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Country report

Non-discrimination

Austria

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including summary



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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Austria

Dieter Schindlauer

Reporting period 1 January 2018 – 31 December 2018

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EXECUTIVE SUMMARY

1. Introduction

Austria is a wealthy modern welfare state with a population of about eight million people. The majority of the population are white and German speaking. Autochthonous and recognised minorities include Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma. Starting in the late 1960s, Austria became a country of immigration, predominantly attracting younger workers from the former Yugoslavia and Turkey.

From the beginning of the 1990s, the situation and perception of 'foreigners' started to change. The political rise of the Freedom Party (FPÖ) started to dominate the political discourse and changed the political culture. The FPÖ has been in coalition government with the centre-right Austrian People's Party (ÖVP) since the end of 2017. The public discourse on immigration and integration has been dominated by the populist FPÖ, which has openly communicated ideas of 'natural' dominance by 'true-born' Austrians and open hostility towards immigrants of the Islamic faith. This tendency has been severely increased by the so-called 'refugee crisis', which brought a peak influx of refugees in 2015; fewer refugees arrived in 2016 and 2017, and the numbers are further decreasing. Austria is among the three European countries that have received the highest rate of refugee arrivals.

Regarding the grounds of race and ethnicity (in Austria, these terms are generally subsumed under 'ethnic affiliation'), the courts recognised relatively quickly that discriminatory reference to 'foreignness' is clearly covered by legal protection.¹ Migrants, mainly refugees, are still the main target of right-wing hatred and suffer a lot from discrimination in all fields. Legislation and jurisprudence have shown that the anti-discrimination regulations do work in practice and offer wide legal protection for migrants.

Although Austria is a predominantly Catholic country, other religious communities have been accepted for many years. Only in the past decade has this general situation of tolerance been shifting, especially with regard to the Muslim community, which is facing an increasingly heightened atmosphere of hostility. After a period of longstanding acceptance and legal standing as a recognised religious community since 1912, the Islamic faith community is now constantly confronted with hostile agitation.

Although public anti-semitism remains a taboo, research still finds that it exists to a high degree in the population. Anti-semitism became an issue of wide public interest with political consequences towards the end of 2017, when FPÖ politicians were publicly confronted with appalling institutionalised anti-semitism in academic fraternities of which they were members.

There are 14 different faith communities legally recognised by Austria – the latest being the Jehovah's Witnesses community, which has been legally recognised only since 7 May 2009.

The situation of the lesbian, gay, bisexual and transsexual communities in Austria is mixed. On the one hand, during the past two decades, the community has reached a high level of visibility and acceptance through public events such as the Pride Parade (*Regenbogenparade*) and the Life Ball as well as in the media. On the other hand, Austria remains a very conservative, predominantly Catholic country where homophobic statements by politicians and high-ranking church officials are still quite common. After

¹ Austria, Viennese Civil Regional Court (Landesgericht für Zivilrechtssachen Wien), Hayet B. v. Ferdinand S., decision Nos. 35R68/07w and 35R104/07i, 30 March 2007, and Supreme Court (Oberster Gerichtshof), decision No. ObA40/13t, 24 July 2013.

legally recognising partnerships for same-sex couples in 2010, in December 2017 the Constitutional Court² opened both legal possibilities – marriage and registered partnership – to both heterosexual and homosexual partners. The judgment will take effect from 2019. So far, all attempts to 'level up' the legal protection against discrimination on all grounds at federal level have failed again and again due to Catholic fears regarding homosexuals. This is at least one strong reason why the scope of protection against discrimination on a personal level has not been widened at federal level, despite the fact that all nine provinces have widened such protection in their legal capacity.

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

The political will to counteract discrimination on the ground of disability appears to be relatively high. The legal standard of protection against discrimination on this ground is considerably higher than the minimum requirements of Directive 2000/78/EC. In 2012, many provinces and the Federation set up institutions such as monitoring boards in order to implement the UN Convention on the Rights of Persons with Disabilities (UNCRPD). These included federal and provincial monitoring mechanisms for the rights of persons with disabilities (*Monitoringausschuss*) and the *National Disability Action Plan 2012-2020*. Concerning the broad scope of protection against discrimination outside employment, Austria seems to be rather advanced. There have been important cases on the subject so far. Nevertheless, disabled people still face a much higher unemployment rate, and those with mental disabilities³ in particular experience a high degree of exclusion. In addition, it is so far only in the field of disability that *actio popularis* for some stakeholders is possible.⁴

In 2018, dialogue with NGOs about anti-discrimination issues had stagnated.

2. Main legislation

The Republic of Austria is a federal state. According to the Austrian Constitution, legal powers are exercised either by the Federation (*Bund*) or the provinces (*Länder*). Under the Constitution, neither the Federation nor the provinces have the exclusive power to regulate 'anti-discrimination'. This has led to a very scattered legal framework, with more than 30 provincial pieces of legislation and five main acts at the federal level. In 2018, many pieces of legislation, at both the federal and provincial levels, were amended, but these amendments were mostly regarding the implementation of Directive 2014/54/EU, the new European data protection requirements and Directive 2016/2102/EU on the accessibility of the websites and mobile applications of public sector bodies.

Austria has ratified most relevant international treaties – the latest being the revised European Social Charter – while Protocol 12 to the European Convention on Human Rights (ECHR) still awaits ratification.

The most important federal acts implementing the directives are:

Equal Treatment Act (*Gleichbehandlungsgesetz*)

The Equal Treatment Act covers the private sector and protects against discrimination in employment on the following grounds: gender, ethnic affiliation (*ethnische Zugehörigkeit*), religion or belief, sexual orientation and age. Protection against discrimination on the ground of ethnic affiliation also extends to social protection,

² Austria, Constitutional Court, decision No. G 258-259/2017 – 9, 4 December 2017.

³ This comprises intellectual as well as psycho-social disabilities.

⁴ Austria, Federal Disability Equality Act (*Behindertengleichstellungsgesetz*), 2005, § 13.

including social security and health care, social advantages, education and access to and supply of goods and services that are available to the public, including housing.

Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*)

The Act covers (federal) public employment and protects against discrimination on the following grounds: gender, ethnic affiliation, religion or belief, sexual orientation and age. It also provides for the installation of a Federal Equal Treatment Commission, Officers for Equal Treatment and Contact Women.

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

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

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

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

Federal Disability Equality Act (*Behindertengleichstellungsgesetz*)

The Act protects against discrimination on the ground of disability in access to and supply of goods and services that are available to the public, including housing. This means that the level of protection goes beyond the minimum requirements of Directive 2000/78/EC. The Act also provides the basis for *actio popularis* in cases affecting a broader group of people.

Provincial level protection most importantly concerns (provincial) public employment. All the provinces expand their protection to all grounds covering not only the employment sphere but also access to and supply of goods and services, housing, social security and benefits and health, and they thereby exceed the minimum requirements of the directives.

3. Main principles and definitions

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

The definitions of direct and indirect discrimination have been quoted literally from the directives. Discrimination on the grounds of an assumed personal characteristic as well as harassment and victimisation are also covered.

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

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

The notions of 'race' and 'race and ethnic origin' are both represented by the term 'ethnic affiliation' (*ethnische Zugehörigkeit*). This does not change the scope, but is an expression of sensitivity regarding language.

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

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

Multiple, or intersectional, discrimination is becoming a more and more important issue, as developing practice shows that it is a very widespread phenomenon. The legislation so far recognises the phenomenon and gives rather general guidelines as to how to deal with it. Basically, courts are obliged to make an overall assessment when taking into account discrimination based on multiple grounds. This means that, while those affected by multiple grounds do not have a separate claim for every ground, the fact that multiple grounds are relevant does affect the assessment of the amount of compensation due.

4. Material scope

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

Provincial legislations have, within the limit of their competences, broadened the scope of protection beyond the workplace for all grounds. Therefore, there is protection for all grounds in relation to employment, access to and supply of goods and services, education, health and social protection/security. The provincial competences are especially important with regard to housing, social benefits, health and education. Regarding social benefits, several provinces (Upper Austria, Tyrol and Lower Austria) have started a policy of issuing legislation to restrict the rights of migrants and refugees in this respect. The courts have repeatedly outlawed such practices.

5. Enforcing the law

Despite the existence of a fairly comprehensive legal framework, the enforcement of legislation is still deficient. There are a couple of reasons for this finding: first, there is still an enormous lack of awareness in the overall population, even in relation to the mere existence of the legislation. Another reason is the very complex and scattered legal framework; more than 40 legal acts could be relevant. Furthermore, the equality bodies are not able to co-ordinate their efforts. More than nine provincial offices, separate structures for the public service and a completely separate system for disability are operating, instead of a strong single body with strong visibility and powers as can be seen in other Member States. The resources for the federal equality bodies are very limited. The National Equality Body (Anwaltschaft für Gleichbehandlungsfragen, Gleichbehandlungsanwaltschaft) (NEB) is still understaffed. The members of the Equal Treatment Commission (Gleichbehandlungskommission) (ETC) are not being paid for this task, but perform their functions in addition to their jobs on a voluntary basis. This delays decisions.

