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Country report

Gender equality



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Country report

Gender equality

How are EU rules transposed into
national law?

Austria

Martina Thomasberger

Reporting period 1 January 2017 – 31 December 2017

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1. Introduction

1.1 Basic structure of the national legal system

Austrian legislation operates on the basis of constitutional principles laid down in the Federal Constitutional Act (*Bundes-Verfassungsgesetz*), additional constitutional legislation, the Federal Financial Constitution Act (*Finanzverfassungsgesetz*) and the provincial constitutional acts for the nine provinces (*Bundesländer*) making up the federal territory. Competence for legislation is split between the federal and provincial levels by Articles 10 to 15 of the Federal Constitutional Act. For instance, the competence for legislating labour law and the connected equal treatment rules lies with the federal level, while legislation concerning provincial civil servants and contractual employees, including equal treatment rules, is reserved to the provincial levels. Federal legislation is carried out by Parliament, which consists of two chambers (*Nationalrat* and *Bundesrat*). Administration is carried out by federal or provincial authorities according to organisational rules laid out by Articles 101 to 104 of the Federal Constitutional Act. Civil and criminal cases are decided within the federal court system with the Supreme Court (*Oberster Gerichtshof*) as the final instance of jurisdiction. Administrative decisions can be appealed within the Administrative Court system (*Bundesverwaltungsgericht* and nine *Landesverwaltungsgerichte*) with the High Administrative Court (*Verwaltungsgerichtshof*) as the final instance of jurisdiction. Questions of the constitutionality of administrative decisions or of federal or provincial legal rules can be taken to the Constitutional Court (*Verfassungsgerichtshof*). Equal treatment and antidiscrimination rules are mostly implemented by civil law and labour law provisions, which means that claims have to be taken to the civil courts or to the labour and social courts.

1.2 List of main legislation transposing and implementing Directives

- Equal Treatment Act for the Private Sector (*Gleichbehandlungsgesetz*, GIBG) BGBl I 66/2004, which in Part IV also contains the guidelines for the provincial equal treatment legislation for forestry and agricultural workers;¹
- Equal Treatment Act for Federal Civil Servants and Federal Contract Employees (*Bundes-Gleichbehandlungsgesetz*, B-GBG);² for constitutional reasons the directives have to be implemented separately on the provincial legislative levels (nine separate equal treatment acts for civil servants of provinces and municipalities), and for forestry and agricultural workers in the provinces (nine separate acts for farm and forestry labourers).

¹

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20003395/GIBG%2c%20Fassung%20vom%2002.11.2015.pdf>, accessed 2 November 2015.

² <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008858/B-GIBG%2c%20Fassung%20vom%2002.11.2015.pdf>, accessed 2 November 2015.

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes. Article 7, section 1 of the Federal Constitutional Act lays down the general equality principle, including prohibiting privileges based on sex, among other attributes. This is a general rule, addressed mainly to federal and provincial legislation but as a constitutional principle it has to be taken into consideration in all acts of state. Article 7, section 2 states that equal treatment and positive discrimination measures shall be considered as constitutional (not breaching the equality principle) until material equality between men and women is achieved.

2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

No.

It must be noted, however, that the European Convention on Human Rights has been transposed into national constitutional law and serves as a national human rights instrument; accordingly the principle of equality in Art. 14 is also part of the national body of law.

2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

Not automatically - fundamental rights and constitutional principles apply to relations between the state and individuals. Indirect third party effects of fundamental rights are commonly recognised in legal doctrine and in case law.³ In civil law indirect third party effects are implemented by way of Paragraph 879 of the Civil Code, which invalidates illegal or unfair or immoral clauses in contracts.⁴

Article 7 is a constitutional guideline for legislation and a benchmark for testing the constitutionality of legislation and acts of state. Traditionally, basic civil rights function as guarantees of freedom from infringements by state or legislative measures. If an enterprise or other entity is owned or controlled by the state, Article 7 and other civil rights can develop an external third party effect (*Drittwirkung*), which binds their activities to the principles laid down in the Constitution and in the civil rights of the European Convention on Human Rights.

2.2 Equal treatment legislation

2.2.1 Does your country have specific equal treatment legislation?

Yes. Equal treatment measures were first included in labour legislation and in all statutes covering civil servants both on the federal and on the provincial levels (Equal Treatment Act for the Private Sector, Federal Equal Treatment Act for Civil Servants).⁵ As far as is

³ E.g. RISJustiz RS0038552 (9 ObA 104/13d), https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19921216_OGH0002_009OBA00602_9200000_002/JJR_19921216_OGH0002_009OBA00602_9200000_002.pdf, accessed 17 November 2016.

⁴ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12018602/NOR12018602.pdf>, accessed Nov 17 2016; see also RISJustiz RS0022866, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19800219_OGH0002_0040OB00138_7900000_003/JJR_19800219_OGH0002_0040OB00138_7900000_003.pdf, accessed 17 November 2016.

⁵ <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20003395/GIBG%2c%20Fassung%20vom%20>

required by the directives this legislation has been extended to goods and services, which are traditionally associated with civil law and consequently adjudicated by the civil courts. Directives 2004/113, 2000/43 and 2000/78 has been implemented through the extension of the material scope of all existing equal treatment acts to cover discrimination on the grounds of ethnicity, age, sexual orientation, and religion or ideology.

The material scope of equal treatment legislation covers sex discrimination, sexual harassment, equal pay, and equal treatment concerning access to employment, working conditions, and the termination of contracts within the context of employment and self-employment as well as equal treatment concerning access to goods and services on the grounds of sex and ethnicity.

[2.11.2015.pdf, https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008858/B-GIBG%2c%20Fassung%20vom%2002.11.2015.pdf](https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008858/B-GIBG%2c%20Fassung%20vom%2002.11.2015.pdf), both accessed 2 November 2015.

3. Implementation of central concepts

3.1 Sex/gender/transgender

3.1.1 Are the terms gender/sex defined in your national legislation?

No. The German term used for the purpose of legal definitions is '*Geschlecht*', which covers the meaning of 'sex' as well as 'gender.' In legal literature the term '*Gender*' describing social attributions or the results of stereotypical ascriptions to biological sex, has been more widely used in recent years but this has no impact on strictly legal terminology.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

No. The legal term '*Geschlecht*' in equal treatment legislation can be legally interpreted as also including within its personal scope persons having undergone a legal change of gender or medical gender reassignment procedures. Case law states, however, that 'everyday living within the bounds of an emotional attachment to a gender other than the biological one' does not constitute a relationship that is close enough to the intended gender identity.⁶ As a consequence, only a legally formalised change of gender or medical gender reassignment gives rise to protection against discrimination.

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes, in the Equal Treatment Act Private Sector in paragraphs 5 (concerning labour) and 31 (concerning access to goods and services). Other equal treatment acts are mostly modelled on the wording and content of this act. The wording of provisions is mostly transferred directly from the German language version of the relevant directive.

Paragraph 3 of the Equal Treatment Act (Private Sector) describes direct discrimination as follows: 'Direct discrimination exists, if a person because of his or her sex experiences a less favourable treatment in a comparable situation than another person experiences, has experienced or would experience.' The same wording is used in all other equal treatment statutes. The wording directly reproduces the German language wording of the recast Directive 2006/54/EC.

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

No. The prohibition of pregnancy and maternity discrimination as direct discrimination on the basis of sex is well established by the case law of the labour courts and the Supreme Court.⁷

⁶ RIS Justiz, RS0124710, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20090421_OGH0002_010OBS00029_09A0000_001/JJR_20090421_OGH0002_010OBS00029_09A0000_001.pdf, accessed 17 November 2016.

⁷ E.g. OGH 8 Ob A 81/13i, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20140227_OGH0002_008OBA00081_13I0000_001/JJR_20140227_OGH0002_008OBA00081_13I0000_001.pdf, accessed 2 November 2015 and OGH 9 Ob A 87/15g and https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20150827_OGH0002_009OBA00087_15G0000_001/JJR_20150827_OGH0002_009OBA00087_15G0000_001.pdf, accessed 2 November 2015.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant

No.

3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes, in Paragraph 5, Section 2 of the Equal Treatment Act (Private Sector):

‘Indirect discrimination exists, if apparently neutral statutes, criteria or processes can disadvantage members of one sex in special ways compared to members of the other sex, unless they are justified by the appropriate pursuit of a legitimate goal and appropriate for achieving this goal.’

As with the definition of direct discrimination, the wording is taken from the German language version of Article 2, Section 1(b) of the recast Directive 2006/54/EC.

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

According to the rules on legal evidence in civil cases both the claimant and the defendant have to offer all means of evidence which they consider relevant for the claim or its rejection. This can include statistical evidence where indirect discrimination is concerned. General evidence rules largely exclude prima facie evidence or presumptions of evidence.

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

Yes. In RIS Justiz RS0120417⁸ the Supreme Court has established case law concerning the indirect discriminatory effects of part-time work for women concerning equal pay and other working conditions. Following the CJEU (e.g. C-187/00, *Kutz-Bauer*), the Supreme Court also consistently rules that budgetary considerations are not a legitimate justification for indirect discrimination (e.g. OGH, 10 Ob S 64/04s).⁹

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

No. Case law and legal doctrine regularly apply both concepts taking into account the circumstances of individual cases and the relevant legal questions. If a rather exacting view is applied one can take the stance that both the Maternity Protection Act and the Fathers Parental Leave Act should incorporate explicit provisions concerning direct and indirect discrimination, based on Clause 5(4) of Directive 2010/18/EU. Parents who claim to have been discriminated against as a result of taking parental leave can file a discrimination lawsuit only on the basis of the relevant Equal Treatment Acts. However, this legal basis requires claimants to offer evidence of a connection between the facts of their case and their sex/gender, which can pose specific challenges in actual situations based mainly on less favourable treatment due to parental leave.

