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))**

In Austria, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

In regard to these areas, the Austrian implementation clearly meets the requirements set out in the directives with the limitation that for cases of discrimination of university-students [apart from access to university] the legislation lacks any sanction (lex imperfecta). This means that all forms of discrimination (including harassment) against students who are admitted to the university are prohibited but cannot be legally redressed. The Federal-Equal Treatment Act explicitly protects the access to university (§ 42) without clarifying whether this is defined as vocational training, education or access to a service.

The Equal Treatment Act provides for protection against discrimination in relation to: measures of vocational training, advanced vocational training and retraining (§ 17), and access to vocational guidance, vocational training, advanced vocational training and retraining beyond a working relationship (§ 18).

The Act on Employment of People with Disabilities (§ 7b) also deals with the whole scope of protection.

### **3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))**

In Austria, national legislation prohibits discrimination in the following areas: membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

The relevant protection clause was literally taken from the directive and incorporated into the Equal Treatment Act in § 18/2 and in § 7a/1/3 Act on Employment of People with Disabilities. This provides for protection on all grounds covered by Directive 2000/78/EC as all respective organisations are governed under civil law.

### **3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)**

In Austria, national legislation prohibits discrimination in the following areas: social protection, including social security and healthcare as formulated in the Racial Equality Directive.

On federal level § 31/3 of the Equal Treatment Act restricts the protection to discrimination on the ground of ethnic affiliation. § 31/3/1 quotes the directive literally without giving a clear interpretation of the terms used and without clearly defining the addressees of the regulations. The protection on the ground of disability in the Federal Disability Equality Act is so broadly formulated that it seems clear that social protection is included although judicial interpretation is needed to be absolutely sure.

On provincial level, most provinces explicitly cite the directive and fully forbid discrimination in all these fields on the grounds of ethnic affiliation, religion or belief, disability, age, sexual orientation and gender. This implementation goes beyond the minimum requirements of the directives. Only Lower Austrian legislation restricts the protection to cover only ethnic affiliation.

### **3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)**

In Austria, national legislation prohibits discrimination in the following areas: social advantages as formulated in the Racial Equality Directive.

On federal level § 31/3/2 of the Equal Treatment Act restricts the protection to discrimination on the ground of ethnic affiliation. The protection on the ground of disability in the Federal Disability Equality Act is so broadly formulated that it seems clear that social advantages are included although they are not explicitly listed (although, judicial interpretation is needed to be absolutely sure.)

On provincial level, most provinces explicitly cite the directive and fully forbid discrimination in all these fields on the grounds of ethnic affiliation, religion or belief, disability, age, sexual orientation and gender. This implementation goes beyond the minimum requirements of the directives. Only Lower Austrian legislation restricts the protection to cover only ethnic affiliation.

In Austria, the lack of definition of social advantages does not raise problems. Initial problems with the interpretation seem solved since a judgment<sup>61</sup> on “commuters aid” in Lower Austria dealt intensively with the interpretation and was clear that it has to be interpreted in a broad sense – no matter how the advantage is officially named or whether there is an enforceable entitlement to it. The Court found discrimination on the basis of ethnic affiliation because the nationality of the claimant<sup>62</sup> was the only reason for rejection.

### **3.2.8 Education (Article 3(1)(g) Directive 2000/43)**

In Austria, national legislation prohibits discrimination in the following areas: education as formulated in the Racial Equality Directive.

Education is covered by § 31/3/3 of the Equal Treatment Act in regard to the wide federal competences. The provision succinctly states that nobody must be directly or indirectly discriminated against on the ground of ethnic affiliation in regard to education. This binds the state and private actors equally. The term education comprises all forms of

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<sup>61</sup> Provincial Court St. Pölten, Case Nr. 21 R 16/13f-13, 31 January 2013.

<sup>62</sup> The claimant qualified as a long-term resident under Directive 2003/109/EC.



education including higher and further education. The protection covers both state-run and private educational institutions. It is clear that regarding education, migrants must not be treated differently from nationals when applying anti-discrimination legislation. Exceptions are only possible when citizenship is a criterion for differentiation (like payment of tuition fees for non (EU-) nationals).

The protection regarding students at universities is limited to access to universities and harassment and lacks sanctions beyond these fields (lex imperfecta in § 42/1 Federal-Equal Treatment Act).

It is unclear whether the protection in the area of access to goods and services granted by the Federal Disability Equality Act (§ 2) also comprises Federal education in regard to the ground of disability. If education is regarded as a service available to the public then disability is also covered by its protection in relation to Federal competences.

There is no general protection against textbooks or teaching material that reproduce stereotypes or use discriminatory language. Only individuals could claim that the use of such material amounts to discrimination or harassment. These have not yet been challenged in court, though research<sup>63</sup> shows that many schoolbooks actually reinforce stereotypes and draw a heteronormative, exoticism and racist picture of the world.

On provincial level (with the exception of Lower Austria) the legal acts state that organs (civil servants and public contracted workers) under their legislation must refrain from any form of discrimination in regard to education. These general norms seem to be broad enough to cover the protection the directives demand for and beyond it as all protected grounds are covered.

#### a) Pupils with disabilities

In Austria, the general approach to education for pupils with disabilities does raise problems.

In regard to policy towards disability and education the last decade has brought a clear shift into the direction of integration not separation.

Many schools host so called "Integration classes" where students with or without disabilities are educated together. There are additional specialised teachers performing in such classes in order to safeguard progress and tailor made assistance. There exists a whole range of specific measures, comprising extra classroom assistance, adapted equipment and other accommodation measures. From 1994/95 to 2006/07 the number of pupils in "special schools" has decreased from 19.000 to 13.200 while the number of pupils in "integrated schooling" has increased from 4.731 to 13.741.<sup>64</sup> (No more up to date figures available, yet) The parents can choose between the two forms of education for their children with disabilities. It is a clear goal of the governmental policy to further support the integrated approach.

Austria's first report for CRPD<sup>65</sup> in 2010 states that for the last years, more than 50% of all children with special educational needs were educated in such integrated schools. The

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<sup>63</sup> See for example: Markom, C., Weinhäupl, CLAIMANT., Die anderen im Schulbuch, Vienna, 2007.

<sup>64</sup> See: Behindertenbericht 2008; Bericht der Bundesregierung über die Lage von Menschen mit Behinderungen 2008; [https://www.sozialministerium.at/cms/site/attachments/5/4/8/CH3434/CMS1450699045149/behindertenbericht\\_2008\\_II.pdf](https://www.sozialministerium.at/cms/site/attachments/5/4/8/CH3434/CMS1450699045149/behindertenbericht_2008_II.pdf), (last accessed 3 February 2017).

<sup>65</sup> Austria, State Party Report to the CRPD, 2010; [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUT%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUT%2f1&Lang=en), (last accessed 3 February 2017)

"National Action Plan regarding Disability"<sup>66</sup> was enacted by the Council of Ministers on 24 July 2012. This contains inter alia a clear commitment for further development of "inclusive schooling" instead of segregated "special schooling".

The concluding observations of the Committee RPD, issued in September 2013<sup>67</sup> expresses great concern, "that progress towards inclusive education in Austria appears to have stagnated" and "that the number of children in special schools is on the increase and that insufficient effort has been made to support the inclusive education of children with disabilities" (CRPD concluding observations para. 40). Although by law the parents are the ones to make the decision whether their child attends special or integrated school, in practice the opinions of experts are very often decisive for that decision. They often recommend special schooling.

#### b) Trends and patterns regarding Roma pupils

In Austria, there are few specific patterns existing in education regarding Roma pupils such as segregation.

Segregation in schools is not a topic touched upon intensively by public or scientific discourse in Austria. ECRI<sup>68</sup> finds in its report on Austria that the disadvantaged position of Roma, for the most part non-autochthonous Roma, in education at all levels plays a central role in excluding them from most other areas of public life.

ECRI criticises that funds available for local initiatives to improve access of Roma youth to education are reportedly extremely limited.

One problem in regard to Roma is that it is legally (and due to the historic burdens inflicted by Nazi-killings of Roma in concentration camps) not possible to obtain reliable quantitative data on Roma.

Segregation is also discussed in relation to primary schools where – especially in Vienna – there are concentrations of pupils who are not German native speakers in some areas. As most Roma in Austria are non-nationals or perceived as foreigners rather than as Roma specifically, this also affects them as they are more likely accepted in schools with a higher attendance of foreigners.

The main political discourse on this issue is xenophobic. Right-wing parties demand for upper limits of migrant children in schools and for comprehensive (German) language tests before admitting migrant children to school. Only a few schools try to address this situation with innovative and affirmative methods.

"Research indicates that 50% of the Roma pupils in Oberwart, where Austria's Roma born between 1975 and 1985 are concentrated, faced severe problems with school education during their first year in primary school. However, around 40% of younger Roma children (born after 1985) were doing well pursuing upper secondary and one (born in 1980) even higher education."<sup>69</sup> Most adult Roma suffer from serious education deficits. Education policy towards Roma is concentrating on youth whereas there are very few attempts to remedy the education deficits of adult Roma.

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<sup>66</sup> Austria, National Action Plan regarding Disability, 2012; <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=225>; (last accessed 3 February 2017).

<sup>67</sup> CRPD; concluding observations on Austria, 2013; [http://www.ohchr.org/Documents/HRBodies/CRPD/10thSession/CRPD-C-AUT-CO-1\\_en.doc](http://www.ohchr.org/Documents/HRBodies/CRPD/10thSession/CRPD-C-AUT-CO-1_en.doc); (last accessed 3 February 2017).

<sup>68</sup> ECRI Report on Austria, adopted 16 June 2015, published 13 October 2015, p 29, <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Austria/AUT-CbC-V-2015-034-ENG.pdf> (25 Februar 2017).

<sup>69</sup> See for this section: EUMC, Roma and Travellers in public education, report 2006.

More recent research<sup>70</sup> shows a positive trend for younger Roma to be involved in higher education and successful educational careers while the overall level of education is still below average.

Since the late 1990s some projects and initiatives try to improve the situation of the Roma in Oberwart. There are projects to bring Roma back into employment or self-employment and extracurricular private tutoring for Roma pupils.

### **3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)**

In Austria, national legislation prohibits discrimination in the following areas: access to and supply of goods and services as formulated in the Racial Equality Directive.

On federal level access to and supply of goods and services is included in the protection against discrimination on the ground of ethnic affiliation (§ 30 Equal Treatment Act).

In regard to disability the protection can be found in § 2/2 in connection with § 4 Disability Equality Act. The private as well as the public sector are bound by these norms. This includes accessibility to goods and services in a rather broad sense as shown by case law finding that a new stair at the entrance of a bakery<sup>71</sup> as well as the missing subtitles of a DVD<sup>72</sup> can constitute discrimination on the ground of disability.

The protection provided by all Provinces is implemented and even provided for the other grounds beyond ethnic affiliation of the Directive 2000/78/EC (except in Lower Austria where only ethnic affiliation is protected).

#### **3.2.9.1 Distinction between goods and services available publicly or privately**

In Austria, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association).

Case law has clarified the meaning of “available to the public”.<sup>73</sup>

The Court established:

“The term “available to the public” indicates some restriction of the goods and services covered but, according to the judgments of the ECJ, exceptions are always to be interpreted narrowly. Goods and services are available to the public whenever an offer is directed to an undefined group of potential customers. Only such offers are excluded from the principle of equal treatment which are directed towards a close circle of family and friends.”

### **3.2.10 Housing (Article 3(1)(h) Directive 2000/43)**

In Austria, national legislation prohibits discrimination in the following areas: housing as formulated in the Racial Equality Directive.

Migrants are not treated differently under anti-discrimination legislation and benefit equally from anti-discrimination law enforcement as nationals. There have been some

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<sup>70</sup> See: Luciak, M., Initiative Minderheiten (2014), *ROMBAS Studienbericht Zur Bildungssituation von Roma und Sinti in Österreich*, available at: [http://minderheiten.at/images/rombas\\_druck.pdf](http://minderheiten.at/images/rombas_druck.pdf) (accessed 28 April 2015).

<sup>71</sup> Josefstadt District Court, Decision Nr. 4C 707/11 z-14, 14 November 2011.

<sup>72</sup> Viennese Commercial Court, L. CLAIMANT. vs. ORF, Nr. 60R93/10x, 8 September 2011.

<sup>73</sup> Viennese Court of Commerce, decision 1R 129/10g, 19 January 2011.

political approaches to restrict access to municipal social housing to persons who speak a high level of German, only.<sup>74</sup>

§ 30/1 of the Equal Treatment Act clearly states that access to and supply of housing is covered by the protection regarding goods and services. However, the protection on federal level only extends to ethnic affiliation and gender.

The regulation on “discrimination-free advertising of housing” (§ 36 Equal Treatment Act), however, allows for a justification of differentiation regarding ethnicity and gender if this is

“justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Especially, it is not deemed discrimination if the provision of housing constitutes a specially close or intimate relationship of the parties or their relatives.”<sup>75</sup>

While this might be in line with the Directive 2004/113/EC (recital 16 and Art. 4 fig. 5) in regard to the gender ground, it constitutes a breach of Directive 2000/43/EC in regard to ethnic affiliation as it introduces an additional justification even for direct discrimination on that ground.

The protection of the Federal Disability Equality Act (§§ 2 – 5) also extends to housing. This protection is valid for “all legal relationships including their initiation and conclusion as well as the claiming or assertion of benefits outside a legal relationship.”

This constitutes a very broad scope for the protection of housing on the (important) federal level.

The provincial laws use the same quotation from the directive but in most cases<sup>76</sup> the scope of protection is extended to all grounds covered by the respective legislation. This is a very important regulation on the provincial level as the provinces are very important landlords. For example the Vienna Province is Austria’s biggest owner of housing space and the most important landlord in eastern Austria.

Provinces and municipalities have competence to govern zoning and building regulations. Therefore, in some parts of the country almost all new buildings (public and private) have to be (disability) accessible and there are special subsidies and grants for (disability) accessible constructions and reconstructions.

#### 3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Austria, there are patterns of housing segregation and discrimination against the Roma. Segregated Roma settlements do exist in Austria, especially in Burgenland.