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

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

Another severe problem with implementation is the persistent lack of relevant case law (there are very few cases). Victims of discrimination cannot be sure of the outcome of their proceedings. If they bring a lawsuit, they have to bear the full risk and cost of the proceedings. Although NGOs try to accommodate victims in this respect, limited resources and victims' fear of suffering another setback during court proceedings make them shy away from judicial redress. The standing of NGOs in court is limited to the possibility of intervention, and this is granted only to an umbrella organisation, Litigation Association of NGOs Against Discrimination (Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern), for all grounds, while the possibilities for *actio popularis* are limited to the disability ground.

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

The sanctions in principle comprise compensation for material and immaterial damages. Injunctions are therefore not available. It is a very difficult task for the courts to decide on the immaterial damages in an effective and dissuasive but still proportionate way, given the lack of legal tradition in this respect. In order for compensation to function as a dissuasive sanction, the existing practice of awarding only very low amounts of compensation for immaterial damage will have to be adjusted by the courts. With regard to harassment, the law has fixed a minimum level of compensation (EUR 1 000). It is interesting to note that the legislator has seen a need to continuously raise the minimum amount of compensation, from EUR 400 to EUR 720 and then to EUR 1 000. Obviously, the practice of courts in sticking strictly to the minimum has created this need in order to avoid ridiculously low outcomes in proceedings with regard to compensation for immaterial damages. A recent decision of the Supreme Court⁵ has given rise to expectations that there will be guidance for the courts directing them to assess the amount of compensation in discrimination cases in a way that is more in line with the directives.

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

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

At the moment, a number of people who face discrimination tend to initiate a free-of-cost proceeding before the Equal Treatment Commission before or instead of addressing the courts. The Equal Treatment Commission cannot impose any sanctions.

6. Equality bodies

Equal Treatment Commission

⁵ Austria, Supreme Court, decision No. 90BA49/16w, 29 September 2016.

The Equal Treatment Commission, a quasi-judicial body that issues non-binding 'opinions' and is established at the Federal Chancellery (Bundeskanzleramt), is divided into three senates, dealing with:

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

The functions of the chairpersons, who are part of the respective senates, are undertaken by federal civil servants. The other members of the commission perform their functions on an unsalaried basis. The new structures started to operate in May 2005. Upon the request of the National Equality Body, of one of the interest groups represented in the given senates or on its own initiative, the responsible senate of the Commission has to give an expert opinion on questions related to the breach of the principle of equal treatment. These expert opinions on whether a violation of the obligation to equal treatment has occurred have to be made public. The sessions of the senates are confidential and not open to the public.

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

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

National Equality Body (Anwaltschaft für Gleichbehandlungsfragen, Gleichbehandlungsanwaltschaft)

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

understaffed, the body has so far not made full use of its powers to conduct independent inquiries and surveys and publish independent reports; only very few of these exist so far.

In combination, the Equal Treatment Commission and the National Equality Body comply with the requirements set out in Article 13 of Directive 2000/43/EG.

For the ground of disability, a separate structure has been set up. The Ombud for Disabled Persons (Behindertenanwalt) is responsible for the provision of advice and support to people with disabilities. The Ombud can conduct surveys on the situation of people with disabilities and give and publish statements and opinions on this issue, and can initiate an *actio popularis* in its own name.

7. Key issues

Over the past few years, there has been a steep rise in anti-Muslim resentment in Austria. The perception of Muslims has shifted toward a very hostile discourse. This has created a very complicated situation in which the atmosphere is often poisoned by undisguised racism. Political discourse is often obsessively focused on Muslims as they are the main scapegoat for the political far right.

2018 saw a strong public debate on hatred on the internet. The year started with a scandal, when the traditional 'New Year's baby' from Vienna was depicted in the news with her mother wearing a headscarf, and thousands of extremely hateful racist comments were posted on social media. The debate may lead to legal amendments, as it quickly reached political ground. The phenomenon of unbelievable forms of hatred (wishes for rape, suicide, murder, genocide...) being spread on the internet on a massive scale has not yet been addressed properly, and it will remain a high-stakes issue in the future.

As for the legal situation, effective and satisfactory enforcement remains the biggest challenge. It is still the case that not many victims of discrimination dare to come forward with their complaints and lawsuits, as the laws⁶ are complicated and the outcome of legal action very often does not satisfy their actual needs. In addition, courts still seem to be uncomfortable with their task of awarding dissuasive amounts of compensation for non-pecuniary damages. This is surely one of the main reasons that still very few cases are brought to court.

However, it would seem that obligatory attempts to settle discrimination cases regarding disability through mediation continue to be a success story. Mediation is used quite frequently, and the agreements reached often reflect a learning experience and therefore a deeper understanding of discrimination among the parties involved.

⁶ Austria, Constitutional Court, decision No. G-258-259/2017 – 9, 4 December 2017.

INTRODUCTION

The national legal system

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

Under the Constitution, neither the Federation nor the provinces have the exclusive power to regulate anti-discrimination. The Federation may – as it did in 1997 regarding disability – introduce a new clause prohibiting discrimination to the constitutional catalogue of human rights. Amending the Federal Constitution is strictly a federal matter. The Federation may also implement the anti-discrimination clause if and insofar as implementation is linked to matters that fall within the legislative powers of the Federation (such as important issues like labour law, public transport law and civil law). This complicated division of competences leads to a very scattered landscape of anti-discrimination laws and provisions.

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

Labour law legislation falls under the competency of the Federation (Article 10(1)(11) of the Federal Constitutional Law. In the area of labour law on agricultural workers, the legislative powers are divided between the Federation and the provinces: legislation of principles by the Federation and implementing legislation by the provinces (Article 12 of the B-VG). Legislation in respect of employees (civil servants) of the nine provinces and of local authorities rests exclusively with those provinces alone (Article 21 of the B-VG); with the notable exceptions of teachers at public compulsory schools (Article 14(2) of the B-VG) and of teachers at certain agricultural schools and educators at certain hostels for agricultural students (Article 14a(2)(e) and Article 14a(3)(b) of the B-VG). Legislative power regarding self-employment, education and training and workers/employers/occupational organisations is divided between the provinces and the Federation; the provinces hold legislative power, for instance, in areas such as social benefits; kindergartens and juvenile educational institutions; hospitals; nursing homes; ambulance services; funeral services; fire brigades; and chambers⁷ of agricultural workers and employers (Articles 10 to 15 of the B-VG). They are very important landlords.

In principle, international human rights treaties have to be incorporated into national law in order to come into effect. The ECHR forms an integral part of the Austrian Constitution. Recently, in implementing the UNCRPD, the Federation and the provinces established mechanisms for the monitoring of the implementation.

⁷ Chambers are public law entities established by statute and involving compulsory membership of all workers/employers in the respective field.

List of main legislation transposing and implementing the directives

The federal legal framework basically consists of:

- Equal Treatment Act⁸ (*Gleichbehandlungsgesetz*); Abbreviation: ETA/GIBG, adopted 26 June 2004, in force since 1 July 2004. Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation. Most important law, covering private employment, access to goods or services, education; defining principle legislation for provinces.
- Federal⁹-Equal Treatment Act¹⁰ (*Bundes-Gleichbehandlungsgesetz*); Abbreviation: F-ETA/B-GIBG, adopted 23 June 2004, in force since 1 July 2004. Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation. Covers federal public employment.
- Act on the Equal Treatment Commission and the National Equality Body¹¹ (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*); Abbreviation: GBK/GAW-G, adopted 23 June 2004, in force since 1 July 2004. Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation. Covers the establishment of and rules of procedure for national equality bodies.
- Act on the Employment of People with Disabilities¹² (*Behinderteneinstellungsgesetz*); Abbreviation: BEinstG, adopted 10 August 2005, in force since 11 August 2005. Grounds covered: disability. Covers public and private employment of persons with disabilities.
- Federal Disability Equality Act¹³ (*Behindertengleichstellungsgesetz*) Abbreviation: BGStG, adopted 10 August 2005, in force since 11 August 2005. Grounds covered: disability. Covers access to goods and services for persons with disabilities.
- Federal Disability Act¹⁴ (*Bundesbehindertengesetz*); Abbreviation: BEinstG, adopted 10 August 2005, in force since 1 January 2006. Grounds covered: disability. Established the Ombud for People with Disabilities.