⁸

https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20051219_OGH0002_008OBA00011_05H0000_001/JJR_20051219_OGH0002_008OBA00011_05H0000_001.pdf.

⁹

https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20010628_OGH0002_010OBS00043_01Y0000_005/JJR_20010628_OGH0002_010OBS00043_01Y0000_005.pdf, accessed 2 November 2015.

3.4 Multiple discrimination and intersectional discrimination

- 3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination – explicitly addressed in national legislation?

Yes, it is systematically covered by the material and the personal scopes of the statutes implementing Directives 2006/54/EC, 2000/78/EC, 2000/43/EC and 2004/113/EC (the most important being the Equal Treatment Act (Private Sector) and the Federal Equal Treatment Act for Civil Servants), but it is addressed as a separate issue only in connection with the amount of damages. Inter-sectoral or multiple discrimination should lead to higher amounts of compensation (Paragraph 12, Section 13 of the Equal Treatment Act (Private Sector) (*Gleichbehandlungsgesetz*) and Paragraph 19a of the Equal Treatment Act (Federal Public Sector) (*Bundes-Gleichbehandlungsgesetz*).

All civil claims, which include claims based on labour legislation, must specify the circumstances of the case as well as the specific statutes on which the legal claim is based and proffer adequate proof. If the circumstances suggest intersectional or multiple discrimination, this has to be specified in the brief, which should also list all possible statutory sources. There are no procedural limits to using as many legal sources as a basis for claims as would seem to be possible and adequate.

- 3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

The first court case that concerned multiple discrimination, was filed by a female employee of the Muslim faith whose work contract had been terminated because she had worn a niqab at work, based on Paragraph 17 section 1 Equal Treatment Act Private Sector.¹⁰ The claim addressed religion and ethnicity as grounds for discrimination, but not gender. In 2016 the Supreme Court decided that the circumstances of the case did not constitute discrimination by the employer on the grounds of religion, only on the grounds of ethnic origin. Previous to this case law there had been several opinions by the equality body for the private sector (*Gleichbehandlungskommission für die Privatwirtschaft*) concerning young women wearing headscarves. In these cases the equality body held that the applicants were discriminated against both on the grounds of sex and of religion.¹¹

3.5 Positive action

- 3.5.1 Is positive action explicitly allowed in national legislation?

Yes, Paragraph 8 of the Equal Treatment Act (Private Sector) and Paragraphs 11 to 11d of the Federal Equal Treatment Act for Civil Servants provide a legal basis for positive action measures.

Positive action aimed at attaining equal opportunities is allowed on all levels of labour relations and is not to be considered as discrimination against members of the other sex. In the context of the federal civil service and most of the provincial civil service legislation, positive action is obligatory until a quota of 40 % female participation has been reached on all levels.

The legal provisions follow the wording of Article 157 (4) TFEU very closely.

¹⁰ OGH, 25.5.2016, 9 ObA 117/15v, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20160525_OGH0002_009OBA00117_15V0000_000/JJT_20160525_OGH0002_009OBA00117_15V0000_000.pdf, accessed March 10 2017.

¹¹ http://www.gleichbehandlungsanwaltschaft.at/site/cob_59061/6880/default.aspx, accessed 3 November 2015.

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

The civil law, on which most of labour law is based, is to a large extent governed by the principle of freedom of contract. Some rules, such as observing equality principles during contract negotiations and the signing of such contracts, are in place as a result of the implementation of the directives. However, it is generally agreed upon by legal scholars that positive action within the labour market cannot be prescribed by general legislation and such measures always have to have some form of consensual basis, e.g. between collective bargaining parties or between employers and works councils.

The federal civil service and some provincial civil service laws have implemented positive action at the relevant legislative levels, which is possible because of the special nature of civil service employment (in many cases it is not based on civil contracts but on decisions by administrative authorities and extensively regulated by legislative processes). For instance, the Federal Equal Treatment Act for Civil Servants surpasses the requirements of Article 157 (4) TFEU in that it implements positive action as an official duty of office holders within the federal civil service. It has to be noted that neglecting official duties such as the obligation concerning the special promotion of women in Paragraph 11 of the Federal Equal Treatment Act can constitute an actionable offence for the civil service personnel responsible.

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

Yes. Companies which have a close relationship with the Austrian Republic (*'staatsnahe Betriebe'*) have been obliged by a resolution of the Federal Government Council (*Ministerrat*) to follow a quota of 25 % of female members on company boards (*Aufsichtsräte*) nominated by the federal government. For these companies actual quotas or female representation are at almost 36 %.

The Act for Incorporated Stock Companies (*Aktiengesetz, AktG*) and the Code of Company Regulations (*Unternehmensgesetzbuch, UGB*) were amended by new legislation concerning equality on company boards in October 2017, which entered into effect on January 1, 2018. The relevant changes were implemented in the rules governing the elections of, and postings to, supervisory boards of listed stock companies and of companies with more than 1 000 employees that have supervisory boards of at least six members. The supervisory boards of these companies will have to have at least a 30 % quota of the underrepresented sex. Only 'single gender' companies (defined as companies that have a workforce with less than 20 % employees of one sex) are exempt from the new regulations. The 30 % quota is sanctioned by an 'empty seat' policy, meaning that elections and postings that fail to meet the required minimum are void and board members holding such seats are barred from voting. The new regulations are applicable to all new board elections; however, current seats will not be affected.

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

The Corporate Governance Code for Companies listed on the Austrian Stock Exchange contains a non-binding obligation in section 52 to include the number of women on boards and in management positions in their internal reporting processes.¹²

¹² Austrian Corporate Governance Code, Section 52, http://www.ecgi.org/codes/documents/cg_code_austria_jan2012_en.pdf accessed 26 June 2017.

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes. National legislation distinguishes between sexual harassment as a form of direct sexualised violence in the workplace and sex-related harassment, which occurs when sexualised behaviours are used to create a hostile or intimidating work environment.

3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

Paragraph 7 of the Equal Treatment Act (Private Sector)¹³ and Paragraph 8a of the Federal Equal Treatment Act define sex-related harassment as behaviour within the workplace constituting unwelcome, inappropriate, insulting, degrading, or offensive sex-related behaviour that causes an intimidating, humiliating or hostile work environment. The definition also includes the treatment of a person in a less favourable way because of their rejection or toleration of acts of sexual harassment.

This definition complies with the EU definition in Article 2(1)(c) of Directive 2006/54.

Sexual harassment and sex-related harassment are also forbidden in the context of access to goods and services (paragraph 35 Equal Treatment Act for the Private Sector).

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes, in Paragraphs 7 and 35 of the Equal Treatment Act (Private Sector) and Paragraph 8a of the Federal Equal Treatment Act.

Sexual harassment is defined as behaviour that intrudes into the sexual sphere and that aims at impairing the personal dignity of a person or succeeds in impairing the personal dignity of a person, if this behaviour is unwanted, inappropriate, or offensive for the person as well as creating a hostile (work) environment. If the fact that someone has rejected acts of sexual harassment or submitted to such acts is used as a basis for positive or for negative decisions related to the work environment, this is also to be considered as sexual harassment. An instruction to sexually harass someone also falls within the scope of the provisions.

This complies with the definition found in Article 2(1)(d) of the Recast Directive.

Sexual harassment of a high intensity which impacts the victim's dignity is a criminal offence (see 3.6.4 below)

3.6.4 Please specify the scope of the prohibition on sexual harassment (e.g. does it cover employment and access to goods and services; is it broader?).

Sexual harassment as a criminal offence is defined by Paragraph 218 of the Criminal Code;¹⁴ this covers sexual acts committed against the will of the victim that have a negative impact on the victim's dignity. This provision covers the public as well as the private sphere and would also apply to intensive harassment in the workplace. According to the explanatory legislative notes, this provision is applicable in cases where a perpetrator touches a body part of the victim within her or his 'sexual sphere', such as the breasts or the buttocks and the notes clarify that the sexual area of a victim's body would also have to be extended to thighs or upper arms if the intent to violate the 'sexual sphere' of the

¹³ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40100109/NOR40100109.pdf>.

¹⁴ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40093007/NOR40093007.pdf>, *Strafrechtsänderungsgesetz 2015*, went into effect on Jan. 1 2016, accessed 2 November 2016.

victim was obvious.¹⁵ The new version of Paragraph 218 of the Criminal Code came into effect on 1 January 2016.

Sexual harassment and sex-related harassment are defined by the relevant paragraphs of the Equal Treatment Acts concerning the workplace (see 3.6.2 above).

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

Yes. Paragraph 6, Section 2, Provision 1 and Paragraph 35, Section 2 of the Equal Treatment Act (Private Sector) as well as Paragraph 8, Section 2, Provision 2 and Paragraph 8a, Section 2, Provision 2 of the Federal Equal Treatment Act include this in the legal definition of discrimination on the ground of gender.