To trace down discrimination of Roma is especially complicated, as most Roma living in Austria are primarily perceived by others as “foreigners” and not as Roma in the first place. Only in regions with a longstanding tradition of Roma settlements (in the Burgenland province) a more specific anti-Roma tension is observable among the population.

There is no specific legislation regarding housing segregation. Generally, housing segregation is not publicly discussed under this topic, but described as a concentration of

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<sup>74</sup> Website of FPÖ provincial functionary Haimuchner; “German as Key for Housing; <http://www.fpoe-ooe.at/deutsch-als-schluesel-zur-wohnung/>, 2015, (last accessed 4 February 2017).

<sup>75</sup> This is a regulation on the prohibition of discriminatory advertisement – so the offer is available to the public.

<sup>76</sup> Except in Lower Austria.

“foreigners” (meaning migrants regardless of citizenship) in certain areas of larger towns and cities. So, for example, a certain part of the 16<sup>th</sup> district in Vienna is called “Little Istanbul” and there are other districts with a larger migrant population.

The equal treatment legislation does apply to the access to and supply of housing without any legal restrictions or exceptions. It will, nevertheless, be up to the courts to decide whether and how far these provisions also protect from harassment by neighbours.

## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

In Austria, national legislation provides for an exception for genuine and determining occupational requirements.

All legislation dealing with discrimination in the workplace also allows for an exception for genuine and determining occupational requirements.

So for example § 20/1 of the Equal Treatment Act reads:

“Different treatment in relation to the grounds mentioned in § 17 shall not constitute discrimination where, by reason of the of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”

§ 7c (3) of the Act on the Employment of People with Disabilities and § 13b/1 Federal-Equal Treatment Act use the same quotation.

### **4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)**

In Austria, national law provides for an exception for employers with an ethos based on religion or belief.

This exception is transposed mainly by § 20 (2) Equal Treatment Act, stating:

“In the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos.”

The law does not explicitly mention that this exception should not justify discrimination on another ground. Still, the provision could be interpreted well in line with the directive.

The provincial acts do not generally use this exemption as they regulate only public employment or duties where there is no room for ethos based on religion or belief.

So far, we do not have a court decision on cases involving an ethos-based institution. All cases brought up so far (concerning mainly the Catholic Church) have been settled out of court.

Especially in rural areas the Catholic Church is a very influential employer. It seems that the lawmakers wanted to see that exception rather broadly interpreted in order to grant it also to such enterprises as church-run breweries, lumber-mills and hotels. It will be a challenge for judiciary to define the fine lines of this concept in line with the directive.

- Religious institutions affecting employment in state funded entities

In Austria, religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State.

In Austria, the situation is similar to Italy and Spain. Generally, the respective faith community selects religious teachers. This is governed by an international agreement with the Holy See for catholic teachers as well as by national law. In principle, teachers for religion of all officially recognised faith communities<sup>77</sup> are employed by the state (federal or provincial) according to the "mission" by the religious community. So the selection and the refusal or withdrawal of the permission to teach lies entirely with the religious communities. The state has to make the teachers redundant or at least cannot use them as teachers of religion without these "missions". The relevant legal basis for this (for Catholic Faith) lies with § 6 of the Act on the Relations of School and Church [RGI. Nr. 48/1868].

More detailed provisions for all religious faiths can be found in:

- § 3 of the Schools Regulation [Schulwesen-Regelung, BGBl Nr. 273/1962];
- §3 of the Act on Religious Education [Religionsunterrichtsgesetz BGBl Nr. 190/1949].

So far there is no case-law on the potentially discriminatory selection of teachers of religion but it seems quite clear that questions might arise in this field in regard to the genuine occupational requirement test.

#### **4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)**

In Austria, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

In Austria, national law includes exceptions relating to difference of treatment based on nationality.

After an important amendment in 2008, the Equal Treatment Act now abandoned a general exception of nationality and states in §§ 17 (2) and 31 (2) that the principle of equal treatment "does neither affect the regulations and conditions on immigration of citizens of third countries or stateless persons or their residence nor the treatment which arises from the legal status of the third-country nationals or stateless persons".

In Austria, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

The issue of protection against discrimination on the basis of nationality or citizenship is crucial for the Austrian situation as most of the racist discourse is not labelled with terms like race or ethnic origin, but the scapegoats and concept of the enemies is to a very large extent about "foreigners", "asylum seekers", "asylum-frauds". Especially discriminatory small-ads, advertising for jobs or housing regularly demand for "Austrians", "genuine Austrians" or state "no foreigners". So the 2008 amendment is a very useful and constructive way of dealing with the actual Austrian situation and discourse as it exempts only those areas from protection where the difference in treatment is based on an objective legal condition.

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<sup>77</sup> A list of the 14 recognised churches and faith communities can be found on this official website: [http://www.bmukk.gv.at/ministerium/kultusamt/Gesetzlich\\_anerkannte\\_Ki5433.xml](http://www.bmukk.gv.at/ministerium/kultusamt/Gesetzlich_anerkannte_Ki5433.xml).

The first judgment<sup>78</sup> on that issue was already very clear in stating that “we do not sell to foreigners” was indeed racial discrimination and not covered by the (then legally enshrined) nationality exception. This discrimination was obviously seen as a direct one.

b) Relationship between nationality and ‘race or ethnic origin’

Given the formulation of the nationality exception, every distinction on grounds of citizenship, which is not founded on a legal basis will in principle be seen as a discrimination on the ground of ethnicity.

Discrimination on the basis of being or looking like “a migrant” is also clearly prohibited.<sup>79</sup>

In its judgment<sup>80</sup> on discriminatory general exclusion of non-nationals from “commuters aid” in Lower Austria, the court had no problem applying the prohibition of discrimination on ethnic grounds to that case.

#### **4.5 Work-related family benefits (Recital 22 Directive 2000/78)**

a) Benefits for married employees

In Austria, it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married. Judicial interpretation might still find otherwise as there is still a lack of case law on this subject.

The text of the laws (most important: § 17/1/3 Equal Treatment Act) does not explicitly touch this issue but the explanatory notes to the Equal Treatment Act states: “The main target of the law is to safeguard protection of gay and lesbian workers from discrimination. Discrimination of homosexual partnerships compared to unmarried heterosexual partnerships is prohibited; voluntary social benefits are to be granted to all partnerships or only to married couples. Privileges for marriage remain permissible. This results from Recital 22 of the Framework Directive stating that the directive is without prejudice to national laws on marital status and the benefits dependent thereon.”

So preferential treatment for married workers remains permissible, while unmarried heterosexuals may not receive any advantage in comparison to homosexuals.

It is questionable whether this interpretation will be reflected by case law, as the law itself is open to the interpretation that privileges for married couples constitute indirect discrimination.

Austria introduced the instrument of legally recognised partnership for same-sex couples from 1 January 2010.

Apart from some distinctions between registered partnerships (which can only be formed by same-sex couples) and marriages directly imposed by the Act on Registered Partnerships and other laws other forms of discrimination related to employment are definitely forbidden. The Constitutional Court found that general exclusion of same-sex couples from artificial insemination<sup>81</sup> and adoption<sup>82</sup> are unconstitutional.

b) Benefits for employees with opposite-sex partners

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<sup>78</sup> Viennese Provincial Court for Civil Matters (Landesgericht für Zivilrechtssachen, Wien), Hayet B. vs. Ferdinand S., 35R68/07w; 35R104/07i, 30 March 2007.

<sup>79</sup> Austria, Regional Civil Court of Vienna, Nr. 36 R 292/15f, 10.12.2015.

<sup>80</sup> Lower Austria, Provincial Court St. Pölten (Landesgericht St. Pölten), 21 R 16/13f-13, 31 January 2013.

<sup>81</sup> Constitutional Court (Verfassungsgerichtshof), G16/2013 ua, 10 December 2013.

<sup>82</sup> Constitutional Court (Verfassungsgerichtshof), G119-120/2014, 11 December 2014.



In Austria, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners (§ 17/1/3 Equal Treatment Act).

#### **4.6 Health and safety (Article 7(2) Directive 2000/78)**

In Austria, there are no exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78).

There are no explicit exceptions mentioned by law. § 7c/3 of the Act on the Employment of Persons with Disabilities contains a general clause on "genuine occupational requirements".

The test for "genuine occupational requirements" can comprise questions of health and safety.

In regard to the exception for "genuine occupational requirements" the explanatory notes to the Equal Treatment Act<sup>83</sup> states: "The exception also comprises the areas of health and safety. This comprises especially those protective provisions regulating a duty to wear uniforms or helmets for reasons of safety." So this exception is not restricted to the ground of disability as permitted by the directive, but valid for all the grounds dealt with by the Equal Treatment Act but it always has to stand the test to be a "genuine occupational requirement."

#### **4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

In Austria, national law provides an exception for direct discrimination on age.

The general exceptions in regard to age can be found in §§ 13b (3)-(5) of the Federal-Equal Treatment Act and in §§ 20 (3)-(5) of the Equal Treatment Act.

- (3) A different treatment does not constitute discrimination if
  1. it is objective and appropriate;
  2. it is justified by a legitimate aim especially from the fields of employment policy, labour market and vocational training;
  3. the means of achieving that aim are appropriate and necessary.
- (4) Such differences of treatment may include, among others:
  1. the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
  2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
  3. the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
- (5) The fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those

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<sup>83</sup> Austria, Parliamentary materials, Nr. 307 of the appendices XXII GP, 26 November 2003, p. 16.

schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.”

As the text contains a lot of rather ambiguous terms (e.g. “special conditions {...} including...”) and leaves a broad scope open for interpretation, the case law will show us the factual scope and limits of these exceptions.

As we can see from the case law,<sup>84</sup> so far courts tend to be very strict in sticking to a narrow interpretation of these exceptions.

a) Justification of direct discrimination on the ground of age

In Austria, it is generally, or in specified circumstances possible, to justify direct discrimination on the ground of age.

The legal situation appears to be in compliance with the test in Art. 6 of Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, *Mangold* and Case C-555/07 *Kucukdeveci*.

The Supreme Court<sup>85</sup> clearly stated that “dismissal does not necessarily constitute discrimination but can be justified even if age is a decisive factor.”

b) Permitted differences of treatment based on age

In Austria, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

The general exceptions in regard to age can be found in §§ 13b (3)-(5) of the Federal-Equal Treatment Act and in §§ 20 (3)-(5) of the Equal Treatment Act.

(3) A different treatment does not constitute discrimination if

1. it is objective and appropriate;
2. it is justified by a legitimate aim especially from the fields of employment policy, labour market and vocational training;
3. the means of achieving that aim are appropriate and necessary.

(4) Such differences of treatment may include, among others:

1. the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
3. the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

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<sup>84</sup> For example: Supreme Court decision Nr. 60b246/10k, 18 July 2011.

<sup>85</sup> In Supreme Court decision Nr. 9ObA113/12a, R.K. vs. Österreichischer Rundfunk, 25 June 2013.

In Austria, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2).

The exception can be found in § 20/5 of the Equal Treatment Act:

- (5) The fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.”

#### **4.7.2 Special conditions for young people, older workers and persons with caring responsibilities**

In Austria, there are no special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection.

There are positive action measures to support younger or older people and people with caring responsibilities in regard to their opportunities on the labour market. There is a rather wide range of different governmental policies in this respect. There are tax advantages for single-parents educators, and special programs to promote the employment of younger or older workers. Such regulations and programs have to stand the test stipulated in §§ 13b/3-5 of the Federal-Equal Treatment Act and 20/3-5 of the Equal Treatment Act.

#### **4.7.3 Minimum and maximum age requirements**

In Austria, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

§§ 13b/3-4 of the Federal-Equal Treatment Act and §§ 20/3-4 of the Equal Treatment Act state this clearly and in quoting the directive.

#### **4.7.4 Retirement**

##### **a) State pension age**

In Austria, there is no state pension age, at which individuals must begin to collect their state pensions.

If an individual wishes to work longer, the pension can be deferred. This is hardly ever used, as an individual can collect a (retirement-)pension and still work.

Still the general retirement (pensionable) age is 65 years for male and 60 years for female workers in the private sector, for civil servants it is for both sexes at 61.5 years. These periods will be harmonised gradually until 2024 when the general retirement age will be 65 years.<sup>86</sup>

Generally, Individuals who have collected the necessary months of paying into the pension scheme<sup>87</sup> can collect a pension and still work.

<sup>86</sup> Budgetbegleitgesetz 2003, BGBl I Nr. 71/2003, [Law Accompanying the Budget 2003, Federal Law Gazette 71/2003], 20 August 2003.

<sup>87</sup> The rules for taking into account periods of apprenticeship, work or studies before the age of 18 for grading and pension scheme have been subject to a series of preliminary judgments by the CJEU: Hütter C-88/08,

Age is not a permissible reason for dismissal and there is no upper age limit for protection against unfair dismissal. In practice, nevertheless, it is generally easier to make an employee redundant who is already entitled to a pension as in order to be protected against socially unfair dismissal (enshrined in § 105/3/2 Labour Constitution Law [Arbeitsverfassungsgesetz]) the employee needs to prove that the dismissal constitutes a social hardship.

b) Occupational pension schemes

In Austria, there is no normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

If an individual wishes to work longer, payments from such occupational pension schemes can be deferred.

An individual can collect a pension and still work.

Workers in the private sector are not required to retire at the pensionable age and workers cannot be transferred into pensionable retirement. Collective agreements might include different regulations for certain occupations. Only in the case of older people who are unemployed, special regulations force them to change into the pension system. A (minimum) 62-year-old worker, who has lost or is losing his/her job, can stay unemployed for one more year. Then if he/she has not found a new job, he/she is obliged to change into the pension system.

c) State imposed mandatory retirement ages

In Austria, there is no state-imposed mandatory retirement age.

Civil servants can ex officio be forced to retire after reaching an age of 738 months (=61.5 years) if there are important official reasons (no legal definition of these reasons provided) for that.<sup>88</sup> Age as such is not deemed a permissible reason.

d) Retirement ages imposed by employers

In Austria, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally.