List of most important provincial acts:

- Styrian Equal Treatment Act (*Steiermärkisches Gleichbehandlungsgesetz*), Landesgesetzblatt (LGBI) 66/2004, last amended by LGBI 104/2017;
- Styrian Disability Act (*Steiermärkisches Behindertengesetz*), LGBI 26/2004, last amended by LGBI 63/2018;
- Styrian Agricultural Labour Relations Act (*Steiermärkische Landarbeitsordnung*), LGBI 39/2002, last amended by LGBI 103/2018;
- Viennese Anti-Discrimination Act (*Wiener Antidiskriminierungsgesetz*), LGBI für Wien 35/2004, last amended by LGBI 39/2018;
- Viennese Service Order (*Wiener Dienstordnung*), LGBI 42/2006, last amended by LGBI 63/2018;
- Viennese Contracted Officers Act (*Wiener Bedienstetengesetz*), LGBI 33/2017, last amended by LGBI 63/2018
- Viennese Agricultural Labour Equal Treatment Act (*Wiener Land-und forstwirtschaftliches Gleichbehandlungsgesetz*), LGBI 25/1980, last amended by LGBI 38/2013;

⁸ BGBl I 66/2004, last amended by BGBl I 40/2017.

⁹ Nb: it is easy to confuse the Equal Treatment Act and the Federal Equal Treatment Act, especially as they are both federal laws.

¹⁰ BGBl I 65/2004, last amended by BGBl I 60/2018.

¹¹ BGBl I 66/2004, last amended by BGBl I 107/2013.

¹² BGBl 22/1970, last amended by BGBl I 32/2018.

¹³ BGBl I 82/2005, last amended by BGBl I 32/2018.

¹⁴ BGBl 283/1990, last amended by BGBl I 59/2018.

- Lower Austrian Equal Treatment Act (*Niederösterreichisches Gleichbehandlungsgesetz*), LGBl 69/1997, last amended by LGBl 109/2011;
- Lower Austrian Anti-Discrimination Act 2017 (*Niederösterreichisches Antidiskriminierungsgesetz*), LGBl 24/2017, last amended by 76/2018;
- Lower Austrian Agricultural Labour Relations Act (*Niederösterreichische Landarbeitsordnung*), LGBl 185/1973, last amended by 41/2018;
- Carinthian Anti-Discrimination Act (*Kärntner Antidiskriminierungsgesetz*), LGBl 63/2004, last amended by 71/2018;
- Carinthian Agricultural Labour Relations Act (*Kärntner Landarbeitsordnung*), LGBl 97/1995 as of 60/2006, last amended by LGBl 50/2018;
- Upper Austrian Anti-Discrimination Act, (*ÖO Antidiskriminierungsgesetz*), LGBl 50/2005, last amended by LGBl 78/2018;
- Upper Austrian Agricultural Labour Relations Act (*Oberösterreichische Landarbeitsordnung*), LGBl 25/1989, last amended by LGBl 79/2018;
- Salzburgian Equal Treatment Act (*Salzburger Gleichbehandlungsgesetz*), LGBl 31/2006, last amended by LGBl 82/2018;
- Salzburgian Agricultural Labour Relations Act (*Salzburger Landarbeitsordnung*), LGBl. 7/1999, last amended by LGBl 82/2018;
- Tyrolian Equal Treatment Act (*Tiroler Landes-Gleichbehandlungsgesetz*), LGBl 1/2005, last amended by LGBl 144/2018;
- Tyrolian Anti-Discrimination Act (*Tiroler Anti-Diskriminierungsgesetz*) LGBl 25/2005, last amended by LGBl 144/2018;
- Tyrolian Equal Treatment Act for Municipalities (*Tiroler Gemeinde-Gleichbehandlungsgesetz*), LGBl 2/2005, last amended by LGBl 81/2016;
- Tyrolian Agricultural Labour Relations Act (*Tiroler Landarbeitsordnung*), LGBl 27/2000, amended by LGBl 61/2005, last amended by LGBl 144/2018;
- Tyrolian Provincial Teachers Employment Act (*Tiroler Landeslehrer-Diensthoheitsgesetz*), LGBl 74/1998, last amended by LGBl 144/2018;
- Vorarlbergian Anti-Discrimination Act (*Vorarlberger Antidiskriminierungsgesetz*), LGBl 17/2005 last amended by LGBl 16/2017;
- Burgenlandian Anti-Discrimination Act (*Burgenländisches Antidiskriminierungsgesetz*), LGBl 84/2005, last amended by LGBl 39/2018;
- Burgenlandian Agricultural Labour Relations Act (*Burgenländische Landarbeitsordnung Burgenländisches*), LGBl 37/1977, last amended by LGBl 59/2018.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

General clauses establishing equality before the law:

- Article 2 of the Basic Law of the State 1867 (*Staatsgrundgesetz*) (StGG);
- Article 7 of the Federal Constitutional Act 1929 (*Bundes-Verfassungsgesetz*) (B-VG);
- Article 14 of the ECHR, as a part of the constitution under BGBl 1964/59.

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

This list is merely a demonstrative one, as the general clause in Article 7 of the B-VG stipulates a full equal treatment obligation. So all other forms of discrimination are in principle covered, if they are a legally accepted or essential part of EU law (like sexual orientation and age, for example).

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

Specific constitutional provisions:

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

These provisions do not apply to all areas covered by the directives as not all grounds are covered.

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

These provisions cannot be enforced against private actors as they bind the state only.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the **main legislation** transposing the two EU anti-discrimination directives:

Federal level:

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

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

Provincial level:

Lower Austria: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation.

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

Styria: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation and sexual identity (protecting transgender persons).

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

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

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

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

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

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

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

Racial origin

The notion of 'race' was removed from the text in the federal legislation and 'race and ethnic origin' are now both represented by the term 'ethnic affiliation' (*ethnische Zugehörigkeit*). This was strongly supported by many NGOs, as the German term *Rasse*

was one of the most misused expressions under the Nazi regime. This does not change the scope but is an expression of sensitivity regarding language.

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

Ethnic origin

Ethnic origin is also not directly translated into the legislation but merged into 'ethnic affiliation'. It seems that courts have no problem with addressing a broad range of racist/xenophobic/anti-immigrant incidents under this ground, in the sense of the Court of Justice of the European Union (CJEU) judgment in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (C-83/14, paragraph 46.)

In an early case, the Viennese Independent Administrative Senate decided¹⁵ that a placement company (*Arbeitsvermittler*) was guilty of placing a discriminatory job advertisement looking for an unskilled kitchen assistant while demanding that candidates have 'excellent proficiency in German' and EU citizenship. The Senate found that both requirements were racially discriminatory (not stating whether directly or indirectly) and set the administrative fine at EUR 100.

Another landmark case was ruled on by the Viennese Civil Regional Court.¹⁶ In this case, the Court, acting as a court of appeal, ruled in the case of a woman of Tunisian origin who had been physically kicked out of a fashion store with the words 'we do not sell to foreigners' in Vienna. The Court held that this constituted discrimination and harassment on the ground of ethnic affiliation and awarded EUR 800 (as opposed to EUR 400 in the first instance) in compensation for immaterial damages. It stated that it was irrelevant whether the claimant was in fact a foreigner or an Austrian citizen of Tunisian origin.

The Supreme Court,¹⁷ in its decision of July 2013, reasoned that referring to an employee's 'foreignness' in a harassing way constitutes harassment on the basis of ethnic affiliation. It stated that the requirement for harassing activity to be linked to a 'protected characteristic' may not be interpreted too narrowly. It also stated that the connection to a characteristic of 'ethnic affiliation' does not depend on the existence of any real differences – the attribution by the harasser is enough. Therefore, discrimination against a person because he or she is perceived as a 'migrant' is, in principle, covered by the definition of 'ethnic affiliation'. Another Viennese case¹⁸ also dealt with discrimination on the grounds of 'visible migration background' (*erkennbarer Migrationshintergrund*), and the court clearly stated that this was covered by 'ethnic affiliation'.

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

Protection of recognised national minorities (*Volksgruppen*: Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma)¹⁹ is provided for according to the state treaties of 1919 and 1955; their legal status and rights are guaranteed by various constitutional

¹⁵ Austria, Viennese Independent Administrative Senate (UVS Wien), decision No. 06/42/318/2008, 11 March 2008.

¹⁶ Austria, Viennese Civil Regional Court (Landesgericht für Zivilrechtssachen Wien), *Hayet B. v. Ferdinand S.*, decision Nos. 35R68/07w and 35R104/07i, 30 March 2007.

¹⁷ Austria, Supreme Court, decision No. 9ObA40/13t, 24 July 2013.

¹⁸ Austria, Regional Civil Court of Vienna (Landesgericht für Zivilrechtssachen Wien), decision No. 36 R 292/15f, 10 December 2015.