3.7 Instruction to discriminate

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

Yes, but only in the context of the workplace and gender related access to goods and services. Paragraph 5, Section 4 and Paragraph 32, Section 3 of the Equal Treatment Act (Private Sector) as well as Paragraph 4a, Section 4 of the Federal Equal Treatment Act for Civil Servants state that 'discrimination also occurs in cases where a person is instructed to discriminate.'

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

No, as far as can be ascertained from the available databases there is no relevant case law.

3.8 Other forms of discrimination

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

No.

¹⁵ https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00689/fname_423854.pdf, accessed 27 May 2016.

4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)

4.1 Equal pay

4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?

Yes, Paragraph 3 of the Equal Treatment Act (Private Sector)¹⁶ and Paragraph 4 of the Federal Equal Treatment Act.

4.1.2 Is the concept of pay defined in national legislation?

No. Pay for employed persons is a concept that is regulated by a complex system of tax and social security law as well as labour regulations on all levels, mostly by collective agreements. Pay in a general sense is what a person earns for his or her labour, in most cases on a monthly basis. Viewed systematically, the relevant provisions comply with the concept of Article 157 TFEU.

The Supreme Court has well-established case law that obliges employers to eliminate gender-specific criteria from the hiring process and from wage negotiations (e.g. OGH 9 Ob A 350/97d).¹⁷ Following the ECJ ruling in the case of *Brunnhöfer* (C-318/99) the Supreme Court confirmed the pre-existing case law that determined that contributions to occupational pension schemes are pay in the sense of Article 156 TFEU.¹⁸

4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?

Yes. Paragraph 11 of the Equal Treatment Act (Private Sector) obliges all parties on every level of collective bargaining to follow the principle of equal pay for work of equal value and to take care that no discriminatory criteria for work evaluation processes are implemented. Pay levels for federal civil servants are regulated by the Federal Civil Servants' Salary Act (*Gehaltsgesetz, GehG*), which contain no distinctions between sexes and are annually adjusted to inflation, as are salaries for provincial civil servants.

Remuneration in the private sector is almost exclusively regulated by collective agreements, which effectively constitute basic levels of pay in all sectors because of the remuneration articles in collective agreements. By law, the personal scope of collective agreements is extended to all employees of a sector irrespective of their union membership. According to Paragraph 9 of the Equal Treatment Act (Private Sector), job advertisements have to contain the minimum amount of collective pay for the job in question. However, a higher rate of pay can be negotiated at any time, which is where equal pay problems may arise in practice. According to Paragraph 11a of the Equal Treatment Act (Private Sector), enterprises that regularly employ more than 150 persons have to publish a report on income distribution among the male and the female part of their workforce every two years. This provision only entered into force in its entirety in 2014 (with a transitional phase between 2010 and 2014).

¹⁶ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151372/NOR40151372.pdf>.

¹⁷ https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_19980520_OGH0002_009OBA00350_97D0000_000/JJT_19980520_OGH0002_009OBA00350_97D0000_000.pdf.

¹⁸ RIS Justiz RS0060292, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJR_19850319_OGH0002_0040OB00031_8500000_004&ResultFunctionToken=837b279f-9303-48bc-ad5e-e3b8cf956ecd&Position=1&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=False&GZ=4+ob+31%2f85&VonDatum=&BisDatum=28.09.2015&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte.

4.1.4 Is a comparator required in national law as regards equal pay?

Yes. If no actual comparator is available, e.g. because only one person has applied for a job, a hypothetical comparator has to be considered.

As far as can be ascertained, the question of a hypothetical comparator has become relevant following an age discrimination case in the private sector.¹⁹ As the wording of Paragraphs 3 (concerning sex discrimination) and 19 (concerning among other grounds age discrimination) of the Equal Treatment Act (Private Sector) are identical this must also be applied to sex discrimination cases. In the cited court case, a male job applicant could prove that he was not hired for the job because of his age. As there were no other applicants for this particular job, the court had to interpret Paragraph 5, Section 1 of the Equal Treatment Act (Private Sector), stating that the law requires a hypothetical comparator to be considered if no concrete comparator is available.

4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

No. Work evaluation systems are contained in some collective agreements but are mostly implemented by obligatory agreements between works councils and employers, in some cases by individual agreements between employers and employees. The Equal Treatment Act (Private Sector) contains no provisions that regulate collective bargaining processes; employees who consider works council agreements as a violation of the principle of equal pay would have to take this up individually with their employers. The principle of equal pay would gain much more traction if it were to be implemented not only as an individual claim but also as a mandatory guideline in collective bargaining rules.

4.1.6 Does national (case) law address wage transparency in any way?

Yes. The income reports (see also 4.1.3 above) are an attempt to establish more transparency concerning income distribution in larger enterprises (upwards of 150 employees). Although this covers a considerable part of the workforce, employees of smaller enterprises are not covered. Moreover, the rules for using the income reports are quite bureaucratic involving confidentiality rules that may deter works councils and employees from pursuing wage negotiations with their employers and even more so from submitting court cases. As far as can be ascertained there is no case law involving income reports.

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country?

No, not yet.

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

In answering this question Paragraph 5 and Paragraph 12 section 12 of the Equal Treatment Act (Private Sector) may serve as a template for all equal treatment statutes, which contain the same or hardly any different wording.²⁰ Acts of indirect discrimination may be justified if they are pursuing a legitimate goal by adequate means. In order to test the possible justification for a measure or rule that is at first seen as indirectly discriminatory it would have to be demonstrated that the measure does not violate any

¹⁹

https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20130129_OGH0002_009OBA00154_12F0000_001/JJR_20130129_OGH0002_009OBA00154_12F0000_001.pdf.

²⁰ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151376/NOR40151376.pdf>, accessed 10 December 2015.

legal rules or principles and that it spells out which goal is pursued and why the goal is adequate within the scope of the relevant policy field.

4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of outsourcing?

No.

4.2 Access to work and working conditions

4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

Yes. Paragraph 3 of the Equal Treatment Act (Private Sector)²¹ and Paragraph 4 of the Federal Equal Treatment Act (which covers federal civil service) cover access to employment, assessment of pay, voluntary social benefits, access to vocational training, professional advancement, working conditions, and the termination of work or employment. There are similar regulations in all equal treatment laws at the provincial and municipal levels.

According to Paragraph 1, Section 1 subsection 1 Equal Treatment Act (Private Sector) a worker is someone who works on the basis of a private work contract. This definition is much broader than the usual legal language used in Austrian labour legislation. It covers every person who depends on an employer for gainful occupation and complies with the case law of the ECJ. See also Chapter 12 below for a discussion of the problem of 'free contract workers.'

Under Paragraph 1, Section 1 of the Federal Equal Treatment Act, the personal scope covers all federal civil servants and federal contractual employees.

4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

The relevant equality provisions cover the scope of Article 14(1) of Recast Directive 2006/54. Paragraphs 3 and 4 of the Equal Treatment Act (Private Sector) and paragraph 4 of the Federal Equal Treatment Act cover the scope of Article 14 (1) of Recast Directive 2006/54 by banning direct and indirect discrimination in connection with access to employment and to occupational promotions, with access to self-employment, with pay, with working conditions, and with access to occupational training and education.

4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Yes. In individual cases, defendants can offer evidence that sex is an essential condition for a certain job (Paragraph 12, Section 12 of the Equal Treatment Act (Private Sector)). This would apply where the biological characteristics of one sex are essential for the requirements of a concrete job. An example given for this is that a soprano cannot sing in the tenor section of a professional choir. As far as can be ascertained there is no relevant case law.

²¹ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151372/NOR40151372.pdf>.

- 4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Yes. Preferential treatment for pregnant women for reasons of their pregnancy is allowed; case law has determined that discrimination against pregnant women is always to be considered direct discrimination on the ground of sex that cannot be justified.²²

- 4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

No.

²² RIS Justiz, RS0129463, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20140227_OGH0002_008OBA00081_13I0000_001/JJR_20140227_OGH0002_008OBA00081_13I0000_001.pdf, accessed 27 September 2016.

5. Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)

5.1 Pregnancy and maternity protection

5.1.1 Does national law define a pregnant worker?

No. In 2006 the Supreme Court submitted a case to the ECJ concerning the question of whether a worker who is currently undergoing fertility treatment in preparation for in vitro fertilisation is to be considered a 'pregnant worker' according to Article 2 of Directive 92/85. In C-506/06 the ECJ ruled that a pregnancy in the sense of Article 2 requires the embryos to have been implanted into the womb. During the fertility treatment the woman is not protected by Directive 92/85 but any adverse decisions concerning her work may constitute discrimination according to equal treatment rules. This has been integrated in the relevant case law.²³ Pregnancy protection in the workplace is set in motion as soon as the employer is demonstrably notified of the pregnancy. Employees for their part can notify employers at any point during their pregnancy, under certain circumstances even after receiving the notification of a dismissal, in which case the dismissal is voided and the employer would have to apply the regular termination procedure for pregnant workers.

5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?

Yes, in Paragraphs 2a to 9 of the Maternity Protection Act, the personal scope of which covers employees, workers, civil servants, teachers and home workers.

All protective measures are listed in separate paragraphs; protective measures are also extended to breastfeeding mothers.

Pregnant workers are prohibited from working under conditions where:

- they have to lift or move weights regularly;
- they have to work standing most of the time without the possibility of short rests in a sitting position or standing for more than four hours per day after week 20 of the pregnancy;
- they are exposed to hazardous materials;
- they have to operate machines with their feet;
- they have to work on means of transportation;
- they have to work piece-rate or on production lines after week 20 of the pregnancy;
- they are sitting most of the time without the possibility to change positions regularly;
- they work in underground mining; or
- in pressurized air.