The termination of an employment contract is always possible but age is not a permitted ground for it. Collective agreements can contain specifications about (younger) pensionable age but still age cannot be the sole reason for termination of contracts.

e) Employment rights applicable to all workers irrespective of age

Age is not a permissible reason for dismissal and there is no upper age limit for protection against unfair dismissal, the entitlement to collecting a pension doesn't change the protection.

f) Compliance of national law with CJEU case law

In Austria, national legislation is in line with the CJEU case law on age regarding compulsory retirement.

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18 June 2009; Pohl, C-429/12, 16 January 2014; Felber C-529/13 21 January 2015, ÖBB Personenverkehr, C-417/13, 28 January 2015.

<sup>88</sup> See § 15a/1/1 Civil Servants Duty Act (Beamtendienstrechtsgesetz), BGBl Nr. 333/1979, last amended by BGBl I Nr. 120, 2016. This norm will be out of force by 1 September 2017.

#### 4.7.5 Redundancy

##### a) Age and seniority taken into account for redundancy selection

In Austria, national law permits age or seniority to be taken into account in selecting workers for redundancy.

Seniority as such is not a protected element in the Austrian labour law. Basically, the ECJ stated in its judgment *Tyrolean Airways* (C-132/11) that the employer was not in conflict with the prohibition of age discrimination when paying employees differently on the basis of their experience acquired within versus outside his own company even if within the same group of companies. So, seniority as such seems to be a permissible reason for different treatment. Generally, in Austria age might be taken into account as there is a special provision declaring "socially unfair" [sozialwidrige] dismissals illegitimate.

105 (3) fig. 2 Labour Constitution Law [Arbeitsverfassungsgesetz]<sup>89</sup> states:

"The dismissal can be challenged in court if the dismissal is socially unfair and if the dismissed worker is already employed at the company for at least six months. A dismissal is socially unfair in case substantial interests of the worker are impaired by it, unless the employer can provide evidence that the dismissal was based on

- a) circumstances lying in the person of the worker which affected negatively the companies' interests; or
- b) operational requirements of the company which are opposed to a further employment.

(...) in case the works council [Betriebsrat] entered an objection against a dismissal according to heading b), the dismissal is deemed socially unfair when a comparison of social aspects shows a bigger social hardship for the affected worker than for other workers of the same company and the same field of occupation, whose work to do is possible and desired by the dismissed worker. In cases of older workers the test of social unfairness and the comparison of social aspects must take into consideration facts of longstanding staff-membership (seniority) and the complications on the basis of higher age he or she has to face in trying to reintegrate into the labour process. (...)

Circumstances under heading a) based on the higher age of a worker who has been employed in the company for long years can only be used to justify the dismissal in case a further employment of the dismissed would massively negatively affect the companies' interests."

##### b) Age taken into account for redundancy compensation

In Austria, national law provides compensation for redundancy. Such compensation is not affected by the age of the worker.

All forms of compensation refer to seniority but not to age. The Equal Treatment Act clarifies that age as such must not be a criterion for different treatment also in this respect.

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<sup>89</sup> BGBl 22/1974, 15 January 1974, as last amended by BGBl I Nr. 71/2013.

#### **4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)**

In Austria, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

#### **4.9 Any other exceptions**

In Austria, other exceptions to the prohibition of discrimination (on any ground) provided in national law are the following:

The regulation on "discrimination-free advertising of housing" (§ 36 Equal Treatment Act) allows for a justification of differentiation regarding ethnicity and gender if this is "justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Especially, it is not deemed discrimination if the provision of housing constitutes a specially close or intimate relationship of the parties or their relatives". While this might be in line with the Directive 2004/113/EC (recital 16 and Art. 4 fig. 5) in regard to the gender ground, it constitutes a breach of Directive 2000/43/EC in regard to ethnic affiliation as it introduces an additional justification even for direct discrimination on that ground. There has been no case law on this provision so far.

On provincial level, § 4/6 of the Vorarlbergian Anti-Discrimination Act<sup>90</sup> and § 2/7 of the Viennese Anti-Discrimination Act<sup>91</sup> are in clear breach of Directive 2000/43/EC as they allow justification (...if justified by a legitimate aim and the means of achieving that aim are appropriate and necessary) even for acts of direct discrimination on the basis of ethnic affiliation for all the scope beyond the workplace.

In Austria, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

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<sup>90</sup> § 4/6 reads: "(6) A difference of treatment on ground of one of the grounds mentioned in § 3/1 does not constitute discrimination if it is justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary." (Remark: the list in § 3/1 includes ethnic affiliation).

<sup>91</sup> § 2/7 reads: "(...) Furthermore, a difference of treatment on ground of one characteristic mentioned in subpara. 1 does not constitute discrimination if it is objective and proportionate as well as justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary." (Remark: the list in § 2/1 includes ethnic affiliation).

## **5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)**

### **a) Scope for positive action measures**

In Austria, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is permitted in national law.

All the laws except the Federal-Equal Treatment Act that are implementing the Directives only state that generally, positive action (positive measures) is permissible and does not constitute discrimination. There is neither important case law nor discussion (apart from academic ground) on this topic.

Main legislation can be found in:

- Equal Treatment Act, §§ 22, 34;
- Disability Equality Act, § 7;
- Act on the Employment of People with Disabilities, §§ 1/1, 6.

### **b) Main positive action measures in place on national level**

The only real positive action implemented in Austria is on the ground of disability. It does really implement what is meant by that concept. There is a wide range of other temporary measures and supportive structures on other grounds, like gender, youth or old age; some benefits for employers to employ long-term unemployed persons and the like, though.

There are some supportive and beneficial measures in place – targeting the integration of migrants – they all do not qualify as positive action as they are not designed to mitigate discrimination, but mainly support the acquirement of certain skills like German language or some occupational aids.

Under § 1(1) *Act on the Employment of People with Disabilities*, all employers employing 25 employees or more in Austria are obliged to employ at least 1 person with disabilities for each group of 25 employees (the ratio of this quota, therefore, being 1:25).<sup>92</sup>

This obligation is widely not complied with but the law itself foresees the payment of a lump-sum compensation. The so-called “Ausgleichstaxfonds”<sup>93</sup> is filled with this money and used for a variety of disability-related measures.

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<sup>92</sup> For certain economic sectors, the Minister for Social Affairs may, by regulation, increase the relevant ratio from 1:25 to up to 1:40; § 1(2) *Act on the Employment of People with Disabilities*.

<sup>93</sup> The name of the mechanism could be translated as ‘Compensatory Fund’.

## **6 REMEDIES AND ENFORCEMENT**

### **6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)**

#### **a) Available procedures for enforcing the principle of equal treatment**

In Austria, the following procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation). Statistics on the frequency of their use are not available.

With only a few exceptions the generally used court procedures will be civil law procedures or employment law procedures.

Administrative penal law is only a remedy against discriminatory advertisement.

For the area of public employment there exists a different treatment of civil servants [Beamte] and contractual employees [Vertragsbedienstete]. While the latter have to bring their claims to the courts, civil servants have to claim their rights before the public office in charge of these issues – so they have to start an administrative procedure against their employer. Claims against (individual) harassers are always to be brought before a court.

The decisions of the civil and labour courts (as well as administrative decisions in cases brought by civil servants) are legally binding decisions whereas as the procedures at the Equal Treatment Commission only result in a non-binding “opinion” [Gutachten, Einzelfallprüfung]. However, the Equal Treatment Act states in its § 61 that courts have to take these opinions into consideration and that they have to give clear reasons in case they come to a dissenting decision. This has very little impact in practice, as courts can easily come to a different reasoning and all reasons have to be clear.

For all claims based on the disability ground the legislation demands a compulsory attempt to mediate the conflict. The local outlets of the Federal Social Service are assigned with the task to conduct these conciliation procedures. Professional mediators can be provided on demand.

#### **b) Barriers and other deterrents faced by litigants seeking redress**

The legal situation regarding discrimination is very complicated and the laws are not intelligible for people without legal education. So also in cases where it is not compulsory to be represented by a lawyer, it seems necessary to have access to legal aid. The powers of the National Equality Body are restricted to help in the procedure before the Equal Treatment Commission, but their help ends at the doors of the courts. One great obstacle is the absence of an established framework of case law – especially regarding the amount of compensation of non-pecuniary damages. As the costs of civil law procedures are related to the amount in dispute<sup>94</sup> this is a crucial question and it bears a lot of risks.

Also NGOs cannot provide for a complete relief, as their procedural rights are limited to side intervention at court and very few additional opportunities like to check insurance terms of contract or the still unused possibility to file a group litigation [§ 13 Federal Disability Equality Act] on behalf of an unidentifiable group of affected persons given to the “Austrian national Council of Disabled Persons”. Otherwise their legal standing does not differ from any other private person or institution. In labour law cases the trade

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<sup>94</sup> The amount in dispute has to be defined by the claimant and serves as a basis for further costs like court fees, advocates fees. Another very costly procedural item could be the requirement of experts.



unions or the Chamber of Labour can grant their members a complete protection so that they do not have to fear any costs.

c) Number of discrimination cases brought to justice

In Austria, there are no available statistics on the number of cases related to discrimination brought to justice.

There are some figures about the compulsory reconciliation attempts in cases regarding disability: This process has been the most used tool (732 cases handled from mid-2006 until mid-2010, and 1000 until the end of 2011).<sup>95</sup> In 2012 there were 228 attempts, for 2013 the figure is 207, and seems to be quite successful in achieving settlements (38% of cases settled by agreement in 2013).

Apart from these statistics, there are no figures available regarding discrimination cases brought to justice.

d) Registration of discrimination cases by national courts

In Austria, discrimination cases are not registered as such by national courts.

There are some internal rules of reporting back to the Ministry of Justice for cases concerning certain fields. Discrimination cases are allegedly among them but no information is made public.

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

a) Engaging on behalf of victims of discrimination (representing them)

In Austria, associations/organisations/trade unions are in principle entitled to act on behalf of victims of discrimination – but there is no special provision on anti-discrimination matters. The general rules of civil procedure apply.

In court cases, associations, organisations or other legal entities may engage on behalf of their clients (and with their consent) within the scope of the directive in proceedings, where no representation through an attorney is compulsory (Anwaltszwang).

This is compulsory for most civil procedures at court and before the courts of public law so there is not much opportunity for NGO representation in civil law courts but more at lower levels of administrative proceedings. In these cases associations, organisations etc. as any other natural persons can represent parties in so far as these parties have formally mandated them.

The Act on the Equal Treatment Commission and the National Equality Body expressly allows NGOs to represent alleged victims of discrimination in the rather informal proceedings before the Equal Treatment Commission (§ 12/2 GBK-GAW-G); this is not a special right, though, as every adult physical person is allowed to represent another. The procedure under the Federal-Equal Treatment Act does not foresee any special third-party intervention.

One further – and still unused – possibility is the restricted position to file a group litigation [§ 13 Federal Disability Equality Act] on behalf of an unidentifiable group of affected persons given to the “Austrian national Council of Disabled Persons” (Österreichische Arbeitsgemeinschaft für Rehabilitation –ÖAR).

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<sup>95</sup> More recent data is not yet available.

On provincial level, the Viennese Anti-Discrimination Act [§ 4 (2)], the Lower Austrian Anti-Discrimination Act [§ 18(3)], the Upper Austrian Anti-Discrimination Act [§ 8(3)], the Salzburgian Equal Treatment Act [§ 29(4)], Styrian Equal Treatment Act [§ 33(3)] state that the claimant can use the help of any legitimate non-profit organisation to be represented in all forms of legal proceedings under these acts, as long as the organisations aims include the safeguarding of the adherence of the two EU Non-discrimination Directives.

b) Engaging in support of victims of discrimination

In Austria, some associations/organisations/trade unions are entitled to act in support of victims of discrimination.

According to the Equal Treatment Act, third party intervention is expressly allowed for one specific NGO ('Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern' [Litigation Association of NGOs Against Discrimination]) in the courts (§ 62 Equal Treatment Act). As this NGO is an umbrella organisation and very open to potential members, there have been no problems with this choice so far. The access to third party intervention is not monopolised by this NGO as others can intervene as well if they can prove their legal interest in a particular case.

The legal basis for the right to intervene is regulated in § 17 of the Civil Procedure Code which states:

1. Those who have a legal interest, that in a pending legal dispute one person shall win, can join the action on this parties side;
2. Furthermore, all persons whom this right is given by legal regulations are entitled to join the action.

So, the basic requirement is a „legal interest“ in one parties victory. In practice, this requirement is not very hard to fulfil for NGOs who are working actively in the field of anti-discrimination.

The Litigation Association of NGOs Against Discrimination has been intervening in quite a number of cases concerning disability, which is not comprised by the explicit mandate given to it by § 62 Equal Treatment Act and the right to intervene has never been contested or even questioned in court.

The form of the intervention is rather limited by law. It only allows the Association to intervene in court proceedings if the claimant wants so. This right to intervention as a third party in support of the claimant is a rather weak construction as it generally does not allow taking over costs and risks from the claimant, but needs action by the victim of discrimination first and the right to independent action or remedies is not included.

For the scope of discrimination on the ground of disability the NGO "Austrian national Council of Disabled Persons" (Österreichische Arbeitsgemeinschaft für Rehabilitation – ÖAR) has been given a similar position in regard to the right of intervention in court cases as well as a restricted position to file a group litigation [§ 13 Federal Disability Equality Act] on behalf of an unidentifiable group of affected persons.

In penal administrative proceedings there is no legal standing for interest groups (indeed not even legal standing for the victim of discrimination itself) at all. In some cases of

discriminatory advertising the National Equality Body Gleichbehandlungsanwaltschaft] has a legal standing and can oppose to the abatement of the proceedings.<sup>96</sup>

The Carinthian Anti-Discrimination Act [§§ 24 (6) and 27 (4)], the Burgenlandian Anti-Discrimination Act [§ 32], the Tyrolean Anti-Discrimination Act [§ 12], and the Vorarlbergian Anti-Discrimination Act [§ 7(4)] give the right to intervene [Nebenintervention] to associations whose statutes state their interest in the adherence of the prohibition of discrimination.

c) Actio popularis

In Austria, national law does allow associations / organisations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**), although this is a very limited tool and only applies to discrimination on the ground of disability.