¹⁹ In December 1993, Austrian Roma and Sinti were recognised as an ethnic minority (autochthonous Roma), but there is an undefined number of immigrant Roma, mostly from the former Yugoslavia.

provisions and partly implemented by the Federal National Minorities Act of 1976 (*Volksgruppengesetz*).²⁰

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

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

The National Minorities Act also provides for the establishment of National Minority Advisory Councils (*Volksgruppenbeiräte*) to be located at the Federal Chancellery, which must be heard prior to the adoption of legal rules and general assistance policies affecting the interests of their ethnic groups; may submit proposals for the improvement of the situation of their ethnic group; and must submit a plan on requested aid measures, including a list of expected costs for the following calendar year, to the Federal Chancellery.

b) Religion and belief

The Austrian legal framework does not contain a legal definition of **religion** or belief. The explanatory notes of the amended Equal Treatment Act state:²¹

'Also the terms "religion and belief" are not defined by European law. Regarding the aims of the "framework-directive" they must be interpreted in a broad manner. Especially "religion" is not restricted to churches and officially recognised religious communities. Nevertheless, it has to be noted that for a religion there are minimum requirements concerning a statement of belief, some rules for the way of life and a cult. Religion is any religious, confessional belief, the membership of a church or religious community. Brockhaus²² defines Religion formally as a system to address in its dogma, practice and social manifestations the last questions of human society and individual life and to find answers to these. According to the respective basic philosophy of salvation and in relation to the respective "experience of mischief" every religion has got its own goal of salvation and its way to salvation. This exists in close relation to the "unavailability" which is perceived as a personal (god, gods) and impersonal (rules, cognition, knowledge) transcendence. Also the wearing of religious symbols and clothes is covered by the scope of protection, as the membership to a specific religion can be assumed by these or these are perceived as an expression of a certain religion. It constitutes an infringement of the prohibition of discrimination, if the employer acknowledges the wishes of a specific group while not acknowledging those of another group.²³ The term "belief" is tightly connected with the term "religion". It is a classification for all religious, ideological, political and other leading perceptions of life and of the world as a construction of

²⁰ Austria, Federal National Minorities Act (*Bundesgesetz über die Rechtsstellung von Volksgruppen in Österreich*), 5 August 1976.

²¹ Austria, parliamentary materials, No. 307 of the appendices XXII GP, 26 November 2003, available at: https://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00307/fname_010536.pdf.

²² Brockhaus (1996-1999), *Die Enzyklopädie, Zwanzigste (20), überarbeitete und aktualisierte Auflage*, Leipzig/Mannheim.

²³ This does not in any way relate to any duty for reasonable accommodation, but clarifies that no faith might be treated more favourably than another.

sense, as well as for an orientation of the personal and societal position for the individual understanding of life.'

The Supreme Court²⁴ has clarified that different treatment based on religious clothing (the headscarf) can constitute direct discrimination on the ground of religion. The Court stated that the discrimination in that case was direct, as distinct religious clothing is not a neutral criterion with regard to religion.

Regarding **belief**, the explanatory notes of the amended Equal Treatment Act state:

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

In its decision No. 9ObA122/07t of 29 February 2009, the Supreme Court developed the following definition of belief in connection with the equal treatment principle:

'(...) the term "belief" is on the one hand closely connected with the term "religion" but also a general term for other leading perceptions of life and of the world as a meaningful whole as well as for the interpretation of the personal and societal position for the individual understanding of life. Beliefs are not scientific systems but interpretations in the form of personal convictions about the basic structure, modality and functioning of the world as such.'

The Federal Equal Treatment Commission, which is responsible for cases concerning federal public employment, frequently deliberates on cases in which political affiliation (i.e. membership of a political party) is considered to be protected by the prohibition of discrimination on the ground of belief.

c) Disability

Several fields of law include lengthy definitions of the term '**disability**'.

The Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*) uses the following definition in § 3:

'Disability is the result of a deficiency of functions that is not just temporary and based on a physiological, mental, or psychological condition or an impairment of sensual functions which constitutes a possible complication for the participation in the labour market. Such a condition is not deemed temporary if it is likely to last for more than 6 months.'

§ 3 of the Federal Disability Equality Act (*Behindertengleichstellungsgesetz*) uses the following definition:

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

²⁴ Austria, Supreme Court, decision No. 9ObA117/15v, 25 May 2016.

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

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

While these definitions (given the specific context of the respective areas of application) are considerably broader than the European Court of Justice (ECJ) judgment in the *Chacón Navas* case (C-13/05), the CJEU’s decision in *Ring and Skouboe Werge* is not yet directly reflected in them. The regulations still place a focus on the ‘impairment’ itself and deduce ‘disability’ from that, while the CJEU’s judgment in *Ring and Skouboe Werge*, following the spirit of the UNCRPD, puts more emphasis on barriers. Nevertheless, it can be presumed that the courts could easily apply the existing definitions completely in line with CJEU case law as those definitions do not in any way block this possibility. However, so far, no case law explicitly confirms this assumption.

d) Age

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

e) Sexual orientation

Sexual orientation is commonly understood (by courts as well as claimants) as referring to heterosexuality, homosexuality and bisexuality only. Transsexuality is seen as being covered by gender. Case law does not raise questions of definition in this regard.

2.1.2 Multiple discrimination

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

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

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

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

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

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

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

In Austria, there is not a lot of case law that deals explicitly with multiple discrimination. In its decision No. 80bA63/09m of 22 September 2010, the Supreme Court explicitly points to multiple discrimination (in this case gender and ethnicity) but does not give many hints on how courts should deal with that phenomenon. Although the Court raises the question whether, in cases of multiple discrimination, the court has to scrutinise every incident and every ground of discrimination to assess the amount of compensation for immaterial damages, it does not answer it for formal procedural questions.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Austria, discrimination based on a perception or assumption of a person's characteristics is prohibited in national law.

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

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

It seems that the wording of the Viennese Anti-Discrimination Act possibly excludes assumed discrimination, as § 3(1) defines direct discrimination as being 'when a person – on the ground of one of the attributes listed – is put on a disadvantage in a comparable situation compared to another person to whom this attribute does not apply, did not apply or would not apply.' Nevertheless, by the inclusion of the hypothetical application of an attribute ('would not'), the scope might extend to assumed discrimination.

§ 3 of the Styrian Equal Treatment Act is quite inconsistent in its wording as it prohibits direct discrimination against a person '*on grounds of his/her gender, his/her ethnic affiliation, his/her religion or the faith, a disability, age or sexual orientation*'. One could interpret the use of possessive pronouns here as a differentiation regarding the grounds of gender, ethnicity and religion on the one hand, and the other grounds on the other hand. It is surely the case that the legislator did not intend to provide for such differentiation, but the wording might lead to the interpretation that discrimination based on assumed criteria might not be protected regarding certain grounds.²⁵

This is also reflected in case law such as (most importantly) Supreme Court decision No. 9ObA40/13t of 24 July 2013. In its decision, the Court reasoned that referring to an employee's 'foreignness' in a harassing way constitutes harassment on the basis of ethnic affiliation. It stated that the requirement of harassing activity being linked to a 'protected characteristic' may not be interpreted too narrowly and that the characteristic of 'ethnic affiliation' does not depend on the existence of real differences – the attribution (assumption) by the harasser is enough.

²⁵ E.g. if a person of Iraqi origin is refused entry into a government canteen with the words 'No Turks in here!', the defendant could argue that the basis of the denial was not the claimant's ethnic affiliation as he is not Turkish. The problem here is mainly that it is one principle/assumption of legal interpretation that the lawmakers do not use different wording for no reason.

b) Discrimination by association

In Austria, discrimination based on association with persons with particular characteristics is prohibited in national law.

Discrimination by association is explicitly covered in:

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

In all those paragraphs, the norm reads:

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

Provincial legislators are required to amend their laws according to §§ 44(4) and 47(4) of the Equal Treatment Act.

With these amendments, the federal legal situation is clearly in line with the requirements of the judgment in *Coleman v Attridge Law and Steve Law* (C-303/06) and presumably also with the *CHEZ* judgment (C-83/14), although no case regarding an association in the sense of the latter decision has ever been brought to court in Austria.

In the Viennese Anti-Discrimination Act (§§ 2(3), 2(4)), protection remains restricted to relatives only. As 'relatives' the law defines: the spouse; all relatives in the direct line; collateral second-degree relatives, even if the relation is illegitimate; brothers-in-law and sisters-in-law; adoptive parents and adopted children as well as common-law spouses and their children; and registered or non-registered same-sex partnerships.

In the first (and so far, only) court case involving discrimination by association,²⁶ regarding access to a club in the company of 'migrants', the courts of two instances had no problem whatsoever with detecting this form of discrimination and applied the law accordingly.

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

a) Prohibition and definition of direct discrimination

In Austria, direct discrimination is prohibited in national law. It is defined.

The (federal) definitions, which are generally in line with the directives (but for § 36 of the Equal Treatment Act – see Article 2(2)(b)) can be found in:

- §§ 17(1), 18, 31(1), 36 of the Equal Treatment Act;
- § 13 of the Federal Equal Treatment Act;
- § 7b(1) of the Act on the Employment of People with Disabilities;
- and § 4(1) of the Federal Disability Equality Act.

b) Justification for direct discrimination

²⁶ Austria, Regional Civil Court of Vienna, decision No. 36 R 292/15f, 10 December 2015.