All protection measures in Directive 92/85 have been completely implemented. The provisions are being surveyed by a specialised administrative authority for the occupational safety and health of employees (*Arbeitsinspektorat*), which also carries out and documents regular evaluations.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

Yes, in paragraphs 10 to 12 of the Maternity Protection Act. In cases where a dismissal takes place before the employee has notified her employer of the pregnancy she can reverse the dismissal by informing the employer as soon as possible.

²³ OGH 8 ObA 27/08s,
https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19950412_OGH0002_009OBA00023_9500000_002/JJR_19950412_OGH0002_009OBA00023_9500000_002.pdf.

Employers can only terminate contracts after having informed the works council and having obtained subsequent consent by the labour courts. Employers are required to sue their employees for dismissal in order to argue their case before the competent labour and Social Law Courts. In court the employers have to offer evidence of the asserted special grounds for dismissal (see below).

A dismissal or the termination of the contract requires special grounds listed in Paragraph 12 of the Maternity Protection Act. These contain, for instance, a failure to show up for work without any justification for a significant period, physical or severe verbal assaults against the employer or his family, theft, fraud, or breaches of trust that would also qualify as a criminal offence (e.g. fraud or serious theft).

Work contracts can also be terminated if the enterprise is shut down and remains closed for at least four months (Paragraph 10 section 3 of the Maternity Protection Act).

Employees who are dismissed without the prior consent of the labour courts can choose to rely on an unjustified premature dismissal or to cease working and to receive legal severance pay (*Kündigungsschädigung*).

The principles of protection from dismissal also apply during parental leave for mothers (paragraphs 12 and 15 section 4 of the Maternity Protection Act)²⁴ and fathers (paragraph 7 of the Fathers' Parental Leave Act).²⁵

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

Yes, Paragraphs 10 to 12 of the Maternity Protection Act.²⁶ A termination of the contract is only possible in cases where the enterprise is materially reduced or closed down. Dismissals require evidence of the grounds listed in paragraph 12 of the Maternity Protection Act, which include severe disturbances of trust, severe theft or fraud, a breach of confidentiality, or assaults upon the employer.

5.2 Maternity leave

5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s)

Maternity leave is at least 16 weeks (eight weeks before and eight weeks after delivery); in cases of premature births, multiple births or C-sections it is extended to 20 weeks (12 weeks after delivery). In some cases specified by medical reasons maternity leave can begin at an earlier date before delivery in order to preserve maternal health (Paragraphs 3 and 5 of the Maternity Protection Act).

5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

Yes. Paragraphs 3 and 5 of the Maternity Protection Act together state that regular statutory maternity leave starts at eight weeks before the due date and ends eight weeks after the actual birth. In cases of health dangers for the pregnant woman or the foetus an individual maternity leave period can start as soon as a competent health official attests

²⁴ § 12, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178134/NOR40178134.pdf>, § 15 <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178136/NOR40178136.pdf>, both accessed 8 March 2018.

²⁵ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40052586/NOR40052586.pdf>, accessed 2 November 2015.

²⁶ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40052555/NOR40052555.pdf>, accessed 3 November 2015.

the need. In cases of premature births, C-sections or multiple births the leave period after birth is extended to 12 weeks.²⁷

Women are not allowed to work during these periods. Employers in breach of this provision face administrative fines.

5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

Yes, Paragraph 14, Sections 1 and 4 of the Maternity Protection Act.²⁸

Pregnant workers have to be removed from dangerous and/or problematic workplaces and be offered a safe working environment. If this is not possible within the company, they have the right to fully paid leave, which has to cover all contract-related rights such as pay and paid vacations.

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

Yes. This is specified in paragraph 14, Section 4 of the Maternity Protection Act.²⁹

Viewed systematically, maternity leave provisions preclude pregnant women from working despite their contractual duties. Because pregnant women and women on maternity leave are legally forbidden to work, the maternity leave period is considered to be part of the active contract; all work-related rights are preserved and extended during this time.

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

All pregnant workers are entitled to maternity benefits from statutory health insurance if they are included in one of the statutory social insurance schemes (which requires previous earnings above the social insurance threshold immediately prior to the beginning of maternity leave).

The amount of maternity benefits is consistently higher than regular sickness benefits. For employees maternity benefits equal the net amount of their monthly earnings without a ceiling.

Self-employed workers who earn above the social security threshold can require an assistant (*Betriebshilfe*) for whom the cost is born by the competent social security body or claim a special maternity benefit of EUR 53.96 per day (in 2017).

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

No. The social security maternity benefit for employees usually equals the former net salary. It would cease only in cases where employers voluntarily pay more than 50 % of the former net salary directly to the pregnant worker.

²⁷ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40170213/NOR40170213.pdf>, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40057689/NOR40057689.pdf>, both accessed 3 November 2015.

²⁸ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12110934/NOR12110934.pdf>, accessed 10 December 2015.

²⁹ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12110934/NOR12110934.pdf>.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

Yes, in Paragraphs 4, 5, 117 and 162 of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz*). In general, pregnant workers are entitled to maternity benefits if they have earnings above the statutory social security threshold (EUR 5 959.80 per annum in 2017). The benefit usually equals average net earnings before the start of the maternity leave period. Similar regulations apply for self-employed workers and farmers, who, during the maternity protection period, are in principle entitled to a benefit in kind (work assistance by a skilled help). In cases where this is not feasible, self-employed workers and farmers are entitled to a cash benefit (EUR 53.96 per day in 2017) during the maternity leave period, the duration of which is defined by the same rules that apply to employed workers (see 5.2.1 above).

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

Yes, Paragraph 15 of the Maternity Protection Act and Paragraph 3 of the Fathers Parental Leave Act. The main duties of a work contract are suspended during maternity leave and parental leave. As soon as the leave period has been completely used up the work contract resumes with full effect and employees have the right to return to their former occupation. Work-related rights are guaranteed during maternity leave and during the first year of parental leave with the exception of advancements in collective pay schemes. Recently some collective agreements have addressed this problem and grant parents full advancement in pay schemes during parental leave.³⁰

5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes, Paragraph 15c of the Maternity Protection Act and Paragraph 5 of the Fathers Parental Leave Act. Adoption leave may be taken from the moment the adoption proceedings have reached the stage where the child is officially included in the adoptive parents' household up to the second birthday of the child; in cases where older children below the age of seven are adopted the adoption leave is for at least for six months.

5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

Yes. Paragraphs 10 and 12 of the Maternity Protection Act, which apply to protection against dismissal for pregnant and breastfeeding women are by law extended to all parental leave periods for biological and adoptive mothers (Paragraph 15(4) of the Maternity Protection Act) and fathers (Paragraph 7 of the Fathers Parental Leave Act).³¹

³⁰ E.g. the Collective Agreement for Social Service Providers (*Kollektivvertrag Sozialwirtschaft*), <http://www.kollektivvertrag.at/kv/sozialwirtschaft-oesterreich-swoe-bags-arb-ang/bags-berufsvereinigung-von-arbeitgebern-fuer-gesundheits-und-sozialberufe-rahmen/4023249?term=sozialwirtschaft>.

³¹ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40111596/NOR40111596.pdf>, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40052586/NOR40052586.pdf>, both accessed 3 November 2015.

5.4 Parental leave

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

No. An evaluation of the regulations by the legislator came to the conclusion that the requirements of Directive 2010/18 were already met by existing legislation even before the date for transposition. Concerning the prohibition of discrimination in Clause 5(4), the existing regulations within equal treatment legislation were considered to be sufficient.³²

5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

Yes. Paragraph 1 of the Maternity Protection Act and Paragraph 1 of the Fathers Parental Leave Act cover both private sector employees and all public servants statutes including teachers, as well as home workers.

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

All regular employment contracts are covered by the personal scope of parental leave legislation. Concerning the labour law status of so-called 'free contract workers' see section 12 below.

5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

The total duration of parental leave is from the end of the maternity leave period, which is reserved for the birthmother, until the second birthday of the child or until the start of the maternity leave period for a younger sibling. The legal concept grants this period to both parents who must reach an agreement as to if and how they divide it between themselves.³³ There are no differences in duration for the private and for the public sector.

5.4.5 Is the right of parental leave individual for each of the parents, a family entitlement or a combination of the two? How many months are reserved for each parent on a take-it or leave it basis?

Both parents have the right to parental leave independently. The statutes require parents to coordinate the amount of parental leave with each other. Within the timeline from the end of maternity leave until the second birthday of the child, parental leave may be taken in up to three parts with a two-month minimum duration for one of those parts. The parental leave regulation does not foresee any 'take it or leave it' system. At the time of the first change between the parents they may take one month of parental leave at the same time (which shortens the overall duration by one month so that parental leave ends one month before the second birthday of the child).

There are no procedural rules in place concerning the coordination of parental leave parts between the parents. As far as can be ascertained, however, no serious disputes concerning this matter have ever occurred. There is no relevant case law.

³² For further information, see Palma Ramalho, M. do R., Foubert P. and Burri S. (European network of legal experts in the field of gender equality) (2015), *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries*, Brussels, European Commission Directorate-General Justice, Freedom and Security, p. 34.

³³ Parental leave until the second birthday of the child can be taken in three parts of at least two months' duration; further information can be found in *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries*, pp. 31 to 32.