Since 2013 actio popularis possibility has been incorporated in § 13/2 of the Federal Disability Equality Act. The regulation provides the right to the Austrian National Council of Disabled Persons, the Litigation Association of NGOs Against Discrimination and the Ombud for People with Disabilities to file a lawsuit against an insurance company in case this company does not comply with the prohibition of discrimination on the ground of disability as set out by § 1d of the Insurance Contracting Act [Versicherungsvertragsgesetz, BGBl Nr. 2/1959, as last amended by BGBl I Nr. 12/2013] in a way *“affecting the general interest of the group of persons protected by this regulation significantly and in multiple cases”*.

d) Class action

In Austria, national law allows one association to act in the interest of more than one individual victim (**class action**) for claims arising from the same event.

For the scope of discrimination on the ground of disability the NGO “Austrian National Council of Disabled Persons” (Österreichische Arbeitsgemeinschaft für Rehabilitation – ÖAR) has been given a restricted position to file an action [§ 13 Federal Disability Equality Act] on behalf of an unidentifiable group of affected persons. This possibility has not yet been used – mainly because it is very restricted, as it is bound to the following conditions:

- The discrimination in question must affect adversely, severely and permanently the general interests of the protected group of people (people with disabilities);
- The Federal Council on Disability [§ 8 Federal Disability Act] must recommend to filing the action with a resolution backed by two-thirds of the votes.

If these conditions are fulfilled the NGO can file an action to establish that a discrimination on the ground of disability has actually occurred (no financial compensation or other remedies are possible here).

This Austrian model of (very limited) group litigation is neither establishing the figure of class action nor is it clearly allowing actio popularis. The collective interests defended by the action mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement; whereas this is without prejudice to

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<sup>96</sup> § 24 (3) Gleichbehandlungsgesetz [Equal Treatment Act], ‘In cases which were induced by the Office for Equal Treatment, the Office has a legal standing in the administrative penal proceeding. The office has the right to appeal against penal decisions.’

individual actions brought by individuals who have been harmed by an infringement<sup>97</sup> and the aim of the action is limited to judicial certification.

### **6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)**

In Austria, national law requires a shift of the burden of proof from the complainant to the respondent. The respective regulations can be found in:

- §§ 26/12, 38/3 Equal Treatment Act;
- § 20a Federal-Equal Treatment Act;
- § 7p Act on the Employment of People with Disabilities;
- § 12 Federal Disability Equality Act.

The wording of the Equal Treatment Act does lower the burden of proof for the claimant but in a way that is different from the way stated in the directives and this continues to be a strange legal construction. The norm reads: "In case the claimant claims a discrimination case in court, he/she has to establish facts that point to it. It is the respondent's obligation to prove that, taking into account all circumstances, it is more likely that a different motive – documented by facts established by the respondent - was the crucial factor in the case or that there has been a legal ground of justification."

Nevertheless, in its important decision 9ObA177/07f, from 9 July 2008, the Supreme Court ruled that this regulation has to be interpreted as being in line with the directive - meaning that: "In case the establishment of facts allowing the assumption of discriminatory infringement is successful – it is for the respondent to prove that he or she did not discriminate."

The lowering of the burden of proof applies to all forms of discrimination, victimisation, and harassment.

By way of amendment (BGBl. I Nr. 81/2013 from 27.12.2013) the regulation on the burden of proof has been changed within the Federal-Equal Treatment Act (nota bene: different from the Equal Treatment Act, which is also a federal piece of legislation). Before this amendment the same construction as quoted above had been used in this act as well. Now it reads – in conformity with the directive -: "*§ 20a Burden of Proof: In order to invoke discrimination in court the claimant has to establish facts that allow the assumption of direct or indirect discrimination. The respondent then has to prove that no breach of the principle of equal treatment has occurred.*" It remains unclear why the legislator chose to change the wording in one act while sustaining the older phrases in the other.

If – in a dogmatic view - we presume that the legislator wants to uphold some different meaning to be adhered to different phrasing, this new development might point to the fact that the Equal Treatment Act (and the other acts using the same wording i.e. the Act on the Employment of People with Disabilities and the Federal Disability Equality Act) is (are) in breach of the directives. Only the application of the burden of proof as in the Federal-Equal Treatment Act is clearly and undoubtedly in line with the directives.

### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

In Austria, there are legal measures of protection against victimisation.

Victimisation is deemed to be any adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment is

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<sup>97</sup> European Directive on Injunctions for the Protection of Consumers' Interests, Directive 2009/22/EC, 23 April 2009.

forbidden (victimisation). Victimisation in the workplace sphere (defined as 'dismissal, notice of quit and any other detriment in reaction to a complaint or to the opening of proceedings enforcing the principle of equality') is prohibited in all bills/drafts, and all of them cover also other employees acting as witnesses or supporting the complaint of a victim. This is enshrined in:

- §§ 27, 39 Equal Treatment Act;
- § 20b Federal-Equal Treatment Act;
- § 7i/2 Act on the Employment of People with Disabilities;
- § 9/5 Federal Disability Equality Act.

So, victimisation is prohibited for all grounds in the employment field and for gender and ethnic affiliation and disability for all fields covered by the Racial Equality Directive.

The same sanctions and remedies as foreseen for discrimination are applicable in cases of victimisation.

Provincial acts also provide for protection against victimisation, often stating that victimisation is a form of discrimination so that the same sanctions and remedies are applicable here as well.

## **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

### **a) Applicable sanctions in cases of discrimination – in law and in practice**

None of the laws provides for criminal sanctions. The main means of the battle against discrimination is civil law. Nevertheless, the Equal Treatment Act provides for administrative penal proceedings for discriminatory job or housing advertisement; the maximum penalty however is EUR 360 and punishment for employers is excluded for first time offenders (admonition only). It must be doubted that this level of sanction meets the directive's requirement of 'effective, proportionate and dissuasive' sanctions.

All of the implementing laws provide for civil sanctions (compensation for material and immaterial damages), and – as a principle for discrimination within a continuing employment relationship only – a victim of discrimination can choose between undoing of the act of discrimination or compensation of pecuniary damage, in both cases with the option to claim non-pecuniary damage. So § 26 (3) Equal Treatment Act states that the worker who was deprived of social benefits can choose either to get the respective benefits or compensation for the damage, both possibilities comprise the possibility to get compensation for non-pecuniary damages.

In a case of discriminatory termination of employment a victim can challenge the termination or take the option to accept the termination and claim pecuniary and non-pecuniary damages.<sup>98</sup>

According to the Equal Treatment Act compensation for non-pecuniary damage, in the case of non-recruitment and non-promotion, is limited to a maximum of EUR 500 if the employer proves that the victim would not have been recruited or not promoted if no discrimination had occurred (so that discrimination did not have the effect of non-promotion or non-recruitment but caused only exclusion from the selection procedure). In the light of the case law of the CJEU<sup>99</sup> this restriction<sup>100</sup> might be questionable. A

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<sup>98</sup> § 26 (7) Equal Treatment Act.

<sup>99</sup> European Court of Justice, 22 April 1997, Case C-180/95, *Nils Draehmpaehl v. Urania Immobilienservice OHG* [1997] ECR I-2195, paras. 25 and 29.

<sup>100</sup> European Court of Justice, 10 April 1984, Case 14/83, *Von Colson and Karmann v. Land Nordrhein-Westfalen* [1984] ECR 1891, paras. 23 and 24.

maximum amount of EUR 500 can only be considered purely nominal compensation, while we have to take into account that general Austrian civil and labour law does not provide for similar non-pecuniary damage claims.

The mere concept of punitive damages is unknown to the Austrian legal tradition, while from a dogmatic point of view the minimum non-pecuniary damages in cases of harassment (EUR 1000 minimum compensation) can be seen as of a punitive nature or having a punitive element as the court does not have to appraise the value of the concrete damage in case only the minimum is claimed. Due to the low amount of this minimum this is, nevertheless, a mainly academic or dogmatic issue.

In case the discrimination proves decisive for non-employment, the Equal Treatment Act states a minimum compensation of two months' salary.<sup>101</sup> In court, the claimant can only demand for financial compensation, not for actually being employed.

In case of discrimination of university-students [apart from access to university; Federal-Equal Treatment Act, § 42] the legislation lacks any sanction.

The Equal Treatment Act establishes a (in principle) very effective sanction for companies not observing the prohibition of discrimination: exclusion from public funding granted by the Federation<sup>102</sup> but it does not extend the exclusion to public procurement, what would render the effectiveness of this sanction perfect.<sup>103</sup> It is, nevertheless, quite unclear in practice how these provisions are surveyed and how the sanction is triggered.

The federal regulations in the acts dealing with discrimination on the ground of disability and the provincial pieces of legislation are in relation to sanctions and remedies modelled like the Equal Treatment Act.

#### b) Ceiling and amount of compensation

According to the Equal Treatment Act compensation for non-pecuniary damage, in the case of non-recruitment and non-promotion, is limited to a maximum of EUR 500 if the employer proves that the victim would not have been recruited or not promoted even if no discrimination had occurred.

There are no established rules and no firm legal tradition in compensating for non-pecuniary damages which leads to generally rather low compensation awarded by Austrian courts.

For the first time, in 2016, the Supreme Court, while rejecting the extraordinary revision in a gender discrimination case in the employment field, came up with a general guideline on how to assess the immaterial damages in discrimination cases.<sup>104</sup> It is still quite a vague language but states that the compensation has to go beyond the mere compensation of "loss of pleasure or amenities of life" as in compensation of physical injury or pain and suffering.<sup>105</sup>

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<sup>101</sup> § 26 (1) Equal Treatment Act.

<sup>102</sup> §§ 14, 26, 37 Equal Treatment Act.

<sup>103</sup> See: European Commission, *Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement* (COM/2001/0566 final), 28 November 2001, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2001:333:TOC>.

<sup>104</sup> Austria, Supreme Court, Decision Nr. 9ObA49/16w, 29 September 2016

<sup>105</sup> "In general, when assessing compensation for discrimination suffered, it is especially necessary to take into account the length and the gravity of the disturbance. When determining this compensatory amount it will be necessary to take into account the psycho-physical situation of the victim, his or her emotional world (Gefühlswelt), his or her sensitiveness, the limits of variability of his/her psyche (Schwankungsbreite seiner Psyche) and to consider that the compensation is not just balancing the loss of the pleasures or amenities of life but shall also remedy the feeling of having been hurt and, thereby, rebuild the disturbed balance of his/her personality." (Austria, Supreme Court, Decision Nr. 9ObA49/16w, 29 September 2016).

### c) Assessment of the sanctions

In an overall assessment the effectiveness of the existing sanctions seems to be rather limited. The main issue here is that the only instrument used as a sanction basically is compensation for material and immaterial damages. While in most cases brought to courts so far, material damage was not playing a major role, the Austrian legal system does not otherwise contain an elaborate legal tradition regarding immaterial damages. Basically, the idea of using compensation for damages in a directive, punitive and thereby dissuasive way is very unfamiliar if not bizarre to judges so far. The legislator has repeatedly seen the need to raise the minimum amount of compensation for harassment (from originally EUR 400 to EUR 1.000 since 2004) as practice showed that many courts in fact used this figure given in the legislation as a reference point for their decision-making even in cases of discrimination not linked with harassment. In most cases, courts treated the minimum amount as a maximum amount at the same time.

The federal legislator as well as some provincial legislators clearly showed their discontent with the rulings of courts as in 2012 they introduced a regulation like the following into their legislations: (e.g. § 19b Federal-Equal Treatment Act:) "The amount awarded for compensating immaterial damages suffered shall be assessed in a way to balance the damages actually and effectively, that the compensation is proportional to the damage suffered and that such discrimination is thereby prevented."

Still, the very low numbers of victims actually bringing their cases to court might not be an indicator whether the sanctions are effective, proportionate and dissuasive, but they indicate that the way to justice seems to be much harder than the benefit expected from a won court case.

The case law reflects the mentioned uncertainties the claimants face regarding the amount of compensation. To illustrate this,<sup>106</sup> see two decisions issued by the same court (Viennese Commercial Court, Handelsgericht Wien) on more or less identical cases with highly contradicting outcomes concerning the assessment of the amounts awarded in compensation:

#### Judgment 1: Viennese Commercial Court Case Nr. 1R129/10g, names withheld, 19 January 2011

**Issue:** A dark-skinned man had been not admitted into a restaurant to celebrate someone's birthday, while his partner and her colleagues (all white) had been admitted without any problem. The court of first instance had found discrimination and awarded the EUR 1.000 the claimant had demanded for.

**Main argument when assessing the amount of compensation:** "In view of the intended preventive effect of the compensation for immaterial damages by the Equal Treatment Act (...) the amount of compensation cannot be compared to the compensation for pain and suffering [Schmerzensgeld] according to § 1325 ABGB (General Civil Law Code) – a conclusion which can already be drawn by the existence of a legally fixed minimum amount of compensation – a figure completely unknown otherwise to the concept of compensation. Insofar the respondent wants to deduct any inappropriateness from a comparison with customary amounts of compensation for pain and suffering, he cannot convince the court."

**Result:** Compensation of EUR 1.000 upheld. All procedural costs have to be paid for by the respondent.

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<sup>106</sup> Although the detailed description of the cases might look more descriptive than analytic, it is a rather effective way of demonstrating the main challenges faced by courts and their unsystematic approach to it, which creates a major obstacle to the usage of the legislation.

Judgment 2: Viennese Commercial Court Case Nr. 60R101/10y, names withheld, 14 September 2011

A dark-skinned woman had been not admitted into a restaurant, as the bouncer refused to let her in with a reference to her skin-colour. The court of first instance had found discrimination and awarded the EUR 1.500 the claimant had demanded for.

Main argument when assessing the amount of compensation: "The reason for the regulations on compensation for immaterial damages within the Austrian legal order is to balance the feelings of aversion [Unlustgefühle] caused by a certain incident. When judging on the amount it stands to reason to refer to the amounts usually awarded to compensate pain and suffering [Schmerzengeld]. Those reach from EUR 100 to EUR 300 per day, graded in light, medium and grave pain. (...)