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

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

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

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

2.2.1 Situation testing

a) Legal framework

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

b) Practice

In Austria, situation testing is hardly ever used in practice.

Situation testing has so far been used only by NGOs, and only to document racist entrance policies in bars and restaurants. It has not been used for litigation purposes in the main, but for awareness-raising in cooperation with the media. There is therefore no case law available on this practice. One study²⁷ on the labour market used a form of situation testing (sending standardised job applications) in recruitment procedures for the purpose of their study and found that there was significant and widespread discrimination.

²⁷ Hofer, H., Titelbach, G., Weichselbaumer, D., Winter-Ebmer, R. (2013), *Diskriminierung von MigrantInnen am österreichischen Arbeitsmarkt (Discrimination against migrants in the Austrian labour market)*, Vienna, Institute for Advanced Studies.

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

a) Prohibition and definition of indirect discrimination

In Austria, indirect discrimination is prohibited in national law. It is defined in:

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

For example, the Equal Treatment Act defines in § 19(2):

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

All definitions in other provisions are modelled in the same way.

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

b) Justification test for indirect discrimination

The justification test for indirect discrimination is directly quoted from the directives and is therefore compatible with them and their application by the CJEU. Case law is scarce on indirect discrimination (it is mostly gender related) but so far the application seems not to be problematic.

2.3.1 Statistical evidence

a) Legal framework

In Austria, there is legislation regulating the collection of personal data.

The Austrian Act on Data Protection²⁸ (*Datenschutzgesetz*) has undergone massive changes in 2018 due to the entry into force of the General Data Protection Regulation (GDPR). In particular, Article 9 of the GDPR has overruled the previous definitions of 'sensitive data'.

The 'special categories of personal data' can be collected only under very protected circumstances and only if necessary. It is not yet evident how this will actually affect the collection and use of data by employers or others. It seems most likely that the possibilities for using statistical data in court will not benefit from this new legal situation.

In Austria, statistical evidence is permitted by national law in order to establish indirect discrimination.

²⁸ Austria, Act on Data Protection (*Datenschutzgesetz*), BGBl I 165/1999, last amended by BGBl I 24/2018.

b) Practice

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

There is a general lack of awareness about indirect discrimination and the possibility or necessity of using statistical data as evidence.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

Harassment explicitly constitutes a form of discrimination. Harassment is dealt with in the workplace and beyond – for the whole material scope of Directive 2000/43/EC (re. ethnic affiliation and disability).

Harassment is prohibited in the following norms:

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

Harassment is defined in the following norms:

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

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

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

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

Harassment is seen as always targeting individuals, or groups of individuals who are actually targeted and/or affected by the harassing activity.

The provisions protecting against harassment on the ground of disability as well as the respective provincial provisions use the same wording.

A recent judgment by the High Provincial Court of Innsbruck²⁹ clarified that a single incident can have the effect of creating an intimidating, hostile or humiliating environment for the person affected, in a case of a waiter who had been harassed by his

²⁹ Austria, High Provincial Court Innsbruck (Oberlandesgericht Innsbruck), decision No. 15Ra 13/17z, 1 March 2017. Available (in German) at: https://www.klagsverband.at/dev/wp-content/uploads/2017/04/OLG-Innsbruck-15Ra13_17z-anonymisiert.pdf.

direct supervisor with the words 'I am going to throw the scrambled eggs on your head, you ugly negro [*Neger*]!'. The court thereby overruled the court of first instance that had found the single incident not conducive to the creation of a hostile environment according to the meaning of the law.

b) Scope of liability for harassment

In Austria, where harassment is perpetrated by an employee, the employer and the employee are liable.

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

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

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

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

The legislation does not go beyond the minimum requirements set out in the directives. There is a separate provision penalising incitement to hatred or violence (§ 283 of the Criminal Code) but this requires very intense and dangerous behaviour and is therefore much narrower than instructions to discriminate in the civil anti-discrimination legislation.

In Austria, instructions explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Austria, the instructor and the discriminator are liable.

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

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

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

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

In Austria, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law and is defined.

The duty defined in the directive – referring to employment - is implemented by:

§ 6(1a) of the Act on the Employment of People with Disabilities, which states:

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

- b) Practice and case law

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

The idea of reasonable accommodation is not completely new to the Austrian legal system. Even without specific legislation, over the past decades courts have developed guidelines involving aspects of 'reasonable accommodation', at least in the context of dismissal. When ruling upon the lawfulness of a dismissal, the Administrative High Court as well as the Supreme Court³⁰ has consistently held that an employer may not dismiss an employee instantaneously if the employee has lost the physical or mental aptitude necessary to carry on with the job.³¹ The employers' duty to care for the employees (*Fürsorgepflicht*) demands – so the courts ruled – otherwise.

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

Dismissal ought to be regarded as a last resort: 'Dismissal on account of incompetence must take place only if the employee has lost the ability to do his or her former job and

³⁰ It is up to the Administrative High Court (Verwaltungsgerichtshof) to decide on the lawfulness of a dismissal if the employee is covered by the Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*); otherwise the decision lies with the Supreme Court.

³¹ E.g. Austria, Supreme Court, decision No. 9 ObA 18/92, 29 March 1992, and decision No. 8 ObA 188/00f, 11 January 2001; Administrative High Court, decision No. 89/09/0147, 22 February 1990, decision No. 90/09/0139, 25 March 1991, and decision No. 97/08/0469, 4 October 2001.

the ability to perform well in another position that is reasonable and adequate, both from the perspective of the employer and the employee.³²

The employers' duty of care (*Fürsorgepflicht*) is activated only when employees can be expected (if necessary, after retraining) to be able to fulfil the new terms of their contract.³³ The larger the number of employees, the stricter the employer's duty to make reasonable adjustments.³⁴ Dismissal must never be pronounced solely on account of an employee's disability.³⁵ If (suitable) other positions are, in principle, at hand, the employer must even consider assigning the employee to a post that entitles them to an increased rate of pay.³⁶

Allowances and grants available under the Act on the Employment of People with Disabilities are to be taken into account when the 'reasonableness' of adjustments regarding a potentially undue burden on the employer is to be judged.³⁷ However, the employer is not obliged to create a 'new' post in the company that is specifically tailored to meet the needs of the employee. A respective case decided by the Administrative High Court is clearly in line with this strand of case law. In this case, the employment of a person who became unable to fulfil the duties of his post was discontinued and the court found that there was no discrimination, considering that redeployment to another post was not possible.³⁸

In addition, if dismissal seems necessary to prevent the company's bankruptcy or other grave disturbances, the employee's interests are usually outweighed by the interests of the employer.³⁹

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

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

c) Definition of disability and non-discrimination protection

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

³² Austria, Supreme Court, decision No. 9 ObA 18/92, 29 March 1992, and decision No. 8 ObA 188/00f, 11 January 2001; Administrative High Court, decision No. 89/09/0147, 22 February 1990, decision No. 90/09/0139, 25 March 1991, and decision No. 97/08/0469, 4 October 2001.

³³ Austria, Supreme Court, decision No. 9 ObA 18/92, 29 April 1992.

³⁴ Austria, Supreme Court, decision No. 9 ObA 18/92, 29 April 1992.

³⁵ Austria, Administrative High Court, decision No. 89/09/0147, 22 February 1990.

³⁶ Austria, Supreme Court, decision No. 9 ObA 18/92, 29 April 1992.

³⁷ Austria, Administrative High Court, decision No. 99/11/0246, 14 December 1999.

³⁸ Austria, Administrative High Court, decision No. 2006/12/0223, 17 December 2007.

³⁹ E.g. Austria, Administrative High Court, decision No. 89/09/0147, 22 February 1990, decision No. 2000/11/0096, 11 June 2000, decision No. 97/08/0469, 4 October 2001.

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

In Austria, failure to meet the duty of reasonable accommodation in employment for people with disabilities does count as discrimination.

A failure to meet the obligation to make reasonable accommodation is deemed indirect discrimination unless the removal of the conditions would constitute a disadvantage or a barrier that would be illegal or would pose an unreasonable and disproportionate burden on the employer.

Courts cannot order actual measures regarding reasonable accommodation – only financial compensation can be requested for the failure to meet this duty. This corresponds to the general decision of Austrian lawmakers in respect of all discrimination claims outside an existing work relationship⁴⁰ to allow only financial compensation but no restitution *in natura* and no further sanctions to be allotted. The idea behind that is to not force someone to conclude a contract with anyone by law (apart from existing duties to contract, such as for monopolists, etc.). The shift of the burden of proof is applied to reasonable accommodation as it is to indirect discrimination (§ 7p of the Act on the Employment of People with Disabilities and § 12 of the Federal Disability Equality Act).