- 5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

Parental leave is by legal definition full-time leave. Parents can voluntarily shorten the leave period and save up to three months of the legal duration for later use (until the child has reached school age or until he or she is seven years of age). They are not required to take the full leave period and can decide to return to the workplace at an earlier date.

Additionally, parents have the right to change their contractual working time or their working patterns instead of taking full time leave (right to parental part-time work, see 5.9. below).

- 5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

Paragraph 15 of the Maternity Protection Act and Paragraph 3 of the Fathers Parental Leave Act establish a set of notification periods. In general, parents have to notify their employers at least four months before the planned beginning of their parental leave period, except for mothers who may notify their employers of the start of their first parental leave part up to the last day of their maternity leave period.

Employers' interests can only be taken into account during the proceedings concerning parental part-time work.

- 5.4.8 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

Yes, (see 5.3.1 above). Adoption leave of at least six months may be taken in cases of adopting children between the ages of two (the legal end point of parental leave for biological children) and seven (the latest starting point for compulsory school attendance).

- 5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

No, not in cases of parental leave. In cases where parents want to exercise their right to parental part time work instead of parental leave or substituting a period of parental leave, they would have to have at least three years duration of contract (including parental leave periods).

- 5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

No.

- 5.4.11 Are there special arrangements for small firms?

No. An exception concerns the duration of parental part-time work (until the fourth birthday of the child) and the procedural rules of conflict resolution for employees of small enterprises (up to 20 employees). In these cases, if the legitimate interests of the employer denying part-time working arrangements as applied for by the parent can be proven during court proceedings, they can be prioritised over the reasons given for the parental part-time application by the parent.

- 5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

No, not in the context of parental leave. For older children there are unpaid leave arrangements in cases of severe illness (*Familienhospizkarenz*).³⁴ In these cases parents may also be eligible for a special care benefit (*Pflegekarenzgeld*).³⁵

- 5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

Yes. This would have to be considered as discrimination concerning working conditions (see Paragraph 3 of the Equal Treatment Act (Private Sector), which may serve as a template for all other equal treatment statutes).

The term 'working conditions' covers collateral contractual duties, formal non-contractual rules, e.g. house rules or working space allocations, and to some extent also informal rules. The Supreme Court has considered the transfer of a mother returning from parental leave to another department with changed working patterns that interfere negatively with the childcare arrangements as discrimination concerning working conditions.³⁶

- 5.4.14 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

In the Austrian system, parental leave suspends the primary obligations of a work contract between the employer and employee for a legally defined period, but it does not end the contractual relationship per se. As soon as the parental leave period ends and the employee returns to her or his workplace, the complete content of the work contract is reinstated as it had been agreed before the parental leave period and there is no need for additional contract negotiations. Consequently the employee has the right to return to his or her contractual duties even if the actual former position is not available. In such cases the employer either has to provide a position that is as similar to the former as possible or, in cases where that is not possible for factual reasons, is required to pay the salary in full until the problem can be resolved or the work contract can be legally terminated. Contractual changes or relocations of employees on returning from parental leave would have to be consensual, in some cases also requiring consent from the works council.

- 5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

Yes. The basis of the work contract remains intact during maternity and parental leave periods; only the main contractual duties of working and of payment are suspended for the duration of these periods while accessory obligations, such as confidentiality, remain intact. The work contract returns to its full effectiveness as soon as parents return to the workplace after a leave period. Parents are entitled to return to their position as defined by the work contract, but they can be transferred to other places within the boundaries of

³⁴ Work Contract Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz*), Paragraphs 14 to 14c <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008872/AVRAG%2c%20Fassung%20vom%2028.09.2015.pdf>.

³⁵ Federal Care Allowance Act (*Bundespflegegeldgesetz*), Paragraphs 21c to 21f <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008859/BPGG%2c%20Fassung%20vom%2028.09.2015.pdf>.

³⁶ 9 Ob A 2/14f, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20140625_OGH0002_009OBA00002_14F0000_000/JJT_20140625_OGH0002_009OBA00002_14F0000_000.pdf.

general labour law, e.g. if and when the requisite consent to a transfer by the works council (where instituted) has been obtained. Transfers can meet legal requirements, such as formal consent of the works council, but still constitute possible breaches of equal treatment obligations under the provisions of the relevant Equal Treatment Acts. As works councils do not have a mandate to step in for equal treatment court cases (as they have for instance in suits concerning terminations of contracts) employees would have to file a lawsuit by themselves and face the financial risks (or apply to their union or to the competent Chamber of Labour for legal aid).

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

The work contract remains in force but its main duties are suspended for the duration of parental leave.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

Under statutory social insurance as well as under the separate public service systems of social security, every woman born after 31 December 1954 is legally granted continuing pension coverage (child care credits) for 48 months after the birth of a child. Part of this coverage will be transferred to fathers for the time they have spent caring for the child (usually determined by the period of their drawing the small children's benefit). Fixed contributions on a legally defined basis are paid by the public authorities. Health insurance is linked to the small children's benefit (*Kinderbetreuungsgeld*). In cases where there is no health insurance coverage available, parents are included in the statutory health insurance of their spouses free of charge.

5.4.18 Is parental leave remunerated by the employer? If so, how much and in which sectors?

No. Parents of small children are entitled to a special non-contributory family benefit (*Kinderbetreuungsgeld*) that is not part of the social security system.

5.4.19 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

No. Family benefits (general family benefit and small children's benefit for children up to three-and-a-half years old) are not part of the social insurance systems. They are paid to parents who have legal residence in Austria and are financed by a special wage-related tax (*Dienstgeberabgabe zum Familienlastenausgleichsfonds*) and by the general revenue from taxes.

General family benefit amounts to EUR 118 to EUR 162 per month and child, with additional amounts for larger families.³⁷ Concerning the small children's benefit the system of lump-sum benefits has been changed to a system that gives parents more time flexibility. The daily amount of the fixed rate benefit is adjusted to the period of time that parents decide on drawing the benefit. The time frame is between 12 months and 35 months with benefit periods of 3 to 7 months reserved for one of the parents,³⁸ resulting in *per diem* benefits of EUR 18.15 to EUR 33.88. Alternately parents can decide to claim an income-related benefit of up to 80 % of average net earnings which is granted for 12 months plus two months reserved for the other parent.

³⁷ <https://www.help.gv.at/Portal.Node/hlpd/public/content/8/Seite.080714.html>, accessed 17 November 2016.

³⁸ <http://www.bmfj.gv.at/familie/finanzielle-unterstuetzungen/kinderbetreuungsgeld-ab-1.3.2017/daten-und-fakten.html>, accessed 10 March 2017.

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

The legal duration of parental leave exceeds the minimum in Clause 2(2) of Directive 2010/18: it is granted until the second birthday of the child or until the start of maternity leave for a younger sibling. The right to parental leave does not depend on a minimum employment period (Clause 3(1)(b)). Employers cannot defer the start of parental leave periods for any reasons (Clause 3(1)(c)). Adoption leave is a right of employees (Clause 4)).

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Fathers working as federal public servants or federal contractual employees can apply for four weeks of additional unpaid leave on the occasion of the birth of their children. Most collective agreements offer at least two or three days of additional paid leave to be taken by fathers on the occasion of the birth of a child (nursing mothers will usually be on maternity leave). Some collective agreements also offer up to four weeks of unpaid paternity leave.

From 1 March 2017, all male employees are offered the legal option to negotiate an unpaid leave period of up to 31 days in connection with the birth of a child (*Familienzeit*). In connection to this leave period they can draw a corresponding part of the small children's benefit as compensation (*Familienzeitbonus*).

5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

Yes. Under the new regulations for paternity leave (*Familienzeit*),³⁹ from 1 March 2017 fathers can negotiate up to one month of unpaid leave within the first three months after the baby's birth. If the father's work contract is terminated because of this (for which the employee would have to offer prima facie evidence) he can sue for the reinstatement of the work contract and continued employment.

The same protection against dismissal applies in time periods between leave periods, in these cases based on provisions of the equal treatment acts.

After notifying the employer of the planned start of a parental leave period, during the parental leave, and for four weeks after its end, fathers have the same level of protection against dismissal as women during pregnancy and parental leave.

5.6 Time off/care leave

5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

Yes, Paragraph 16 of the Paid Vacations Act (*Urlaubsgesetz*). Employees have the right to one week of additional paid leave per year in cases where a relative living in the same household is sick and requires care. Where the relative is a child below 12 years of age the period is extended to up to two weeks per year. Force majeure leave is also extended to parents who have to be admitted into in-patient care together with their sick children. This leave may be taken on a daily basis.

³⁹ https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01110/index.shtml, accessed 11 January 2017.

5.7 Leave in relation to surrogacy

5.7.1 Is parental leave available in case of surrogacy?

Yes. Austria has a legal prohibition on surrogacy in place. Parents may however enter into a surrogacy relationship in a country where this is legal. If the biological parents are Austrian citizens the children have to be given all citizen and residency rights on their return to the country and are covered by all provisions of Austrian law. This would also have to be extended to the right to parental leave and parental part-time arrangements for the parents.⁴⁰ So far no relevant case law concerning labour regulations and surrogacy exists.

5.8 Leave sharing arrangements

5.8.1 Does national law provide a legal right to share (part of) maternity leave?

No. Maternity leave – in accordance with ILO Convention C 183, 2000 – is reserved for pregnant women and nursing mothers for reasons of public health. Paid maternity leave periods are first of all a public health measure to protect the health of both mothers and new-born children and to lower the risks of premature births and stillborn children. Public policies in Austria are not set to change this. Where paternity leave provisions are in place, they are granted in addition to maternity leave.