The claimant has been discriminated against by the conduct of the bouncer, while the immaterial damage done was calculated with an amount clearly beyond the margin of discretion – especially when relating it to the amounts awarded for light pain. The court of appeal sees an amount of EUR 250 to be an appropriate compensation for the personal damage suffered by the claimant."

Result: Compensation reduced from EUR 1.500 to EUR 250, which at the same time means that the claimant (the victim) has to fully pay the cost of the whole proceeding<sup>107</sup> – in this case only the costs of the respondent which had to be paid by the claimant in addition to her own costs, amounted to EUR 925,61. As a result, the victim of discrimination suffered a financial loss of minimum EUR 675,61.

In 2016, the Supreme Court took the opportunity to issue some first guidelines for courts on how to assess the amount for compensation in discrimination cases:<sup>108</sup> "In general, when assessing compensation for discrimination suffered, it is especially necessary to take into account the length and the gravity of the disturbance. When determining this compensatory amount it will be necessary to take into account the psycho-physical situation of the victim, his or her emotional world (Gefühlswelt), his or her sensitiveness, the limits of variability of his/her psyche (Schwankungsbreite seiner Psyche) and to consider that the compensation is not just balancing the loss of the pleasures or amenities of life but shall also remedy the feeling of having been hurt and, thereby, rebuild the disturbed balance of his/her personality." This guides clearly beyond the mere compensation for pain and suffering.

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<sup>107</sup> Under the general Civil Procedure Code the burden of procedural costs shifts totally to the claimant if the amount awarded by court is lower than half of his/her claim.

<sup>108</sup> Austria, Supreme Court, Decision Nr. 9ObA49/16w, 29 September 2016.



## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The Act on the Equal Treatment Commission and the National Equality Body establishes an Equal Treatment Commission<sup>109</sup> and the National Equality Body.<sup>110</sup> In transposing Art.13 of the Racial Equality Directive, Austria extended the functions of the present Equal Treatment Commission<sup>111</sup> and the Ombud for Equal Employment Opportunities to deal with discrimination on the ground of gender and on all other grounds mentioned in art 19 TFEU except disability.

Two additional Ombuds for the National Equality Body were appointed and took office in the Federal Chancellery. In late April 2005 two chairpersons for new senates within the Equal Treatment Commission were appointed. The findings on general issues and cases are published in an anonymous and condensed form.<sup>112</sup>

For the ground of disability, a separate structure has been set up since 1 January 2006. The Ombud for Persons with Disabilities (Behindertenanwalt) has been appointed by the Minister of Labour, Social Security and Consumer Protection and is responsible for advice and support of people with disabilities. The Ombud can conduct surveys on the situation of people with disabilities and give and publish statements and opinions on this issue. So far, all ombudspersons appointed have been former Ministers of Social Affairs.

For Disability, there is no body equivalent to the Equal Treatment Commission, but a compulsory attempt to settle individual cases in a joint dispute resolution process before the "Sozialministeriumservice" [Service of the Minister of Social Affairs].

### **Provincial bodies**

The provinces are obliged to set up specialised bodies to promote equal treatment in their own field of competence. The provincial bodies are therefore not linked to each other<sup>113</sup> and have no shared responsibilities with the federal structures. As becomes apparent by the impressive list of different bodies it might not always be easy for victims of discrimination to find out where to turn to.

In *Vienna*, an "Office for the Fight against Discrimination" (Stelle zur Bekämpfung von Diskriminierungen) was set up. The position was set up independently by provincial constitutional law.<sup>114</sup> The duties are not very broad – it is mainly a counselling service and a vague possibility for mediating conflict as well as writing reports and studies. These tasks were given to an already independent body of the Vienna Province, the so called "Bedienstetenschutzbeauftragter" [Commissioner for the Safety of Employees], a position that had nothing to do with issues of discrimination before but was responsible for safety issues concerning the employees of the City of Vienna.

<sup>109</sup> [https://www.bmgf.gv.at/home/Frauen\\_Gleichstellung/Gleichbehandlung/Gleichbehandlung\\_s-kommissionen/Gleichbehandlungs-kommission/](https://www.bmgf.gv.at/home/Frauen_Gleichstellung/Gleichbehandlung/Gleichbehandlung_s-kommissionen/Gleichbehandlungs-kommission/).

<sup>110</sup> <http://www.gleichbehandlungsanwaltschaft.at/>.

<sup>111</sup> And a Federal-Equal Treatment Commission dealing with cases of federal employees only.

<sup>112</sup> [https://www.bmgf.gv.at/home/Frauen\\_Gleichstellung/Gleichbehandlung/Gleichbehandlung\\_s-kommissionen/Gleichbehandlungs-kommission/Senat\\_II/Einzelfallpruefungen/](https://www.bmgf.gv.at/home/Frauen_Gleichstellung/Gleichbehandlung/Gleichbehandlung_s-kommissionen/Gleichbehandlungs-kommission/Senat_II/Einzelfallpruefungen/), and [https://www.bmgf.gv.at/home/Frauen\\_Gleichstellung/Gleichbehandlung/Gleichbehandlung\\_s-kommissionen/Gleichbehandlungs-kommission/Senat\\_III/](https://www.bmgf.gv.at/home/Frauen_Gleichstellung/Gleichbehandlung/Gleichbehandlung_s-kommissionen/Gleichbehandlungs-kommission/Senat_III/).

<sup>113</sup> Although there are annual meetings of the provincial bodies.

<sup>114</sup> Austria, Viennese Anti-Discrimination Act, LGBl Nr. 35/2004, last amended LGBl Nr. 53/2014, §§ 7 – 8.

*Styria* sets up a range of bodies for Equal Treatment: The Styrian Equal Treatment Commission, the Commissioner for Equal Treatment<sup>115</sup> and Contact Persons. The Commissions main task is to give statements in individual cases of alleged discrimination (in connection to employment with the province) and to comment on specific legal drafts. The Commissioner(s) for Equal Treatment are mainly counselling bodies and they are entitled to issue independent reports and initiate disciplinary proceedings. The Contact Persons are established in all major municipalities and offices of the Styrian Government. Their task is mainly to counsel individual civil servants. The Commissioners and the contact Persons are independent in fulfilling their functions; a Provincial Constitutional Provision safeguards this.<sup>116</sup> Since May 2012, the Styrian Government and the City of Graz also fund a general "Anti-Discrimination Office" that offers individual counselling to everybody and issues statements and expert opinions.

*Carinthia* has set up an Anti-Discrimination Office<sup>117</sup> [Antidiskriminierungsstelle] at the section for civil law within the Office of the Provincial Government. This office entitled to support (counsel) victims of discrimination and to issue recommendations as well as to conduct independent surveys on discrimination. This body is not independent.

*Lower Austria* has set up a Lower Austrian Commission for Equal Treatment<sup>118</sup> [Niederösterreichische Gleichbehandlungskommission] whose main tasks are to give recommendations in individual cases of alleged discrimination (in connection to employment with the province) and to comment on specific legal drafts. The chairperson of the Commission is at the same time the Lower Austrian Commissioner for Equal Treatment [Niederösterreichische/r Gleichbehandlungsbeauftragte/r] and heads the Anti-Discrimination Office [Niederösterreichische Antidiskriminierungsstelle]. This Commissioner is mainly a counselling body with powers to initiate proceedings. The Office can conduct surveys and issue reports. Lastly Coordinators for Equal Treatment and Promotion of Women are established in all major municipalities and offices of the provincial government. Their task is mainly to counsel individual civil servants and notify grievances to the Commissioner. The members of the Commission and the Commissioner are independent in fulfilling their functions; this is safeguarded by a Provincial Constitutional Provision.

*Upper Austria* has set up an Office for Anti-Discrimination<sup>119</sup> [OÖ Antidiskriminierungsstelle] within the provincial government whose main tasks are to give recommendations in individual cases of alleged discrimination (in connection to employment with the province) and to comment on specific legal drafts. It will also be responsible for the dialogue with NGOs and is entitled to issue independent reports.

*Burgenland* has set up an Anti-Discrimination Commission and an Anti-Discrimination Commissioner (Antidiskriminierungs-beauftragte/r).<sup>120</sup> It is mainly a counselling service and a given a vaguely described possibility for mediating conflict as well as writing reports and studies. The independence of the head of this office within the Office of the Provincial Government is safeguarded by a constitutional provision.

*Salzburg*<sup>121</sup> has set up five Commissions for Equal Treatment whose main tasks are to issue expert opinions and give recommendations in individual cases of alleged discrimination (in connection to different areas of employment with the province) and to

<sup>115</sup> And a separate Commissioner for the City of Graz.

<sup>116</sup> Austria, Styrian Styrian Equal Treatment Act, LGBl Nr. 5/2010, last amended LGBl Nr. 130/2014, §§ 34-47.

<sup>117</sup> Austria, Carinthian Anti-Discrimination Act, LGBl Nr. 63/2004, last amended LGBl Nr. 18/2013, §§ 32 – 33c.

<sup>118</sup> Austria, Lower Austrian Equal Treatment Act, - please note that there was a complete recodification of this Act after the cut-off date for this report.

<sup>119</sup> Austria, Upper Austrian Anti-Discrimination Act, LGBl Nr. 50/2005, last amended by LGBl Nr. 90/2013, § 14.

<sup>120</sup> Austria, Burgenlandian Anti-Discrimination Act, LGBl Nr. 84/2005, last amended by LGBl Nr. 82/2016, §§ 29b – 31.

<sup>121</sup> Austria, Salzburgian Equal Treatment Act, LGBl Nr. 31/2006, last amended LGBl Nr. 49/2016, §§ 30-40.

comment on specific legal drafts. A Commissioner for Equal Treatment is mainly set up as a counselling body with powers to initiate proceedings. Additionally, for the City of Salzburg a Commissioner for Equal Treatment was established within the Magistrate with similar duties and powers referring to equality affairs on municipality level. These Commissioners can conduct surveys and issue reports. Lastly Coordinators for Equal Treatment and Promotion of Women are established in all offices of the provincial government. Their task is mainly to counsel individual civil servants and notify grievances to the Commissioner. The members of the Commissions and the Commissioners as well as the Coordinators are independent in fulfilling their functions; this is safeguarded by a provincial constitutional provision.

*Tyrol* appointed a Commissioner for Equal Treatment.<sup>122</sup> It is mainly set up as a counselling body with powers to initiate proceedings and conciliation mechanisms. The Commissioner can also conduct surveys and issue reports. Independence is safeguarded by a provincial constitutional provision.

*Vorarlberg* has used the existing Provincial Ombudsman (Landesvolksanwalt) and the Provincial Ombud for Health care (Patientenanwalt) to serve as Anti-Discrimination Bodies as well.<sup>123</sup> They are already established by provincial constitutional law and have been assigned the tasks to provide legal counsel, to investigate cases of alleged discrimination and to issue independent reports and conduct independent surveys.

#### b) Status of the designated body/bodies – general independence

The Equal Treatment Commission (Gleichbehandlungskommission) has been set up at the Federal Ministry for Health and Women [now: Minister of Education and Women]. The Commission's structure consists of three specialised senates.

The first senate is supposed to deal with issues related to equal treatment of women and men in the workplace; the second senate is responsible for discrimination in employment and occupation covering all other grounds mentioned in Art 19 TFEU except disability. The third senate is responsible for the non-employment related scope of the Racial Equality Directive.

The functions of the chairpersons, who are heading the three senates, are held by federal civil servants appointed by the Minister of Health and Women [now: Minister of Education and Women]. The members of the commission are performing their functions on an unsalaried (no extra fees) voluntary basis.

A major point of criticism in connection with independence is the composition of the senates of the Equal Treatment Commission. Senate II and Senate III are composed of members nominated by Ministers and Social Partners only. Although they can act independently as members of the Commission, the image is that the Commission consists of persons sent by institutions to represent those institution's attitudes and political opinions.

The National Equality Body, which has been set up at the Federal Ministry of Health and Women [now Federal Ministry for Women and Public Service], is structured similarly to the Commission's senates. This was broadening the mandate of the already existing institution, called "Gleichbehandlungsanwältin" (Office of the Ombud for Equal Employment Opportunities) which has been responsible for equal treatment of women and men at the workplace.

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<sup>122</sup> Austria, Tyrolean Anti-Discrimination Act, LGBl Nr. 25/2005, last amended LGBl Nr. 114/2013, §§ 15-17.

<sup>123</sup> Austria; Vorarlbergian Provincial Anti-Discrimination Act, LGBl Nr. 17/2005, last amended LGBl Nr. 46/2014, §§ 11-15.

Following an amendment<sup>124</sup> to Art. 20/2 of the Federal-Constitution (B-VG) in January 2008 the “independent bodies” are finally formally independent in performing their functions. Nevertheless, practice shows that there is independence but for resources and budget. The financial resources for these bodies are still marginal in relation to the tasks assigned to them.

Although detailed information about the budgets of all specialised bodies is not readily available, the National Equality Body seems to be the body where the discrepancy between resources and tasks is most obvious. Only few persons are employed to fulfil all the duties of the body related to all protected areas and all grounds except gender and disability.

The members of the Equal Treatment Commission are not paid for this function separately; they exercise it in the course of their regular employment with the institutions sending them.

The Ombud for People with Disabilities is quite restricted by its mandate to counsel individuals and to speak publicly in favour of rights of people with disabilities.

The provincial bodies are generally set up, staffed and financed by the provincial governments, provided with formal independence as regards content of their work but otherwise completely embedded in the provincial administration.

c) Grounds covered by the designated body/bodies

Both bodies deal with gender, ethnic affiliation, religion, belief, age, and sexual orientation. Discrimination of migrants plays an important role for the work of the bodies though they do not set priorities for their work as they mainly respond to complaints by individuals who feel discriminated.

d) Competences of the designated body/bodies – and their independent exercise

Equal Treatment Commission

The Equal Treatment Commission is divided into three senates, dealing with

- equal treatment of men and women in the workplace;
- equal treatment within the scope of Directive 2000/78/EC, - ethnic affiliation, religion, belief, age, and sexual orientation in employment and occupation, excluding disability;
- equal treatment within the (rest) scope of Directive 2000/43/EC for ethnic affiliation and recently gender regarding the scope of Directive 2004/113/EC.