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

'(4) It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers⁴¹ would be illegal or would pose an unreasonable and disproportionate burden on the employer.

(5) When testing whether a burden is disproportionate, the following has to be taken into account in particular:

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

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

(7) When assessing whether certain circumstances constitute indirect discrimination it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent it has been complied with. Premises or other facilities, means of transport, technical equipment, information systems or other dedicated spheres of life shall be deemed accessible [*barrierefrei*] if they can be accessed and used by people with disabilities in a customary way, unassisted and without extra difficulty.'

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

⁴⁰ The only exception to this rule is that in a case of discriminatory termination of the employment, the claimant can choose whether to maintain the employment relationship or opt for compensation. However, concrete measures regarding reasonable accommodation cannot be ordered by the court.

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

In Austria, there is a legal duty to provide reasonable accommodation for people with disabilities outside the area of employment.

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

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

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

'Indirect discrimination shall be taken to occur where apparently neutral provisions, criteria or practices or characteristics of constructed areas [*Merkmale gestalteter Lebensbereiche*]⁴² would put people with disabilities at a particular disadvantage compared with other persons, unless that provisions, criteria or practices or characteristics of constructed areas is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.' (§ 5(2) of the Federal Disability Equality Act).

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

- (1) It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers⁴³ would be illegal or would pose a disproportionate burden on the provider of goods or services. When testing whether a burden is disproportionate, the following has to be taken into account in particular:
- the necessary effort to eliminate the conditions constituting the disadvantage;
 - the economic capacity of the person denying the discrimination;
 - public financial assistance available for the necessary improvements;
 - the time span between the coming into force of this Act and the alleged discrimination;
 - the effect of the disadvantage in regard to the general interests of the persons protected by this act;
 - concerning access to housing: the need of the person for the particular accommodation. This need has to be demonstrated by the person claiming access.
- (2) In case the removal of conditions which constitute the disadvantage turns out to be a disproportionate burden in this sense it shall still be deemed discrimination if the provider failed to improve the situation of the affected person at least in a considerable way in order to reach the best possible approximation to equal treatment.

⁴² This rather obscure wording obviously tries to be as broad as possible, including physical barriers and technical equipment.

⁴³ The term 'barriers' is not defined or specified by law; it nevertheless seems that the legislator wants it to be interpreted in a broad sense, to include physical, technological barriers and daunting procedures.

- (3) When assessing whether certain circumstances constitute indirect discrimination it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent it has been complied with.
- (4) Premises or other facilities, means of transport, technical equipment, information systems or other dedicated spheres of life shall be deemed accessible [*barrierefrei*] if they can be accessed and used by people with disabilities in a customary way, unassisted and without extra difficulty.'

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

When assessing the practical interpretation of the scope of protection, the outcome of some confidentially concluded dispute resolution processes seem to show that the Federation accepts this wide scope of protection, while one case⁴⁴ shows the practical limitations of it. In this case, the Court basically stated that moving a newly introduced public office (here, 'service for citizens') into a historic building that was not accessible to a wheelchair user did not constitute discrimination and did not trigger the duty to provide reasonable accommodation, to the extent that accessibility was safeguarded as 'the law only applies to newly built barriers.'

There have been few important cases on the subject so far. One case concerned a bakery in Vienna, where a newly built stair at the entrance was found to constitute discrimination.⁴⁵ The second case concerned the production of a DVD by the Austrian Broadcasting Corporation (ORF) without subtitles.⁴⁶ Here, the Court found that there was discrimination against deaf customers.

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

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

Only the Viennese Anti-Discrimination Act includes the concept of 'disproportionate burden' for all grounds (§ 3a), as the law implicitly introduces the duty to provide reasonable accommodation for all grounds. In § 3a(3), the Act states:

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

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

⁴⁴ Austria, Viennese Civil Regional Court, *M.L. v. The Republic of Austria*, decision No. 36 R96/12b, 5 December 2012.

⁴⁵ Austria, Josefstadt District Court, decision No. 4C 707/11 z-14, 14 November 2011.

⁴⁶ Austria, Viennese Commercial Court (Handelsgericht Wien), *L.H. v. ORF*, decision No. 60R93/10x, 8 September 2011.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Austria, there are no residence⁴⁷ or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

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

a) Protection against discrimination

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

The main provisions can be found in:

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

Two provincial legislations explicitly protect legal persons,⁴⁸ if the discrimination is directed against its members, partners or organs on one of the protected grounds in connection with their activities for the legal person. It is unclear whether a general formula⁴⁹ used in all other provincial pieces of legislation only clarifies the liability of legal persons for discriminatory acts or also extends to their protection.

b) Liability for discrimination

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

The main provisions on liability can be found in:

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

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

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

a) Protection against discrimination

⁴⁷ Immigration laws and alien employment laws still bar immigrants without the respective permissions from employment, however. Legal permission to work in Austria will therefore regularly be a genuine and determining occupational requirement.

⁴⁸ Austria, Burgenlandian Anti-Discrimination Act (LGBl 84/2005, last amended by LGBl 82/2016), § 24(3); Upper Austrian Anti-Discrimination Act (LGBl 50/2005, last amended by LGBl 51/2017), § 1(2).

⁴⁹ 'This prohibition of discrimination applies to other natural or legal persons in as far as their activities are regulated by provincial legislation.' E.g. Salzburgian Equal Treatment Act (LGBl 31/2006, last amended by LGBl 54/2017), § 28(1).

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

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

b) Liability for discrimination

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

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

- §§ 16, 17 of the Equal Treatment Act (private sector; ethnic affiliation, religion/belief, sexual orientation, age);
- § 13 of the Federal-Equal Treatment Act (public sector; ethnic affiliation, religion/belief, sexual orientation, age);
- § 7b of the Act on the Employment of People with Disabilities (private/public sector; disability)

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

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

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

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

and women in regard to self-employment). Migrants are equally covered by all legal acts prohibiting discrimination in all areas protected by the directives.

The main provisions can be found here:

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

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

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

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

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

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

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

With regard to these areas, implementation in Austria clearly meets the requirements set out in the directives. For students at universities, protection by § 42 of the Federal Equal Treatment Act remains unclear. This provision states that all forms of discrimination (including harassment) against students at university are prohibited, but the form of legal redress remains uncertain. This needs judicial interpretation. The Federal Equal Treatment Act explicitly protects access to university (§ 42(1)) without clarifying whether this is defined as vocational training, education or access to a service.

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

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

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

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

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

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

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

At the federal level, § 31(3) of the Equal Treatment Act restricts the protection to discrimination on the ground of ethnic affiliation. Attempts to broaden the personal scope have found no majority in Parliament so far. § 31(3)(1) quotes the directive literally without giving a clear interpretation of the terms used and without clearly defining the addressees of the regulations. The protection on the ground of disability in the Federal Disability Equality Act is formulated so broadly that it seems clear that social protection is included, although judicial interpretation is needed to be absolutely sure. Migrants are equally protected by the anti-discrimination legislation. There are on-going discussions on cutting social benefits for migrants and refugees, but that had not happened by the cut-off date for this report.

At provincial level, all provinces explicitly cite the directive and fully forbid discrimination in all these fields on the grounds of ethnic affiliation, religion or belief, disability, age, sexual orientation and gender. This implementation goes beyond the minimum requirements of the directives.

a) Article 3(3) exception (Directive 2000/78)

In Austria, the possible exceptions in Article 3(3) of the Employment Equality Directive in relation to religion or belief, age, disability and sexual orientation have not been transposed into national law.

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

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

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

At the provincial level, most provinces explicitly cite the directive and fully forbid discrimination in all these fields on the grounds of ethnic affiliation, religion or belief, disability, age, sexual orientation and gender. This implementation goes beyond the minimum requirements of the directives.

In Austria, the lack of definition of social advantages does not raise problems. Initial problems with the interpretation seem to have been solved since a judgment⁵⁰ on 'commuters' aid' in Lower Austria dealt intensively with the interpretation and was clear that it has to be interpreted in a broad sense – no matter how the advantage is officially named or whether there is an enforceable entitlement to it. The court found that there was discrimination on the basis of ethnic affiliation because the nationality of the claimant⁵¹ was the only reason for rejection.⁵²

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

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

Education is covered by § 31(3)(3) of the Equal Treatment Act in respect of the wide federal competences. The provision succinctly states that nobody must be directly or indirectly discriminated against on the ground of ethnic affiliation in regard to education. This binds the state and private actors equally. The term 'education' comprises all forms of education, including higher and further education. The protection covers both state-run and private educational institutions. It is clear that, regarding education, migrants must not be treated differently from nationals when anti-discrimination legislation is applied. Exceptions are possible only when citizenship is a criterion for differentiation (such as the payment of tuition fees by non- (EU-) nationals).