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent?

No. Both mothers and fathers are entitled to the full parental leave period; if they want to split the period between them, they are required to reach an agreement on the duration of each part of the parental leave within the legal framework (parental leave may be taken in three parts between the end of the maternity protection period and the second birthday of the child, unless the parents decide to defer a part of the parental leave for later). Only one month of parental leave can be taken by both parents at the same time; this shortens the overall leave period by one month.

The minimal duration of one part of parental leave has to be two months, irrespective of which parent takes it. Other than that parents can split the maximum period according to their wishes and needs.

5.9 Flexible working time arrangements

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

Yes. Paragraphs 15h to 15o of the Maternity Protection Act and Paragraphs 8 to 8h of the Fathers Parental Leave Act contain the right to change working time and/or working patterns for the parents of children up to the age of four. If the work contract of the parent has lasted for at least three years, including parental leave periods, and in enterprises with 21 or more employees, the right is extended to when the child is aged up to seven years.

⁴⁰ Constitutional Court B 13/11 and B 99/12 et al., https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09888786_11B00013_2_01/JFR_09888786_11B00013_2_01.pdf and https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09878989_12B00099_01/JFR_09878989_12B00099_01.pdf.

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

Yes. Employees have to approach their employers with a detailed proposal concerning the amount of working time and the required working pattern during a regular working week. This proposal cannot be simply rejected by the employer, who has to provide a counter-proposal in writing. If an ensuing conflict cannot be resolved within a certain timeframe, the employer (or the employee in cases of smaller enterprises) has to commence court proceedings.

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

No.

There are no provisions concerning remote work in labour legislation. Some of the more progressive collective agreements contain rules on working remotely, but these are not specifically modelled for the benefit of parents.

Parental part-time work modifies the main duties of the work contract only regarding working time and pay, while other contents of the contract remain unchanged. According to this systematic framework, the work contract as originally agreed upon resumes with full effect after the parental part-time working period ends. Continuing work in a part-time or changed work pattern would require a change of the existing work contract between the employer and employee, consecutive to the parental part-time working arrangement.

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can 'bank' hours to take time off in the future?

Yes. Some collective agreements and some public service laws contain these options, although they are not specifically tied to parenthood.

Usually employees can agree to be paid 20 % to 25 % less over a period of five or four years and then take a paid leave of absence for a year.⁴¹

⁴¹ See, for example, Federal Contractual Civil Servants Act (*VertragsbedienstetenG, VBG*), Paragraph 20a, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40089023/NOR40089023.pdf>, accessed 19 December 2016.

6. Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?

Employers' contributions to occupational social security schemes are considered as part of pay (see also 6.7 below).

Discrimination concerning contributions would therefore have to be evaluated under Paragraph 3 ('Equal pay') of the Equal Treatment Act.⁴²

6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.

Occupational pension schemes are not widespread in Austria. They have to be based on an agreement between an employer and the works council or in some cases on a collective agreement with a trade union. Only if and when such an agreement is in place do the legal rules constitute requirements for contributions, pension benefits, and financial security arrangements. Pension scheme agreements have to include all workers and employees within the enterprise who work under regular employment contracts. Established case law by the Supreme Court has clarified that pension scheme contributions by the employer and occupational pension benefits are part of pay and therefore have to comply with rules on equal pay.⁴³

The personal scope of the Occupational Pension Schemes Act (*Betriebspensionsgesetz, BPG*) and of Private Pension Fund Act (*Pensionskassengesetz, PKG*) cover every worker and employee working under a private contract whose employer has established an occupational social security scheme for pensions, including board members.

Additionally and in order to strengthen the 'second column' of retirement benefits the Occupational Financial Provisions Act (*Betriebliches Mitarbeiter- und Selbständigenvorsorgesetz, BMSVG*) requires employers to pay a monthly contribution for every employee based on a percentage of gross monthly earnings into a scheme usually borne by a specially certified financial company; the personal scope also covers all employees working under a private contract. Since 2007 this provision has been extended to self-employed persons who are required to pay an additional contribution of 1.53 % of annual taxable earnings to a specialised financial fund holder.⁴⁴

The scope of the acts mentioned above is more limited than Article 6 of Directive 2006/54 it does not cover unemployment or sickness benefits for periods of disability in respect of work.

Austrian employers are required to continue employees' pay during comparatively long periods of sick leave (at least six weeks of full pay and at least four weeks of half pay, even longer in cases of occupational accidents). Additionally, there is a well-established

⁴² RIS Justiz RS00117672, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20030423_OGH0002_009OBA00256_02S0000_002/JJR_20030423_OGH0002_009OBA00256_02S0000_002.pdf, accessed 3 November 2015.

⁴³ https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20060921_OGH0002_008OBA00050_06W0000_003/JJR_20060921_OGH0002_008OBA00050_06W0000_003.pdf.

⁴⁴ <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10007036/BPG%2c%20Fassung%20vom%2005.11.2015.pdf>,
<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10007055/PKG%2c%20Fassung%20vom%2005.11.2015.pdf>,
<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20002088/BMSVG%2c%20Fassung%20vom%2005.11.2015.pdf>, all accessed 3 November 2015.

and secure system of social security benefits in place by way of the statutory social security systems, which are financed by mandatory contributions from both the employees and the employers. Statutory health insurance and unemployment insurance schemes include practically all employed and many self-employed persons with earnings above the social security threshold. The broad coverage of statutory social security makes additional occupational schemes covering unemployment or health benefits superfluous. Article 6 of Directive 2006/54 allows for adapting the implementation of the chapter on occupational social security schemes in accordance with national law and/or practice.

6.3 Is the material scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.

The material scope covers occupational old-age pensions, disability pensions, and survivors' benefits. Occupational accidents and illnesses, and unemployment are not covered. This is a result of the well-established framework of statutory social security where both employers and employees are obliged to pay contributions. Mandatory social insurance is contribution based: the benefits are calculated on the amount of contributions and the duration of their payment without regard to the sex of the recipient.

Occupational pension schemes are considered as an additional 'second column' of retirement benefits, which are introduced as internal pay benefits and to complement, not replace, statutory old age or disability pensions. As part of pay, the contributions to occupational pension schemes may not have a discriminatory basis or effect.

6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54?

No. Under the Occupational Financial Provisions Act (*Betriebliches Mitarbeiter- und Selbständigenvorsorgegesetz*) employers and self-employed persons insured under the Trade and Commerce Social Security Act have to pay mandatory contributions into a financial scheme that is set to provide additional occupational pension benefits to employees or to self-employed persons.

6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?

No.

6.6 Is sex used as an actuarial factor in occupational social security schemes?

No.

6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

Occupational social security schemes are conceived as an additional 'second column' of retirement benefits, the 'third column' being private pension insurance and personal savings. Compared to the pensions from statutory social insurance the two additional 'columns' do not have a relevant statistical impact on the financial safeguarding of employees and self-employed persons after retirement. It was never part of social policy development to include occupational social security schemes for unemployment or occupational accidents and diseases within the scope, because relevant benefits are already extensively covered by federal social security legislation.

Where occupational pension schemes have been established they are financed by contributions from the employers. Both contributions and benefits are consequently regarded as part of pay.⁴⁵ Case law of the Supreme Court stresses the importance of the general equality principle that forbids arbitrary differentiation between groups of employees.⁴⁶ Even if there are different pensionable ages in the statutory pension systems, different ages for benefits eligibility or earlier contribution stops for women because of their earlier retirement age are in breach of the equal treatment principle.⁴⁷

Due to the concept of supplementing statutory pensions, occupational benefits have usually been modelled according to the requirements of statutory pensions, e.g. regarding accession ages.

The case law relating to occupational social security schemes in most cases concerns questions of liability, e.g. in cases of employer insolvency.

⁴⁵ RIS Justiz, RS0021639, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19890111_OGH0002_009OBA00513_8800000_011/JJR_1_9890111_OGH0002_009OBA00513_8800000_011.pdf, accessed 3 November 2015.

⁴⁶ https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20060921_OGH0002_008OBA00050_06W0000_003/JJR_20060921_OGH0002_008OBA00050_06W0000_003.pdf, accessed 3 November 2015.

⁴⁷ RIS Justiz, RS0117672, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20030423_OGH0002_009OBA00256_02S0000_002/JJR_2_0030423_OGH0002_009OBA00256_02S0000_002.pdf, accessed 3 November 2015.

7. Statutory schemes of social security (Directive 79/7)

7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?

Yes. There is no special article or paragraph in the statutory social security regulations concerning gender equality. Apart from the transitional period still allowing for different pensionable ages until 2033 for men and women in the statutory social security schemes there are no differences in the conditions of social security between men and women.⁴⁸

7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

Austria's social security is separated into statutory systems that cover health insurance, old age pensions and disability benefits for employees and unemployed persons, self-employed persons and farmers, and statutory social security for federal and provincial public servants. Pensioners have mandatory health insurance. Employees have mandatory unemployment insurance, which also offers an option for self-employed persons. The personal scope of Article 2 is completely covered.

7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

In some respects the material scope is broader than required by Article 3. All pension rights cover surviving family members of insured persons, who can claim widows'/widowers' pensions or orphans' pensions with annexed public health insurance.

7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.