Upon request of the National Equality Body, of one of the interest groups represented in the given senates or on its own initiative, the responsible senate of the Commission has to give an expert opinion on questions related to the breach of the principle of equal treatment.

These expert opinions on whether a violation of the obligation to equal treatment had occurred have to be made public. The sessions of the senates are confidential and not open to the public.

The senate has to act in individual cases upon request of an employer or an employee, a member of a works council, of a representative of those social partners represented in the relevant senate or the National Equality Body.

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<sup>124</sup> Amendment by Federal Law Gazette I Nr. 2/2008, 04 January 2008.

Senate III, dealing with cases falling under the non-employment related scope of the Directive 2000/43/EC also has to act upon request of an alleged victim.

Victims of discrimination can decide to be represented before the Commission by a representative of one of the interest groups represented in the responsible senate or by a NGO or by any other person he/ she trusts in.

If the senate comes to the conclusion that a violation of the principle of equal treatment has occurred, it has to issue a written proposal to the employee or to the person responsible for the non-employment-related discrimination on how the obligation under the act can rightly be fulfilled. The senate has to call upon the person responsible to end the discrimination.

In case the addressee does not follow the instructions of the commission, the institutions represented in the senate or the National Equality Body can file a civil action for a declaratory judgment concerning the violation of the obligation to equal treatment. The commission has the right to demand from the person, who is alleged of discrimination a written report concerning the assumed discrimination. The commission can also order expert opinions on any company concerned.

The Federal-Equal Treatment Commission is modelled similar to the described Equal Treatment Commission.

The Commission does not assist individual victims and does not conduct surveys or reports<sup>125</sup> – it concentrates on expert opinions and its quasi-judicial role which includes recommendations in individual cases, although its mandate includes the role of giving expert opinions (Gutachten) of a more general nature.

#### National Equality Body (Anwaltschaft für Gleichbehandlungsfragen)

The National Equality Body, which has been set up at the Federal Ministry of Health and Women, is structured similarly to the Commission's senates. The already existing institution, called "Gleichbehandlungsanwältin" (Office of the Ombud for Equal Employment Opportunities) remains responsible for equal treatment of women and men at the workplace. Out of the two other so called "Gleichbehandlungsanwälte (Ombuds for Equal Treatment) one is responsible for discrimination on the basis of race, ethnic affiliation, religion, age and sexual orientation in relation to employment, and the other for discrimination based on ethnic affiliation outside the working environment. The Federal Minister for Health and Women has appointed the members of the National Equality Body.

The National Equality Body is responsible for counselling and supporting victims of discrimination. To fulfil these functions, the Office can hold consultation-hours and consultation days in the whole federal territory.

Most importantly, the National Equality Body can conduct independent inquiries and surveys and publish independent reports<sup>126</sup> and recommendations concerning all questions related to discrimination. Practice so far has shown that the Ombuds receive quite a respectable number of requests and complaints but do not have enough time (resources) for all other parts of their mandate so reports are scarce and no surveys have been conducted so far.

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<sup>125</sup> Their reports (the latest from 2012-2013) only refer to the procedures brought before it and present and discuss in detail the expert opinions given:

[https://www.bmbf.gv.at/frauen/gleichbehandlung/gbb\\_priv\\_2012\\_2013\\_T01.pdf?4l0wxx](https://www.bmbf.gv.at/frauen/gleichbehandlung/gbb_priv_2012_2013_T01.pdf?4l0wxx) (accessed 15 April 2016).

<sup>126</sup> See their website at: <http://www.gleichbehandlungsanwaltschaft.at> (accessed 15 April 2016).

In cases of alleged discrimination in relation to employment the National Equality Body can call upon the employee or enterprise concerned to comment on the case in writing. In further investigation, the National Equality Body can request information from the concerned employee, the organisation, the works council or other employees.

All persons involved are obliged to co-operate with the National Equality Body. If the National Equality Body finds a violation of the obligations lay down by the amended Equal Treatment Act likely in a single case, they can establish the case before the Commission for Equal Treatment.

The Commission is obliged to take up the case in its next session but at least within one month and can assign the National Equality Body with the necessary inquiry. In this case the Body is allowed to enter company premises and inspect company documents. A planned inspection has to be notified to the employer in due time. The non-binding decision about the question of a possible infringement of the equal treatment obligation rests with the Commission.

e) Legal standing of the designated body/bodies

In Austria, the designated bodies have limited legal standing to bring discrimination complaints to courts concerning discrimination.

The basic concept of the national bodies implies that the National Equality Bodies' power to complain ends at the Equal Treatment Commission. It has a limited power to bring cases to court in order to demand a decision in principle – meaning that the court has to decide whether or not discrimination has occurred (§§ 12/4-5 GBK-GAW-G). This opportunity has been rather rarely used so far.

f) Quasi-judicial competences

In Austria, one body is a quasi-judicial institution.

The role of the Equal Treatment Commission can be described as a quasi-judicial one. The decisions are not binding but can trigger a right of action (in court) for the institutions represented in the senate or the National Equality Body. Due to the non-binding nature of the decisions appeal is not possible.

The Commission cannot impose sanctions and also has the duty to publish its findings in an anonymous form. So there is no "naming and shaming".

The question whether the decisions are well respected is hard to answer. One indicator might be that quite a large number of "defendants" [Antragsgegner] voluntarily uses professional legal representation in the process although these costs cannot be reimbursed even in case they win. This indicates that the decision might be feared while it remains unclear whether this fear is accompanied by respect.

Another issue is the treatment of opinions in court. Although courts have to use these opinions as pieces of evidence, their value is quite low, mainly due to the fact that the procedure before the Equal Treatment Commission does not even meet most of the basic procedural standards of courts. As courts have to produce reasoned judgments in any case there is not much barrier for them to "overrule" a decision of the Equal Treatment Commission.

g) Registration by the body/bodies of complaints and decisions

In Austria, the bodies register the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public. The latest report

covers 2014 to 2015. Information is to be found on their websites.<sup>127</sup>

In 2014 and 2015, the National Equality Body dealt with 338 requests regarding age, 488 regarding ethnic affiliation, 212 on religion, 63 on sexual orientation and 64 on belief in the workplace and 353 in the scope beyond the workplace while the Equal Treatment Commission received 75 (42 of which on the ground of ethnic affiliation) applications and gave 27 expert opinions on the other grounds in employment and received 48 applications (24 of which on the ground of ethnic affiliation) and gave 26 expert opinions regarding the scope outside employment.

#### h) Roma and Travellers

At the moment, there are no such priorities by the specialised bodies. Both, the National Equality Body and the Equal Treatment Commission are just relating their work to complaints they receive. Given the rather poor equipment and budget of the National Equality Body, setting specific priorities seems hardly possible for them. Only an increase of their resources might trigger such activities. The National Strategy on Roma Integration is now followed quite closely by the National Equality Body, by regularly sending representatives to sessions of the "Roma Dialogue Platform".

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<sup>127</sup> Equal Treatment Commission: [https://www.bmgf.gv.at/home/Frauen\\_Gleichstellung/Gleichbehandlung/Gleichbehandlung\\_s-kommissionen/Gleichbehandlungs-kommission/](https://www.bmgf.gv.at/home/Frauen_Gleichstellung/Gleichbehandlung/Gleichbehandlung_s-kommissionen/Gleichbehandlungs-kommission/) (15 April 2016).  
National Equality Body: <http://www.gleichbehandlungsanwaltschaft.at> (15 April 2016).

## **8 IMPLEMENTATION ISSUES**

### **8.1 Dissemination of information, dialogue with NGOs and between social partners**

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The duty to disseminate information about the issues at stake is not given a high priority by the Federal Government though there are some activities<sup>128</sup> in this field. Most of the widely visible activities have been taking place between 2004 and 2007.

Generally, basic information about the main functioning of the federal anti-discrimination legislation is now readily available on the Internet. Information about provincial legislation, bodies and structures are quite more complicated to find for some provinces (Burgenland, Vorarlberg) than others (Vienna, Upper Austria, Styria).

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

The dialogue with NGOs started informally, when the National Equality Body accepted the invitations of specialised NGOs and entered into a frequent informal exchange of thoughts and cooperation in individual cases in 2005.

A first official dialogue meeting was held with the Minister of Health and Women on May 8<sup>th</sup> 2006. A small number of NGOs was invited but the response to the meeting was generally positive.

The ministers in charge then continued this meeting policy and her successors held other annual meetings. As these meetings are short single events planned to be held once a year it is a bit hard to call this a dialogue but it seems that both sides do not very actively strive for a tighter relationship.

Apart from this formal "dialogue" the interested NGOs are always invited to officially comment on legal drafts and do so regularly and there is quite some bilateral discussion between the ministries and several NGOs.

Many NGOs dealing with disability are in constant contact with the competent Minister for Social Affairs and consider themselves well informed and involved.

In all the provincial pieces of legislation such a dialogue is at least mentioned. There seems to be, though, a rather weak formal dialogue in practice.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

There is regular contact between the social partners and governmental officials but no procedure was set up to ensure regular meeting specifically concerning issues of discrimination or equal treatment. Generally, social partners have a strong standing in Austrian politics and are involved in most spheres concerning discrimination.

- d) Addressing the situation of Roma and Travellers

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<sup>128</sup> Some informative brochures were financed by the government – including guidance in discrimination cases. (e.g. <http://www.gleichbehandlungsanwaltschaft.at/DocView.axd?CobId=35606>).



The NGO dialogue and the social dialogue have not specifically addressed Roma issues. In the dissemination of information no specific focus was put on Roma issues. The general debate on discrimination and equal opportunities is more focused on immigrants, especially on Muslim and black communities. An official dialogue does not seem to be the forum to actually promote issues with the public institutions, concerning legal developments. The possibility to submit official comments on legislative bills is one rather visible and sometimes fruitful way of communication with the responsible governmental institutions and the parliament.

In general, Roma issues are still quite invisible and usually not in the spotlight of public debates. Only in the course of the prohibition of public begging, Roma play an important role in the recent public discourse – as a target for stereotyping and repression.

Apart from this, the development of a National Strategy for Roma Integration<sup>129</sup> has started in 2011 and was actually formulated in 2012. As one visible outcome of this, the Federal Chancellery set up a so-called "National Contact Point for Roma integration" in June 2012. This Contact Point is mainly coordinating the governmental activities regarding the Roma strategy and caring for a corresponding "dialogue platform" which is also maintaining contacts with NGOs. This platform continued and intensified its work in 2016.

## **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

### **a) Mechanisms**

None of the bills meant to implement the directives contain provisions on that matter. Although the general principles of law "*lex specialis derogat legi generali* and *lex posteriori derogat legi priori*" apply to the Austrian legal system it is still necessary to question and challenge each individual provision before a competent Authority or court in order to find out whether it is still prevailing or obsolete.<sup>130</sup> Usually the prohibition of discrimination will be the more general norm, anyway.

### **b) Rules contrary to the principle of equality**

A comprehensive and concluding assessment of the situation in regard to the whole legislation is not possible.

No general assessment has been made in regard to this aspect. So it is highly likely that in the course of time several provisions will show up whose compliance with the principle of equal treatment appears questionable.

Only the legislator or the Constitutional Court can abolish such discriminatory laws. Civil servants can challenge decisions by administrative authorities based on such discriminatory legislation in the Constitutional Court. Other employees have to challenge decisions by their employers based on such discriminatory legislation in the labour Courts and could only ask the Court (of second or higher instance) to refer the matter to the Constitutional Court.

Discriminatory application of neutrally worded provisions can be challenged before the administrative authority (in the case of civil servants) or in the labour Courts (in the case of other employees).

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<sup>129</sup> See: [http://ec.europa.eu/justice/discrimination/files/roma\\_implement\\_strategies2014\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_implement_strategies2014_en.pdf) for evaluation by European Commission.

<sup>130</sup> Primacy of application of Union law, since *Costa vs ENEL*, Rs 6/64, 15 July 1964: national law conflicting with European norms must not be applied; direct effect also between private contractual partners.

Discriminatory provisions in secondary legislation (decrees implementing primary legislation) can only be abolished by the issuing administrative authority or by the Constitutional Court.

## 9 COORDINATION AT NATIONAL LEVEL

In principle it is the task of the Federal Chancellery [Bundeskanzleramt] to coordinate the Activities for the implementation of the directives within the ministries and the Provinces. The specialised bodies are also coordinated by the Federal Chancellery.

The Equal Treatment Act and the Federal-Equal Treatment Act are both coordinated and elaborated by the Federal Ministry for Labour, Social Affairs and Consumer Protection [Bundesministerium für Arbeit, Soziales und Konsumentenschutz] and the Federal Minister for Education and Women. The Federal Minister of Justice [Bundesministerium für Justiz] has a rather limited role in the implementation of these regulations.

The implementation regarding disability is in the hands of the Federal Ministry for Labour, Social Affairs and Consumer Protection.

The provincial regulations are in the hands of the Offices of the Provincial Governments [Ämter der Landesregierungen].

There is no National Action Plan on anti-racism or discrimination. There had been some ideas in this direction in 2009 but nothing has actually happened. Some political parties are still interested in developing this idea further.

There is, nevertheless, a National Action Plan on Disability 2012-2020,<sup>131</sup> adopted by the Council of Ministers on 24 July 2012. In this paper, protection against discrimination, accessibility and awareness raising are prime topics.

There are plans for a National Action Plan on Human Rights that might include anti-discrimination issues.

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<sup>131</sup> Austria, Ministry of Social Affairs, National Action Plan 2012-2015 – interim report <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=362>.

## 10 CURRENT BEST PRACTICES

- Continuous support for Litigation Association of NGOs Against Discrimination

Being a rather unique mechanism, the Litigation Association of NGOs Against Discrimination (Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern)<sup>132</sup> is one of the driving forces to the creation of case law and legal development in Austria. An umbrella-organisation focusing on strategic litigation and legal knowledge involving NGOs dealing with all protected grounds is highly effective in its impact. Through long-term agreements of financial support, the government acknowledges this importance and safeguards its existence.