With regard to practice relating to Muslim students, the Initiative für ein diskriminierungsfreies Bildungswesen,⁵³ in its 2016 report, lists four examples of incidents in which Muslim women or girls faced discriminatory treatment for the fact that they wore Muslim headscarves in a school context. Schools are not free to prohibit the wearing of headscarves. In these incidents, Muslim pupils were verbally linked to Islamic State or other radicals by teachers, and sports teachers demanded that they take off their headscarves for sports. None of the affected pupils has taken legal action.

A specific issue surfaced in schools in which cooking is part of the compulsory curriculum. The Ministry of Education has prepared an information sheet for parents⁵⁴ explaining that in these schools, there is no way to avoid tasting (*abschmecken*) food including pork and alcoholic beverages. The pupils are allowed to spit out the items after tasting, but they cannot refuse to taste. Parents have to sign a form to express their consent if they want their children to be accepted into these schools. The issue is so far legally unsolved, with regard to whether this knock-out requirement is justifiable in respect of the principle of non-discrimination on the basis of religion (as these are public state-run schools). There have been no judicial proceedings on this matter yet, and the concept of reasonable accommodation has not been discussed in this respect.

The protection of students at universities prohibits discrimination against students, including harassment, which gives rise to the question of how sanctions could be applied (apart from in cases of harassment, where this is explicit in the law). This needs judicial clarification.

⁵⁰ Austria, Provincial Court St. Pölten (Landesgericht St. Pölten), decision No. 21 R 16/13f-13, 31 January 2013.

⁵¹ The claimant qualified as a long-term resident under Directive 2003/109/EC.

⁵² There have been further judgments along this line, especially concerning Tyrol – see District Court Innsbruck, decision No. 26C263/13y-11, 7 January 2014 – and Upper Austria; see Provincial Court Linz, decision No. 14R201/18d, 9 November 2018.

⁵³ Initiative für ein diskriminierungsfreies Bildungswesen (2017), *Diskriminierungen im österreichischen Bildungswesen – Bericht 2016*, available at: <http://diskriminierungsfrei.at/wp-content/uploads/2017/06/IDB-Bericht-2016-WEB.pdf>.

⁵⁴ Bundesministerium für Bildung, Wissenschaft und Forschung (2012), *Formular: besondere Aufnahmeinformation für Schulen für wirtschaftliche Berufe und Tourismusschulen*, available at: https://bildung.bmbwf.gv.at/ministerium/rs/2012_01_21800.pdf?5i834y.

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

There is no general protection against textbooks or teaching materials that reproduce stereotypes or use discriminatory language. Only individuals could claim that the use of such materials amounts to discrimination or harassment. Such materials have not yet been challenged in court, though research⁵⁵ shows that many schoolbooks actually reinforce stereotypes and present a heteronormative, exoticist and racist picture of the world.

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

a) Pupils with disabilities

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

With regard to policy towards disability and education, the past decade has brought a clear shift in the direction of integration rather than separation.

Many schools host so called 'integration classes' in which students with or without disabilities are educated together. There are additional specialised teachers in such classes in order to safeguard progress and provide tailor-made assistance. There exists a whole range of specific measures comprising extra classroom assistance, adapted equipment and other accommodation measures. From 1994-1995 to 2006-2007, the number of pupils in 'special schools' decreased from 19 000 to 13 200 while the number of pupils in 'integrated schooling' increased from 4 731 to 13 741.⁵⁶ (More up-to-date figures are not yet available). Parents can choose between the two forms of education for their children with disabilities. It is a clear goal of government policy to further support the integrated approach. There is no data available on the inclusion of students with disabilities in higher education.

Austria's first report for the Committee on the Rights of Persons with Disabilities (CRPD)⁵⁷ in 2010 stated that, in the years that it covered, more than 50 % of all children with special educational needs were educated in such integrated schools. The National Action Plan regarding disability⁵⁸ was enacted by the Council of Ministers on 24 July 2012. This contains *inter alia* a clear commitment to the further development of 'inclusive schooling' instead of segregated 'special schooling'.

⁵⁵ See for, example, Markom, C., Weinhäupl, H. (2007), *Die anderen im Schulbuch*, Vienna.

⁵⁶ See *Behindertenbericht 2008; Bericht der Bundesregierung über die Lage von Menschen mit Behinderungen 2008*, available at: https://www.sozialministerium.at/cms/site/attachments/5/4/8/CH3434/CMS1450699045149/behindertenbericht_2008_II.pdf.

⁵⁷ Austria (2010), *State Party Report to the CRPD*, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUT%2f1&Lang=en.

⁵⁸ Austria (2012), *National Action Plan regarding Disability*, available at: <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=225>.

The concluding observations of the CRPD, issued in September 2013,⁵⁹ expressed great concern 'that progress towards inclusive education in Austria appears to have stagnated' and 'that the number of children in special schools is on the increase and that insufficient effort has been made to support the inclusive education of children with disabilities' (CRPD concluding observations, paragraph 40). Although by law the parents are the ones who make the decision on whether their child attends a special school or an integrated school, in practice the opinions of experts are very often decisive, and they often recommend special schooling.

b) Trends and patterns regarding Roma pupils

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

Segregation in schools is not a topic touched on intensively in public or scientific discourse in Austria. The European Commission against Racism and Intolerance (ECRI)⁶⁰ found in its report on Austria that the disadvantaged position of the Roma, for the most part non-autochthonous Roma, in education at all levels plays a central role in excluding them from most other areas of public life.

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

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

'Research indicates that 50 % of the Roma pupils in Oberwart, where Austria's Roma born between 1975 and 1985 are concentrated, faced severe problems with school education during their first year in primary school. However, around 40 % of younger Roma children (born after 1985) were doing well pursuing upper secondary education, with one (born in 1980) even pursuing higher education.⁶¹ Most adult Roma suffer from serious education deficits. Education policy towards the Roma concentrates on youth, whereas there are very few attempts to remedy the education deficits of adult Roma.

More recent research⁶² shows a positive trend for younger Roma to be involved in higher education and successful educational careers, while the overall level of education is still below average.

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

Segregation is also discussed in relation to primary schools in areas – especially in Vienna – where there are concentrations of pupils who are not German native speakers. As most Roma in Austria are non-nationals or are perceived as foreigners rather than as

⁵⁹ Committee on the Rights of Persons with Disabilities (CRPD) (2013), *Concluding observations on the initial report of Austria*, available at: http://www.ohchr.org/Documents/HRBodies/CRPD/10thSession/CRPD-C-AUT-CO-1_en.doc.

⁶⁰ European Commission against Racism and Intolerance (ECRI) (2015), *ECRI report on Austria*, p. 29, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Austria/AUT-CbC-V-2015-034-ENG.pdf>.

⁶¹ See for this section: European Monitoring Centre on Racism and Xenophobia (EUMC) (2006), *Roma and Travellers in Public Education*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/179-roma_report.pdf.

⁶² Luciak, M., (2014), *ROMBAS Studienbericht Zur Bildungssituation von Roma und Sinti in Österreich*, Initiative Minderheiten, available at: <https://docplayer.org/28641502-Studienbericht-rombas.html>.

Roma specifically, this also affects them as they are more likely to be accepted into schools with a higher attendance of foreigners.

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

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

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

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

With regard to disability, the protection can be found in § 2(2), in connection with § 4 of the Disability Equality Act. The private as well as the public sector are bound by these norms. This includes accessibility to goods and services in a rather broad sense, as shown by case law in which it has been found that a new stair at the entrance of a bakery⁶³ as well as missing subtitles from a DVD⁶⁴ can constitute discrimination on the ground of disability.

The protection provided by all provinces is implemented and even provided for the other grounds beyond ethnic affiliation of Directive 2000/78/EC.

a) Distinction between goods and services available publicly or privately

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

Case law has clarified the meaning of 'available to the public'.⁶⁵

The court established:

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

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

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

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

⁶³ Austria, Josefstadt District Court, decision No. 4C 707/11 z-14, 14 November 2011.

⁶⁴ Austria, Viennese Commercial Court, *L. CLAIMANT. v. ORF*, decision No. 60R93/10x, 8 September 2011.

⁶⁵ Austria, Viennese Commercial Court, decision No. 1R 129/10g, 19 January 2011.

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

'justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Especially, it is not deemed discrimination if the provision of housing constitutes a specially close or intimate relationship of the parties or their relatives.'⁶⁶

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

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

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

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

Migrants are not treated differently under anti-discrimination legislation and benefit equally from anti-discrimination law enforcement as nationals. There have been some political approaches to restrict access to municipal social housing to persons who speak German at a high level.⁶⁷

To give a few examples, the city of Wels tried to tie access to public housing to the requirement for a certain degree of mastery of the German language. These ideas (by FPÖ mayors) have been found to be illegal and were not put into practice until December 2017, when Upper Austria introduced severe restrictions on provincial subsidies for housing⁶⁸ (*Wohnbauförderung, Wohnbeihilfe*). The law requires migrants to have been residing legally for more than five years in Austria; to have been employed for at least 54 months within the past five years; and to show proof of their ability to speak German in order to qualify as a beneficiary of these subsidies. NGOs have brought several cases to court in support of people affected by this rule, and have described the practice as racist and discriminatory. Most cases are still pending, while the second-instance court has found in favour of the claimant in one decision.⁶⁹ It might be a bit unclear whether, technically, this matter falls under housing or under social benefits, as it links both aspects.