The Austrian Constitutional Court repealed all provisions concerning different pensionable ages for men and women in 1992. The statutory social security schemes instigated a long transition period for the raising of women's pensionable age, starting in 2024 and raising the pension age for women in six-monthly steps until it reaches 65 in 2033.⁴⁹ Austria has consequently declared an exception to Article 7 concerning the age for pension eligibility for men and women in the statutory social security systems. This does not apply to the pension systems of federal public servants who have a uniform pension age of 65. It is to be noted that all public servants' social security schemes and most of the professional corporate associations have introduced a uniform pension age without transition periods.

⁴⁸ Austria has a considerable pension gap (see European Commission (2013), *The Gender Gap in Pensions in the EU*, Luxembourg, p.79, available at: http://ec.europa.eu/justice/gender-equality/files/documents/130530_pensions_en.pdf, accessed 31 May 2016), which is however not due to gender differences in the social security systems but results from gender inequalities in the labour market and from inadequate systemic compensations for periods of economic inactivity due to family or other care responsibilities.

⁴⁹ Constitutional Act on different age limits for men and women in statutory social security pension schemes (*Bundesverfassungsgesetz über unterschiedliche Altersgrenzen von männlichen und weiblichen Sozialversicherten, BVG Altersgrenzen, BGBl 1992/832*), <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008799/Unterschiedliche%20Altersgrenzen%20von%20m%C3%A4nnlichen%20und%20weiblichen%20Sozialversicherten%2c%20Fassung%20vom%2005.11.2015.pdf>, accessed 3 November 2015.

7.5 Is sex used as an actuarial factor in statutory social security schemes?

Not widely. A sex-based actuarial difference concerned additional pension annuities resulting from voluntary additional contributions by insured persons, which were privileging women. The relevant ordinance has been amended; from April 2016 the actuarial differences have been eliminated.⁵⁰ Another issue of minor importance still exists in Paragraph 184 of the General Social Security Act concerning the actuarial factors used for calculation of indemnities for occupational accident pensions.⁵¹ Numbers and amounts of indemnities paid under this provision have steadily been decreasing over recent years. Currently the largest of the self-governing bodies that carry the mandatory occupational accidents and occupational health insurance, the General Occupational Accidents Insurance (*Allgemeine Unfallversicherungsanstalt, AUVA*) has instituted a moratorium on granting these indemnities (based on a resolution by the governing board).

7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

No.

⁵⁰ BGBl II 64/2016, https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_II_64/BGBLA_2016_II_64.pdf with addendum https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_II_64/COO_2026_100_2_1205553.pdf, both accessed 31 May 2016.

⁵¹ Paragraph 184 General Social Security Act, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12093674/NOR12093674.pdf>, and Ordinance BGBl II 1999/245, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10009150>, both accessed 19 December 2016.

8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 Has Directive 2010/41/EU been explicitly implemented in national law?

Yes. Additional wording was introduced into paragraph 1 of the Equal Treatment Act (private sector). It states that 'the formation, establishment, or extension of an enterprise as well as the beginning or extension of any kind of self-employed occupation' is part of the material scope.⁵²

8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)

There is no formal legal definition of self-employment. Self-employment is to a large extent defined by membership in one of the professional corporate associations (*Kammern*) or by exercising a self-employed occupation for which no professional corporation exists. Another way of ascertaining if a person is self-employed is to assess their social security status. Persons who are insured under the Trade and Commerce Social Security Act or under the Farmers' Social Security Act are considered to be self-employed.

8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.

Persons insured in one of the statutory systems are either self-employed or employed, depending on their social security status.

In all statutory social security systems, spouses are considered to be covered by statutory health insurance (if they are not covered themselves by a statutory scheme) and survivors' benefits.

Registered same-sex partners are considered in the same way as spouses.

Life-partners can be included in statutory health insurance (if they are not covered by a statutory scheme) after 10 months of living in a registered common household. They have no claims for survivors' benefits, however.

8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted, or broader than specified in Article 4 Directive 2010/41/EU?

Implementation was carried out in the Equal Treatment Act – see 8.1 below. Both the personal scope and the material scope correspond to the directive.

8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?

There are no state programmes or initiatives, but this is mostly due to the corporatist organisation of trade and commerce, the free professions and farming. Each of these sectors has its own professional *Kammer* (statutory corporation that has administrative, organisational and disciplinary duties for their member groups). The corporations are self-

⁵² <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151371/NOR40151371.pdf>, accessed 3 November 2015.

governing bodies, which means the state has no purview in matters concerning positive action measures.

8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?

Yes. Austrian social security is governed by the principle of statutory insurance. Every person earning an income above a legally defined social security threshold is included in the mandatory system and has to pay contributions. There is no opting out of social security.

Members of the Chambers of Commerce as defined by the Trade and Commerce Act, many self-employed persons not covered by the Trade and Commerce Act, members of the free professions like lawyers and medical practitioners in free practice, and self-employed farmers and forestry workers are insured under the Trade and Commerce Social Security Act or under the Farmers' Social Security Act on a mandatory basis.

There is no choice of system; social security authorities are self-governing bodies that bear the administration and the schemes.

Mandatory social security covers age, disability, occupational accidents and illnesses, unemployment, and health. Self-employed persons (except for farmers) can voluntarily opt into the mandatory unemployment insurance.

All mandatory social insurance systems offer pension benefits for surviving spouses, same-sex registered partners and children including health insurance. This does not extend to unmarried life-partners. Spouses, registered same-sex life-partners, and children without mandatory insurance are legally included in health insurance, in many cases free of charge so no contributions have to be paid.

8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?

Yes, Paragraphs 102 and 102a of the Trade and Commerce Social Security Act and Paragraphs 97 and 98 of the Farmers' Social Security Act.⁵³

Self-employed persons are automatically included in the statutory social security system if their taxable income surpasses the social security threshold.

Where feasible, insured pregnant women and nursing mothers can demand a replacement for running their business or they can claim maternity benefit (EUR 53.11 per day in 2017).

8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?

No. Paragraphs 49 to 61 of the Occupational Financial Provisions Act (*Betriebliches Mitarbeiter- und Selbständigenvorsorgegesetz, BMSVG*) for persons insured under the Trade and Commerce Social Security Act state that self-employed persons insured under the Trade and Commerce Social Security Act are required to pay 1.53 % of their taxable annual income into an occupational scheme provided by specialised financial institutions with heightened responsibilities concerning the investment and management of these

⁵³

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008422/GSVG%2c%20Fassung%20vom%2006.11.2015.pdf>,
<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008431/BSVG%2c%20Fassung%20vom%2006.11.2015.pdf>, both accessed 3 November 2015.

contributions. The resulting investment can only be withdrawn after at least three years of contributions and in cases of ending the self-employed occupation for reasons of claiming a disability or old-age pension or for reasons of ending the self-employed occupation.

Occupational pension schemes within the narrower meaning of Articles 10 and 11 of Directive 2006/54 would be incompatible with the existing legal system because they can only be based on an act of collective labour bargaining.

8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.

No.

8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?

Yes. Paragraph 1, Section 1, Provision 4 of the Equal Treatment Act (Private Sector) was introduced in 2013. It extends the material scope of the Equal Treatment Act to the foundation, establishment or extension of an enterprise as well as the entry into and extension of all kinds of self-employed occupation.

9. Goods and services (Directive 2004/113)

9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?

Yes. Paragraphs 30 to 40c of the Equal Treatment Act (Private Sector).

9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.

Neither. The wording of the material scope of Paragraph 30 of the Equal Treatment Act (Private Sector) concerning sex discrimination has been modelled on Article 3 and covers the same scope.

9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?

Yes. Paragraph 30, Section 3 of the Equal Treatment Act (Private Sector) specifies the area of private and family life as well as the content of media and of advertising as exceptions.

9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.

Yes. Paragraph 33 Equal Treatment Act (Private Sector) states that providing goods, services and housing mainly for persons of one sex is a justifiable exception if this is a proportionate means to a legitimate goal. This section was introduced to ensure that gender separate services like gender segregated entrance times into public pools could not be challenged on the basis of gender equality. There is no case law so far.

9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?

Yes. Paragraph 9, Sections 2, 3 and 4 of the Insurance Monitoring Act (*Versicherungsaufsichtsgesetz*), which contained specific provisions for the use of sex-specific actuarial factors, were repealed as a consequence of the *Test Achats* case. A new Section 2 with the wording: 'The factor sex may not lead to different premiums or benefits for men and women' was introduced.

9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.

See above 9.5. There has been no national debate on this.

9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?

No.

9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.

No. There is no case law in existence.

10. Violence against women and domestic violence in relation to the Istanbul Convention

10.1 Has your country ratified the Istanbul Convention?

Yes. Austria was the first country in Europe to introduce specific legislation for protection against domestic violence. Apart from plans for a more consistent approach to data gathering and evaluation, the specific changes to criminal law concerned making sexual harassment a criminal offence (see 3.6.4 above).

11. Enforcement and compliance aspects (horizontal provisions of all directives)

11.1 Victimisation

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

Yes. Again the Equal Treatment Act (Private Sector) may be used as a template. In several provisions (e.g. Paragraph 5, Sections 3 and 4, Paragraph 6, Sections 3 and 4, and Paragraph 35, sections 2 and 3) the same or very similar wording is used. An extension of discriminating behaviour or practice, or retaliation against persons who have a working or personal relationship with the direct victim of discrimination is defined as discrimination in and of itself. This covers the requirements of the directives.