- The compulsory reconciliation attempts in cases concerning discrimination on the ground of disability.

In all cases concerning discrimination on the ground of disability – a compulsory reconciliation attempt is prescribed by law before a suit can be filed to the regular courts. This mechanism does not involve any cost for the parties and figures show, that in 2014,<sup>133</sup> in 38% of the attempts they could close the case by an agreement. It avoids the purely controversial attitude necessary in a court case and the discussions and negotiations might be useful to make perpetrators understand discrimination better than they would in court. This mechanism appears to be highly useful and well accepted by claimants. As it is free of risks of cost and done in a respectful manner by the competent Authorities this can be regarded as a best practice example.

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<sup>132</sup> <http://www.klagsverband.at/english>.

<sup>133</sup> No more up-to-date data available.

## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives (if any)

Federal level:

- Burden of proof: The wording of the (federal) Equal Treatment Act does lower the burden of proof for the claimant but in a way that is different from the way stated in the directives and this continues to be a strange legal construction. Nevertheless, in its important decision 9ObA177/07f, from 09/07/2008, the Supreme Court ruled that this regulation has to be interpreted as if being in line with the directive.
- By way of the amendment (BGBl. I Nr. 81/2013 from 27 December 2013) the regulation on the burden of proof has been changed within the Federal-Equal Treatment Act (nota bene: different from the Equal Treatment Act, which is also a federal piece of legislation). Before this amendment the same construction as quoted above had been used in this act as well. Now it reads – in conformity with the directive -: “§ 20a Burden of Proof: In order to invoke discrimination in court the claimant has to establish facts that allow the assumption of direct or indirect discrimination. The respondent then has to prove that no breach of the principle of equal treatment has occurred.” It remains unclear why the legislator chose to change the wording in one act while sustaining the older phrases in the other ones. If – in a dogmatic view - we presume that the legislator wants to uphold some different meaning to be adhered to different phrasing, this new development might point to the fact that the Equal Treatment Act, as well as the Act on the Employment of People with Disabilities and the Federal Disability Equality Act are in breach of the directives.
- Exception for ethos-based employers. The text of § 20/2 Equal Treatment Act does not explicitly state that applying the exception regarding faith or religion may not lead to discrimination on the basis of another ground.
- Penalties: a maximum administrative fine of as low as EUR 360, and exclusion of punishment for employers as first-time-offenders (warning only) in cases of discriminatory job-advertisements and discriminatory housing advertisements. These sanctions are not effective, dissuasive and proportionate, neither.
- The regulation on “discrimination-free advertising of housing” (§ 36 Equal Treatment Act) allows for a justification of differentiation regarding ethnicity and gender if this is “justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Especially, it is not deemed discrimination if the provision of housing constitutes a specially close or intimate relationship of the parties or their relatives”. While this might be in line with the Directive 2004/113/EC (recital 16 and Art. 4 fig. 5) in regard to the gender ground and have some legitimate aspects in regard to Art. 8 ECHR, it constitutes a breach of Directive 2000/43/EC concerning ethnic affiliation as it introduces an additional justification even for direct discrimination on that ground.
- For cases of discrimination of university students [apart from access to university] the legislation lacks any sanction (lex imperfecta). This means that all forms of discrimination (including harassment) against students who are admitted to the university cannot be legally redressed. § 42 Federal-Equal Treatment Act does prohibit discrimination and harassment in connection with being a student (or candidate) – but the regulation is not connected with any sanctions in case of an infringement.
- Compensation: limitation to a maximum amount (as low as EUR 500) if the employer proves that the victim would not have been recruited or not promoted anyway. This sanction is not effective, dissuasive and proportionate.

Provincial level:

Implementation of Directive 2004/113/EC has been used to introduce a new possibility to justify direct as well as indirect discrimination regarding access to and provision of goods and services for all grounds. The formula for this was taken from the justification of indirect discrimination (*if justified by a legitimate aim and the means of achieving that aim is appropriate and necessary*). As a result, even direct discrimination can now be justified that way. § 4/6 of the Vorarlbergian Anti-Discrimination Act<sup>134</sup> and § 2/7 of the Viennese Anti-Discrimination Act<sup>135</sup> are in clear breach of Directive 2000/43/EC as they allow this kind of justification even for acts of direct discrimination on the basis of ethnic affiliation for the fields outside employment.

The Styrian Equal Treatment Act does not protect against victimisation effectively outside the field of employment as the respective regulation prohibiting victimization are not in any way connected with sanctions (§ 32a Styrian Equal Treatment Act). This constitutes a breach of Art. 9 of Directive 2000/43/EC.

### 11.2 Other issues of concern

- No legal means of redress for cases similar to the Feryn case (ECJ-Case C-54/07) where discriminatory statements without a known individual victim were found to be unlawful in the light of the Directive. In Austria - without an individual claiming to have suffered damage from such conduct - no one has the legal right to sue or start a proceeding.
- Limited NGO legal standing: Third party intervention within the regime of the Equal Treatment Act<sup>136</sup> is only allowed for one specific NGO explicitly ('Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern' [Litigation Association of NGOs Against Discrimination]) in the courts (§. 62 GIBG [Equal Treatment Act]). This umbrella-association is open for all specialised NGOs to join in but all NGOs not joining the Litigation Association are excluded from any special procedural rights. If other NGOs want to use the tool of legal intervention, they have - like all other legal parties - to prove their legal interest in the case. This is a shortcoming but not in conflict with the implementation of the directives.
- Still the scope of protection is varying regarding the non-employment areas. In eight provinces a horizontal approach has been chosen to guarantee the same level of protection regarding all grounds extended to the non-employment fields. Only the Province of Lower Austria does not go beyond the minimum standards of protection of the directives. This leads to a very strong difference in the level of protection against discrimination in important fields like primary education, healthcare and social issues within a few kilometres of distance.<sup>137</sup>

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<sup>134</sup> § 4/6 reads: "(6) A difference of treatment on ground of one of the grounds mentioned in § 3/1 does not constitute discrimination if it is justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary." (Remark: the list in § 3/1 includes ethnic affiliation).

<sup>135</sup> § 2/7 reads: "(...) Furthermore, a difference of treatment on ground of one characteristic mentioned in subpara. 1 does not constitute discrimination if it is objective and proportionate as well as justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary." (Remark: the list in § 2/1 includes ethnic affiliation).

<sup>136</sup> Nota bene: different from Federal-Equal Treatment Act.

<sup>137</sup> Note: This situation has been amended after the cut-off date of this report, by a legal amendment (recodification) of the Lower Austrian Anti-Discrimination Act in: Lower Austrian Provincial Law Gazette Nr 24/2017 of 13 March 2017, in force since 14 March 2017.

## 12 LATEST DEVELOPMENTS IN 2016

2016 did not bring much development in regard to the legal implementation of anti-discrimination law, the legal amendments basically dealt with changes of names of institutions or minor formalities not touching the core of the pieces of legislation. There have been, though, discussions about the legal requirements of “integration” for immigrants, calling for more restrictions and enshrining of “our values”. The discussion also started to target Muslim religious clothing of women like the burqa and the hijab, following the publication of the relevant recent case law of the ECtHR (especially *SAS v France*).<sup>138</sup> A legal ban of certain clothes perceived as religious seemed possible, suddenly. The legal debate was focussed on clothing fully covering the face, only.

### 12.1 Legislative amendments

In 2016 there have been no important legislative amendments. The amendments on federal level concerned some adaptations of language and terms used in connection with other legislation or with the establishment of monitoring mechanisms related to the CRPD, which has been finalised in 2016 for all provinces.

The changes in more detail:

#### Federal Level:

- Act on the Employment of People with Disabilities, BGBl I Nr 62/2016: Some amendments regarding the use of special budget for personal assistance to persons with disabilities.

#### Provincial Level:

##### Vienna:

- Viennese Service Order, LGBl Nr. 37/2016: some corrections and technical updates
- Viennese Agricultural Labour Relations Act, LGBl Nr. 13/2016: regulations concerning paternal and parental leave as well as educational leave (Bildungskarenz) or leave to care for a close relative (Pflegekarenz).

##### Lower Austria:

- Lower Austrian Agricultural Labour Relations Act, LGBl Nr. 102/2016: Prohibition of victimization for persons using the right to free movement within the European Union, in case they complain related to Art 45 TFEU (implementing Directives 2014/54/EU and 2014/36/EU).

##### Carinthia:

- Carinthian Agricultural Labour Relations Act, LGBl Nr. 13/2016: Technicalities regarding certain types of payment and contributions by the employer.

##### Upper Austria:

- Upper Austrian Agricultural Labour Relations Act, LGBl Nr. 84/2016: Prohibition of victimization for persons using the right to free movement within the European Union, in case they complain related to Art 45 TFEU (implementing Directives 2014/54/EU and 2014/36/EU).

##### Salzburg:

- Salzburg Equal Treatment Act, LGBl Nr. 49/2016: Implementation of the provincial monitoring board regarding the CRPD.

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<sup>138</sup> ECHR, judgment *SAS v France*, Nr. 43835/11, 1 July 2014.

Tyrol:

- Tyrolean Equal Treatment Act and Tyrolean Equal Treatment Act for Municipalities, LGBl Nr. 81/2016: Measures to implement Directives 2014/54/EU and 2014/36/EU.

Burgenland:

- Burgenlandian Anti-Discrimination Act, LGBl Nr. 82/2016: Measures to implement Directive 2014/54/EU.
- Burgenlandian Agricultural Labour Relations Act, LGBl Nr. 26/2016: regulations concerning paternal and parental leave as well as educational leave (Bildungskarenz) or leave to care for a close relative (Pflegekarenz).

## 12.2 Case law

**Name of the court:** Austria, Supreme Court

**Date of decision:** 29 September 2016

**Name of the parties:** Names withheld

**Reference number:** 9ObA49/16w

**Address of the webpage:**

[https://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20160929\\_OGH0002\\_009OBA00049\\_1\\_6W0000\\_000/JJT\\_20160929\\_OGH0002\\_009OBA00049\\_16W0000\\_000.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20160929_OGH0002_009OBA00049_1_6W0000_000/JJT_20160929_OGH0002_009OBA00049_16W0000_000.pdf)

**Brief summary:** In rejection of a case of extraordinary appeal to the Supreme Court, the Court defines the principle of assessing the amount for compensation regarding immaterial damages caused by discrimination. It states: In general, when assessing compensation for discrimination suffered, it is especially necessary to take into account the length and the gravity of the disturbance. When determining this compensatory amount it will be necessary to take into account the psycho-physical situation of the victim, his or her emotional world (Gefühlswelt), his or her sensitiveness, the limits of variability of his/her psyche (Schwankungsbreite seiner Psyche) and to consider that the compensation is not just balancing the loss of the pleasures or amenities of life but shall also remedy the feeling of having been hurt and, thereby, rebuild the disturbed balance of his/her personality. The case dealt with gender discrimination in the workplace but is relevant to all other fields in its definition of guiding principles.

**Name of the court:** Austria, Supreme Court

**Date of decision:** 26 November 2015, published 7 January 2016

**Name of the parties:** Names withheld

**Reference number:** 9OBA107/15y

**Address of the webpage:**

[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20151126\\_OGH0002\\_009OBA00107\\_1\\_5Y0000\\_001/JJR\\_20151126\\_OGH0002\\_009OBA00107\\_15Y0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20151126_OGH0002_009OBA00107_1_5Y0000_001/JJR_20151126_OGH0002_009OBA00107_15Y0000_001.pdf)

**Brief summary:** The Court had to decide whether the layoff of a person with a disability constituted discrimination as it was caused by the fact that the employee did not inform the employer about his disability and insisted on not doing so, even when the employer got notice of his official status as "benefitted disabled person" according to the Act on the Employment of Persons with Disabilities. The Court states that the disabled person has no duty to inform the employer about the nature of his disability, as long as the disability does not affect his working performance or pose a threat to himself or others in the workplace – or is the basis of needs for reasonable accommodation. As all this was not the case, the layoff was found to be discriminatory.

**Name of the court:** CJEU

**Date of decision:** 16 June 2016

**Name of the parties:** Franz Lesar vs. Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt

**Reference number:** C-159/15

**Address of the webpage:**



<http://curia.europa.eu/juris/document/document.jsf?text=&docid=180322&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1>

**Brief summary:** The Court found that Articles 2(1), 2(2)(a) and 6(2) of Council Directive 2000/78 must be interpreted as not precluding national legislation, which excludes the taking into account of periods of apprenticeship and of employment completed by a civil servant before reaching the age of 18 for the purpose of granting a pension entitlement and the calculation of the amount of his retirement pension, in so far as that legislation seeks to guarantee, within a civil service retirement scheme, a uniform age for admission to that scheme and a uniform age for entitlement to the retirement benefits provided under that scheme. So, in essence, the Austrian provisions, constitute an expression of the freedom enjoyed by the Member States under Article 6(2) of Directive 2000/78/EC to fix, in relation to occupational social security schemes, an age for admission to civil service retirement schemes or entitlement to retirement benefits which are paid under that scheme. Member States are allowed to not only to fix different ages for employees or groups or categories of employees, but also to fix, within an occupational social security scheme, an age for admission or entitlement to retirement benefits. The court built up on previous case law from Austria, quoting its decisions Hütter (C-88-08) and Felber (C-529/13).

There are no figures on Roma cases or any reported Roma court case in 2016. There is a report on anti-gypsyism (2013-2015), though, showing exemplary incidents concerning Roma.<sup>139</sup> The incidents do not, usually, lead to court cases.

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<sup>139</sup> See: Romano Centro, Antigypsyism in Austria, incident documentation 2013-2015, Vienna 2015, p. 5; [http://www.romano-centro.org/downloads/Antigypsyism\\_in\\_Austria\\_2015.pdf](http://www.romano-centro.org/downloads/Antigypsyism_in_Austria_2015.pdf) (accessed 01 April 2017).