11.2 Burden of proof

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

Yes. Paragraph 12, Section 12 of the Equal Treatment Act (Private Sector) may be used as a template for all other relevant anti-discrimination laws.⁵⁴

The claimants have to offer plausible evidence of the discrimination itself or of a discrimination motive. Defendants may then offer arguments that another plausible motive was the more probable reason for the decision.

11.3 Remedies and Sanctions

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

Sanctions are almost exclusively limited to civil law (except for administrative fines for violations of the requirement for gender-neutral job advertisements) and there are no criminal provisions for sanctions for discrimination (with the exception of racial discrimination and criminal sanctions for severe cases of sexual harassment).

One exception is the criminal offence of severe sexual harassment (see also 3.6.4 above), which can carry a punishment of up to six months' imprisonment or a fine of EUR 360 per diem rates.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

Remedies and sanctions cover a broad spectrum from being able to sue for reinstatement and for compensation and damages to administrative fines in cases of discriminatory job advertisements. Paragraph 12, Section 14 of the Equal Treatment Act (Private Sector) requires courts to adjust damages for the personal impairment by an act of discrimination according to the facts of the case.⁵⁵

Administrative fines concerning breaches of the gender-neutral requirement for job advertisements can amount up to EUR 360 in each case.

⁵⁴ <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151376/NOR40151376.pdf>.

⁵⁵ RIS Justiz RS0130287, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20150827_OGH0002_009OBA00087_15G0000_001/JJR_20150827_OGH0002_009OBA00087_15G0000_001.pdf, accessed 17 November 2016.

11.4 Access to courts

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

Access to the courts is open to citizens and to all persons and enterprises who claim to have a legal interest that is actionable in Austria. In many cases claimants do not need professional legal representation, at least at first instance. Claimants who lose their case have to bear their own expenses including the cost of legal representation as well as those of the defendant (and vice versa in the case of winning). The costs of court proceedings and legal representation are calculated on the basis of the value of the claim.

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

Access to the civil courts is limited to persons or to legal entities who are themselves impaired by a discrimination (or any other breach of law or of contract). There are no provisions that would permit non-governmental organisations to act by proxy with the exception of Klagsverband (<http://www.klagsverband.at/>), which is an umbrella organisation of several non-governmental organisations acting in the field of anti-discrimination. It has been specifically granted the procedural right to act, with the agreement of individual claimants.

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

Austria has no specific legal aid system. Private insurance for legal aid is available and can cover most of the expenses of civil court and criminal cases. The statutory corporations for employees (*Kammern für Arbeiter und Angestellte*) and the trade unions offer free legal consultations in labour law and social security law and in urgent cases free legal representation for all levels of jurisdiction for their members. Claimants can also file a petition to the relevant court for financial aid concerning court fees, which may also include legal representation by a lawyer (*Verfahrenshilfe*). This can be granted in cases where legal representation is considered necessary and if the claimant meets certain financial criteria.

11.5 Equality body

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

Yes. The relevant equality body is the Equality Ombud (*Gleichbehandlungsanwaltschaft*, www.gleichbehandlungsanwaltschaft.at), which consists of three independent parts that are responsible for handling discrimination complaints and taking these to the Equal Treatment Commission, and for promoting equality and anti-discrimination activities, especially inquiries into individual or sectoral discrimination. The three offices of the Equality Ombud cover gender discrimination in working life, discrimination on grounds of ethnicity, religion or ideology, age, and sexual orientation in working life and discrimination on grounds of ethnicity and of gender concerning access to goods and services. The Equality Ombud has five regional branches.

The Equal Treatment Commission (*Gleichbehandlungskommission*) functions in addition to and in close cooperation with the Equality Ombud.

The Equal Treatment Commission sits in three senates corresponding to the three offices of the Equality Ombud: Senate I is responsible for discrimination on the ground of sex in

working life, Senate II for discrimination on the grounds of ethnicity, religion or ideology, age, and sexual orientation in working life, and Senate III for discrimination on the grounds of sex or ethnicity concerning social protection, social benefits and education as far as covered by federal legislative competences.

The Equal Treatment Commission can be approached by the Equality Ombud or by applicants directly. It is competent to conduct inquiries (mostly through witness testimony and analysis of documents) and to issue non-binding opinions. If the same case is subsequently brought to court, the commission's opinion may be offered as additional evidence by either the claimant or the defendant. The commission can also act as an informal arbitrator and offer suggestions for compromise agreements.

11.6 Social partners

11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

Representatives of the social partners are statutory members of the Equal Treatment Commission and have the right to co-decide the commission's opinions.

Traditionally the social partners are involved in policy development and consultations on on-going legislative initiatives. This entails, among other functions, the inclusion in the customary review process of policy and legislative initiatives before the start of the formal parliamentary process. Social partner institutions are invited to enter written expert opinions on legislative initiatives by the federal and provincial governments stating their policy views on the contents. These opinions are political statements, policy suggestions, and are also sometimes utilised as informal policy guidelines for parliamentarians.

11.7 Collective agreements

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

Collective agreements are the basis of national wage policies and can also cover various other workplace policies. The jurisdiction for collective bargaining is based on the Labour Relations Act (*Arbeitsverfassungsgesetz, ArbVG*), which grants the right to collective bargaining to the employee trade unions and to the statutory employers' corporations, most importantly the Chamber for Trade and Commerce (*Wirtschaftskammer*). Collective agreements have the legal status of binding general labour ordinances. Their personal scope applies to all enterprises and to all workers of the relevant sector or industry and covers the whole state territory (*Flächenkollektivverträge*). The state does not have any influence on the collective bargaining process and consequently cannot issue guidelines or regulations. The social partners, however, pay attention to the legislative level and take care to include policy and societal developments. The principle of equal pay for equal work has been observed by the collective bargaining parties for many years resulting in, for example, the elimination of special low wage groups for female workers (so-called '*Leichtlohngruppen*'). Collective agreements are also used to implement progressive provisions such as additional paid or unpaid paternal leave periods, additional paid days of force majeure leave, positive action measures, or the factoring in of parental leave periods for time-related working rights.

12. Overall assessment

Austria has implemented the gender equality directives, in most cases within the required timeframe. In many cases the implementation has been effected by transferring the wording from the German language version of directives into national legislation, leaving it to the courts to interpret the meaning within the systematic context of the national legislative framework.

In 2010 the CJEU decided that annually recurring legislation must also be considered under the rules of EU directives. The legislation in question concerned the annual increase of statutory pensions for the year 2008. The increase percentage for this year had been set at a lower number for persons with small pensions (amounting to approximately EUR 850) than for other groups. The Supreme Court submitted a question to the CJEU as to whether this was compatible with Article 4 of Directive 79/7 if there were more women than men in this group.⁵⁶ The Constitutional Court had ruled in the same case (which had been brought before it prior to its submission to the CJEU) that the legislation in question was consistent with the existing legal framework and did not infringe the general equality principle. The CJEU ruled that annual increases of statutory pensions that are calculated on the basis of previous contributions are to be considered as a calculation of benefits according to Article 4 of Directive 79/7 and are indirectly discriminating if this affects more women than men. This ruling strengthens the legal view of the precedence of European Union law over national legal concepts and it also reinforces the concept that even recent legislation has to be viewed under the auspices of directive implementation.

Austrian law distinguishes between employees working under a regular working contract and so-called free contract workers (*freie Dienstnehmer/innen*). This group works under a different contract type than employees, which entails some characteristics of self-employment (such as using one's own working equipment, less stringent workplace attendance requirements or more flexible working hours). Legal doctrine and case law preclude the application of the labour law statutes, especially concerning parental leave, equal treatment, sexual harassment, wage regulations, paid vacations, and working time. Due to this distinction the group of free employees, who in reality share many characteristics with regular employees, are also effectively excluded from the scope of many statutes that implement the directives. This seems to be a shortcoming especially regarding Directive 2010/18/EU and Directive 2006/54/EC. Since January 2016, pregnant, free-contract workers have been included in legal maternity protection and are granted the right to maternity leave (maternity benefit was extended to this group of workers in 2008).

Neither the Maternity Protection Act (*Mutterschutzgesetz*) nor the Fathers Parental Leave Act (*Väterkarenzgesetz*) contains specific rules against discrimination on grounds of gender or family roles. While the requirements of Article 5 of Directive 2010/18/EU are contained in various statutes, the direct legal basis for claims of direct or indirect discrimination on the ground of sex in conjunction with parental leave with parenting requirements is comparatively weak. Workers claiming discrimination based on reasons of taking up their parental rights and duties would have to rely on the provisions of the applicable Equal Treatment Act. All of the relevant equal treatment statutes contain the wording that 'no one may be discriminated against because of sex, especially not based on family status or the circumstance of having children.' In a court case claimants would have to offer evidence that directly connects the fact of taking parental leave to their sex and to their family status as well as to a discriminating fact or occurrence, while the defendant can offer evidence of other circumstances or motives being the more probable reasonable cause for their decisions. This seems to confront claimants with an enhanced burden of proof in these circumstances.⁵⁷

⁵⁶ ECJ, C-123/10, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-123/10>, accessed 3 November 2015.

⁵⁷ See also *The Implementation of Parental Leave Directive 201/18 in 33 European Countries*, p. 37; see also commentary by M. Windisch-Graetz (2011), '§ 3 GIBG, n° 11' in Neumayr/Reissner (eds) *Zeller Kommentar*

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