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Austria  
**Date:** 1 January 2017

<b>Equal Treatment Act</b>	Title of the law: Equal Treatment Act Abbreviation: GIBG Date of adoption: 23.06.2004 Latest amendments: BGBl I Nr. 34/2015 Entry into force: 01.07.2004 Weblink: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation
	Mainly civil law with a few administrative penal provisions
	Material scope: Most important law, private employment, access to goods or services, education, principle legislation for provinces
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
<b>Federal-Equal Treatment Act</b>	Title of the law: Federal-Equal Treatment Act Abbreviation: B-GIBG Date of adoption: 23.06.2004 Latest amendments: BGBl I Nr. 65/2015 Entry into force: 01.07.2004 Weblink: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation
	Administrative and civil law
	Material scope: Public (Federal) employment
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
<b>Act on the Equal Treatment Commission and the National Equality Body</b>	Title of the law: Act on the Equal Treatment Commission and the National Equality Body Abbreviation: GBK/GAW-G Date of adoption: 23.06.2004 Latest amendments: BGBl I Nr. 107/2013 Entry into force: 01.07.2004 Weblink: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation
	Administrative law
	Material scope: Creation of specialised bodies
	Principal content: Creation of specialised bodies and procedures
<b>Act on the Employment of People with Disabilities</b>	Title of the law: Act on the Employment of People with Disabilities Abbreviation: BEinstG Date of adoption: 10.08.2005 Latest amendments: BGBl I Nr. 62/2016 Entry into force: 11.08.2005 Weblink: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: disability
	Civil (labour) law
	Material scope: Employment, public/private
	Principal content: Prohibition of discrimination, special protection
<b>Federal</b>	Title of the law: Federal Disability Equality Act

<b>Disability Equality Act</b>	Abbreviation: BGStG Date of adoption: 10.08.2005 Latest amendments: BGBl I Nr. 59/2014 Entry into force: 11.08.2005 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: disability
	Civil law
	Material scope: Goods and services
	Principal content: accessibility, protection against discrimination beyond employment
<b>Federal Disability Act</b>	Title of the law: Federal Disability Act Abbreviation: BBG Date of adoption: 10.08.2005 Latest amendments: BGBl I Nr. 59/2014 Entry into force: 01.01.2006 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: disability
	Administrative law
	Material scope: Establishing Ombud for People with Disabilities and Monitoring Board Disability
	Principal content: Specialised bodies
<b>Styrian Equal Treatment Act</b>	Title of the law: Styrian Equal Treatment Act Abbreviation: Stmk-GIBG Date of adoption: 28.10.2004 Latest amendments: LGBl Nr. 130/2014 Entry into force: 01.11.2004 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation
	Civil and administrative law
	Material scope: Public (provincial) employment
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
<b>Styrian Disability Act</b>	Title of the law: Styrian Disability Act Abbreviation: Stmk-BHG Date of adoption: 25.06.2004 Latest amendments: LGBl Nr. 113/2015 Entry into force: 01.07.2004 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: disability
	Administrative law
	Material scope: specialised institution
	Principal content: Installment of provincial "Ombud for people with disabilities" – general task to work on complaints. Discrimination not expressly mentioned
<b>Styrian Agricultural Labour Relations Act</b>	Title of the law: Styrian Agricultural Labour Relations Act Abbreviation: STLAO Date of adoption: 12.04.2002 Latest amendments: LGBl Nr. 117/2015 Entry into force: 01.05.2006 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, ethnic affiliation, religion, belief, disability age, and sexual orientation
	Civil and administrative Law
	Material scope: Employment of agricultural and forestry workers
	Principal content: prohibition of direct and indirect discrimination,

	harassment, victimisation; provincial specialised institution
<b>Viennese Anti-Discrimination Act</b>	<p>Title of the law: Viennese Anti-Discrimination Act  Abbreviation: Wr-ADG  Date of adoption: 08.09.2004  Latest amendments: LGBl Nr. 53/2014  Entry into force: 09.09.2004  Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a>  Grounds covered: race, ethnic origin, religion, belief, age, sexual orientation, sexual identity, gender, pregnancy, maternity</p> <p>Civil and administrative Law</p> <p>Material scope: Non-employment scope of Directive 2000/43/EC</p> <p>Principal content: prohibition of direct and indirect discrimination, harassment, victimisation</p>
<b>Viennese Service Order</b>	<p>Title of the law: Viennese Service Order  Abbreviation: WDO  Date of adoption: 22.09.2006  Latest amendments: LGBl Nr. 37/2016  Entry into force: 09.09.2004  Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a>  Grounds covered: race, ethnic origin, religion, belief, disability, age, sexual orientation, sexual identity, gender, pregnancy, maternity</p> <p>Civil and administrative Law</p> <p>Material scope: Public (provincial) employment</p> <p>Principal content: prohibition of direct and indirect discrimination, harassment, victimisation</p>
<b>Viennese Agricultural Labour Equal Treatment Act</b>	<p>Title of the law: Viennese Agricultural Labour Equal Treatment Act  Abbreviation: -  Date of adoption: 08.09.1980  Latest amendments: LGBl Nr. 13/2016  Entry into force: 16.07.2005  Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a>  Grounds covered: gender, ethnic affiliation, religion, belief, disability age, and sexual orientation</p> <p>Civil and administrative Law</p> <p>Material scope: Employment of agricultural and forestry workers</p> <p>Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution</p>
<b>Lower Austrian Equal Treatment Act</b>	<p>Title of the law: Lower Austrian Equal Treatment Act  Abbreviation: NÖ GIBG  Date of adoption: 11.07.1997  Latest amendments: LGBl Nr. 109/2011  Entry into force: 18.09.2004  Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a>  Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation</p> <p>Civil and administrative Law</p> <p>Material scope: Public (provincial) employment</p> <p>Principal content: prohibition of direct and indirect discrimination, harassment, victimisation</p>
<b>Lower Austrian Anti-Discrimination Act</b>	<p>Title of the law: Lower Austrian Anti-Discrimination Act  Abbreviation: NÖADG  Date of adoption: 29.04.2005  Latest amendments: LGBl Nr. 113/2011 (24/2017, new regulation)  Entry into force: 30.04.2005  Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a>  Grounds covered: gender, ethnic affiliation, religion or belief,</p>

	disability, age, sexual orientation
	Civil and administrative Law
	Material scope: anti-discrimination beyond employment
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
<b>Lower Austrian Agricultural Labour Relations Act</b>	<p>Title of the law: Lower Austrian Agricultural Labour Relations Act</p> <p>Abbreviation: NÖLAO</p> <p>Date of adoption: 30.11.1973</p> <p>Latest amendments: LGBl Nr. 102/2016</p> <p>Entry into force: 27.09.2006</p> <p>Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a></p> <p>Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation</p>
	Civil and administrative Law
	Material scope: Employment of agricultural and forestry workers
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
<b>Carinthian Anti-Discrimination Act</b>	<p>Title of the law: Carinthian Anti-Discrimination Act</p> <p>Abbreviation: K-ADG</p> <p>Date of adoption: 28.12.2004</p> <p>Latest amendments: LGBl Nr. 18/2013</p> <p>Entry into force: 29.12.2004</p> <p>Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a></p> <p>Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation</p>
	Civil and administrative Law
	Material scope: Public (provincial) employment and non-employment scope. Comprehensive Anti-discrimination legislation
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
<b>Carinthian Agricultural Labour Relations Act</b>	<p>Title of the law: Carinthian Agricultural Labour Relations Act</p> <p>Abbreviation: KLAO</p> <p>Date of adoption: 11.09.2006</p> <p>Latest amendments: LGBl Nr. 13/2016</p> <p>Entry into force: 12.09.2006</p> <p>Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a></p> <p>Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation</p>
	Civil and administrative Law
	Material scope: Employment of agricultural and forestry workers
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
<b>Upper Austrian Anti-Discrimination Act</b>	<p>Title of the law: Upper Austrian Anti-Discrimination Act</p> <p>Abbreviation: OÖ-ADG</p> <p>Date of adoption: 06.05.2005</p> <p>Latest amendments: LGBl Nr. 90/2013</p> <p>Entry into force: 01.06.2005</p> <p>Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a></p> <p>Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation</p>
	Civil and administrative Law
	Material scope: Public (provincial) employment, goods & services, education, social matters (soziales), health
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised office
<b>Upper</b>	Title of the law: Upper Austrian Agricultural Labour Relations Act

<b>Austrian Agricultural Labour Relations Act</b>	Abbreviation: OÖ-LAO Date of adoption: 07.04.1989 Latest amendments: LGBl Nr. 84/2016 Entry into force: 30.07.2005 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation
	Civil and administrative Law
	Material scope: Employment of agricultural and forestry workers
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
<b>Salzburg Equal Treatment Act</b>	Title of the law: Salzburg Equal Treatment Act Abbreviation: S-GLBG Date of adoption: 31.03.2006 Latest amendments: LGBl Nr. 49/2016 Entry into force: 01.05.2006 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation
	Civil and administrative Law
	Material scope: Public (provincial) employment, goods & services, education, social matters (soziales), health
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised office
<b>Salzburgian Agricultural Labour Relations Act</b>	Title of the law: Salzburgian Agricultural Labour Relations Act Abbreviation: S-LAO Date of adoption: 22.04.2009 Latest amendments: LGBl Nr. 60/2015 Entry into force: 23.04.2006 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation
	Civil and administrative Law
	Material scope: Employment of agricultural and forestry workers
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised office
<b>Tyrolian Equal Treatment Act</b>	Title of the law: Tyrolian Equal Treatment Act Abbreviation: T-GLBG Date of adoption: 11.01.2005 Latest amendments: LGBl Nr. 81/2016 Entry into force: 12.01.2005 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
	Civil and administrative Law
	Material scope: Public (provincial) employment,
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
<b>Tyrolian Anti-Discrimination Act</b>	Title of the law: Tyrolian Anti-Discrimination Act Abbreviation: T-ADG Date of adoption: 31.03.2005 Latest amendments: LGBl Nr. 114/2013 Entry into force: 01.04.2005 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation

	Civil and administrative Law
	Material scope: goods & services, education, social matters, health reasonable accommodation for disabled persons
	Principal content: prohibition of direct and indirect discrimination, harassment, provincial specialised office
<b>Tyrolian Equal Treatment Act for Municipalities</b>	<p>Title of the law: Tyrolian Equal Treatment Act for Municipalities  Abbreviation: T-GGIBG  Date of adoption: 11.01.2005  Latest amendments: LGBl Nr. 81/2016  Entry into force: 12.01.2005  Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a>  Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation</p>
	Civil and administrative Law
	Material scope: Public employment in municipalities
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation, (same as Equal Treatment Act)
<b>Tyrolian Agricultural Labour Relations Act</b>	<p>Title of the law: Tyrolian Agricultural Labour Relations Act  Abbreviation: T-LAO  Date of adoption: 26.07.2005  Latest amendments: LGBl Nr. 106/2015  Entry into force: 27.07.2005  Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a>  Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation</p>
	Civil and administrative Law
	Material scope: Employment of agricultural and forestry workers
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
<b>Tyrolian Provincial Teachers Employment Act</b>	<p>Title of the law: Tyrolian Provincial Teachers Employment Act  Abbreviation: TLDHG  Date of adoption: 01.12.2005  Latest amendments: LGBl Nr. 75/2014  Entry into force: 01.01.2006  Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a>  Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation</p>
	Administrative Law
	Material scope: Employment of provincial teachers
	Principal content: provincial specialised institution for teachers (Equal Treatment Commission)
<b>Vorarlbergian Anti-Discrimination Act</b>	<p>Title of the law: Vorarlbergian Anti-Discrimination Act  Abbreviation: V-ADG  Date of adoption: 19.05.2005  Latest amendments: LGBl Nr. 46/2014  Entry into force: 01.06.2005  Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a>  Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation</p>
	Civil and administrative Law
	Material scope: Public (provincial) employment, goods & services, education, social protection, health
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
<b>Burgenlandian Anti-</b>	<p>Title of the law: Burgenlandian Anti-Discrimination Act  Abbreviation: B-ADG</p>

<b>Discrimination Act</b>	Date of adoption: 05.10.2005 Latest amendments: LGBl Nr. 82/2016 Entry into force: 06.10.2005 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
	Civil and administrative Law
	Material scope: Public (provincial) employment, goods & services, education, social protection, health
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
<b>Burgenlandian Agricultural Labour Relations Act</b>	Title of the law: Burgenlandian Agricultural Labour Relations Act Abbreviation: B-LAO Date of adoption: 16.05.1977 Latest amendments: LGBl Nr. 26/2016 Entry into force: 17.06.2006 Web link: <a href="http://www.ris.bka.gv.at">www.ris.bka.gv.at</a> Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
	Civil and administrative Law
	Material scope: Employment of agricultural and forestry workers
	Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution



## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country:** Austria  
**Date:** 1 January 2017

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd.mm. YYYY</b>	<b>Date of ratification (if not ratified please indicate) Dd.mm. YYYY</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals ?</b>
European Convention on Human Rights (ECHR)	13.12.1957	03.09.1958	No	Yes	Yes, it is part of the Federal Constitution
Protocol 12, ECHR	04.11.2000	Not ratified, 01.01.2017	N/A	N/A	N/A
Revised European Social Charter	07.05.1999	20.05.2011	N/A	Ratified collective complaints protocol? No	N/A
International Covenant on Civil and Political Rights	10.12.1973	10.09.1978	Exclusion of Habsburg-Lorraine family. Different treatment of Austrian nationals and aliens.	Yes	No
Framework Convention for the Protection of National Minorities	01.02.1995	31.03.1998	Limitation to "national minorities" as defined by Law on Ethnic Groups	N/A	No
International Covenant on Economic, Social and Cultural Rights	10.12.1973	10.09.1978	No	No	No
Convention on the Elimination of All Forms of Racial Discrimination	22.07.1969	09.05.1972	No	Yes	No
Convention on the Elimination of	17.07.1980	30.04.1982	No	Yes	No

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd.mm. yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd.mm. yyyy</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals ?</b>
Discrimination Against Women					
ILO Convention No. 111 on Discrimination	10.01.1973	10.01.1973	No	N/A	No
Convention on the Rights of the Child	26.08.1990	06.08.1992	No	N/A	No
Convention on the Rights of Persons with Disabilities	30.03.2007	26.09.2008	No	Yes	No

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