Provinces and municipalities have the competence to govern zoning and building regulations. Therefore, in some parts of the country almost all new buildings (public and

⁶⁶ This is a regulation on the prohibition of discriminatory advertisements – where the offer is available to the public.

⁶⁷ Website of FPÖ provincial functionary Haimuchner (2015) 'German as Key for Housing', <https://www.fpoee-ooe.at>.

⁶⁸ See: Austria, Upper Austrian Act on Housing Support Subsidies (*OÖ Wohnbauförderungsgesetz*), (LGBl 6/1993, last amended by LGBl 98/2017), § 6(9).

⁶⁹ See: Austria, Upper Austria, Provinzial Court Linz, decision No. 14R201/18d, 9 November 2018.

private) have to be (disability) accessible and there are special subsidies and grants for (disability) accessible constructions and reconstructions.

a) Trends and patterns regarding housing segregation for Roma

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

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

There is no specific legislation regarding housing segregation. Generally, housing segregation is not publicly discussed under this topic heading, but is instead described as a concentration of 'foreigners' (meaning migrants regardless of citizenship) in certain areas of larger towns and cities. For example, a certain part of the 16th district in Vienna is called 'Little Istanbul', and there are other districts with a larger migrant population.

The equal treatment legislation does apply to the access to and supply of housing without any legal restrictions or exceptions. It will, nevertheless, be up to the courts to decide whether and how far these provisions also protect people from harassment by neighbours. There is no case law on the matter.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

For example, § 20(1) of the Equal Treatment Act reads:

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

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

In its decision No. 9ObA117/15v of 25 May 2016, the Supreme Court ruled that the dismissal of an employee because of her decision to wear a niqab in the office of a public notary was covered by the exception for genuine and determining occupational requirements, while the discrimination she suffered before wearing the niqab, based on wearing a headscarf and abaya, were not justified by this exception. The Court stated that a face covering veil obstructed 'interpersonal interaction and communication' between the claimant and her clients and colleagues, so the order not to wear it was justifiable under the exception for genuine and determining occupational requirements. The headscarf and abaya clearly did not qualify for that exception.

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

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

This exception is transposed mainly by § 20(2) of the Equal Treatment Act, which states:

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

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

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

So far, there has been no court decision on cases involving an ethos-based institution. All cases brought so far (concerning mainly the Catholic Church) have been settled out of court.

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

– Religious institutions affecting employment in state-funded entities

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

In general, the respective faith community selects religious teachers. This practice is governed by an international agreement with the Holy See for Catholic teachers as well as by national law. In principle, teachers of religion of all officially recognised faith communities⁷⁰ are employed by the state (federal or provincial) according to the 'mission' of the religious community. The selection and the refusal or withdrawal of the permission to teach therefore lies entirely with the religious communities. The state has to make the teachers redundant or at least cannot use them as teachers of religion without these 'missions'. The relevant legal basis for this (for the Catholic faith) lies with § 6 of the Act on the Relations of School and Church (BGBl 48/1868).

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

1. § 3 of the Schools Regulation (*Schulwesen-Regelung*) (BGBl 273/1962);
2. § 3 of the Act on Religious Education (*Religionsunterrichtsgesetz*) (BGBl 190/1949).

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

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

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

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

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

⁷⁰ A list of the 17 recognised churches and faith communities can be found on this official website: <https://www.bundeskanzleramt.gv.at/kirchen-und-religionsgemeinschaften>.

The issue of protection against discrimination on the basis of nationality or citizenship is crucial for the Austrian situation, as most of the racist discourse is not labelled with terms like race or ethnic origin; instead, scapegoating and the concept of 'enemies' is to a very large extent concerned with 'foreigners', 'asylum seekers' and 'asylum frauds'. In particular, discriminatory small ads for jobs or housing regularly demand that applicants be 'Austrians' or 'genuine Austrians', or state 'no foreigners'. The 2008 amendment is therefore a very useful and constructive way of dealing with the Austrian situation and discourse, as it exempts from protection only those areas in which the difference in treatment is based on an objective legal condition (in the sense of directly demanded, e.g. by alien law status or employment permits).

The first judgment⁷¹ on that issue was very clear in stating that the assertion that 'we do not sell to foreigners' was indeed racial discrimination and was not covered by the (then legally enshrined) nationality exception. This discrimination was obviously seen as being direct discrimination.

b) Relationship between nationality and 'racial or ethnic origin'

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

Discrimination on the basis of being or looking like 'a migrant' is also clearly prohibited.⁷² In its judgment⁷³ on the discriminatory general exclusion of non-nationals from 'commuters' aid' in Lower Austria, the court had no problem in applying the prohibition of discrimination on ethnic grounds to that case.

It seems that Austrian courts generally use an interpretation of ethnic discrimination that does not scrutinise the 'particular ethnic origin' of the person affected as the CJEU did in its *Jyske Finans* judgment,⁷⁴ but instead takes a broader view of the term 'on grounds of ethnic affiliation'. In general, the focus of the Austrian decisions lies more on the perception of the discriminators: if these acts driven by the view that a person is to be treated differently based on a perceived 'otherness' that contains ethnic elements, they find that there is ethnic discrimination. It remains uncertain, however, how a case in which there was reference solely to a person's place of birth would be judged.

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

a) Benefits for married employees

In Austria, it does constitute unlawful discrimination in national law if an employer provides benefits only to those employees who are married.

With the legal amendment of the Federal Equal Treatment Act by BGBl I 60/2018, 'family status' – including marital status – is now protected against discrimination in public employment, as the amended § 13(1) now reads:

'On grounds of ethnic affiliation, religion or belief, age or sexual orientation – especially regarding family status or the fact whether somebody has children – no one shall be directly or indirectly discriminated against in connection with a public service contract or a public traineeship, especially not

⁷¹ Austria, Viennese Civil Regional Court, *Hayet B. v. Ferdinand S.*, decisions Nos.35R68/07w and 35R104/07i, 30 March 2007.

⁷² Austria, Viennese Civil Regional Court, decision No. 36 R 292/15f, 10 December 2015.

⁷³ Lower Austria, Provincial Court St. Pölten, decision No. 21 R 16/13f-13, 31 January 2013.

⁷⁴ Judgment of 6 April 2017, *Jyske Finans v. Ligebehandlingsnævnet*, C-668/15.

- (...)
- 2. pay
- 3. regarding voluntary benefits that are not deemed to be pay'
- (...)

In connection with corresponding definitions in §§ 3 and 4 of the Equal Treatment Act (where gender is defined including 'family status or the fact whether somebody has children') it seems that work-related benefits only for married employees are no longer legal with regard to public and private employment.

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

Apart from some distinctions between registered partnerships and marriages directly imposed by the Act on Registered Partnerships and other laws, other forms of discrimination related to employment are definitely forbidden. The Constitutional Court found that the general exclusion of same-sex couples from artificial insemination⁷⁵ and adoption⁷⁶ is unconstitutional.

On 4 December 2017, the Austrian Constitutional Court issued its ruling No. G 258-259/2017 – 9, finding that the words 'of different sex' in the regulation on marriage in the General Civil Law Code (ABGB) and the words 'same-sex couples' and 'of same sex' are unconstitutional and shall be set aside from 1 January 2019. This means that, according to the Constitutional Court, it is discriminatory and therefore unconstitutional to uphold two separate legal institutes – marriage and registered partnership – only to make a symbolic distinction between heterosexual and homosexual couples. With the Court's judgment, both legal possibilities will be open to everybody.

b) Benefits for employees with opposite-sex partners

In Austria, it constitutes unlawful discrimination in national law if an employer provides benefits only to those employees with opposite-sex partners.

This is clearly stated by §§ 17(1)(3) of the Equal Treatment Act and 13(1) of the Federal Equal Treatment Act.

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

In Austria, there are no exceptions in relation to disability and health and safety as allowed under Article 7(2) of the Employment Equality Directive.

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

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

In regard to the exception for 'genuine occupational requirements', the explanatory notes to the Equal Treatment Act⁷⁷ state: 'The exception also comprises the areas of health and safety. This comprises especially those protective provisions regulating a duty to wear uniforms or helmets for reasons of safety.' This exception is therefore not restricted to the ground of disability as permitted by the directive, but is valid for all the grounds dealt

⁷⁵ Austria, Constitutional Court (Verfassungsgerichtshof), decision No. G16/2013 ua, 10 December 2013.

⁷⁶ Austria, Constitutional Court (Verfassungsgerichtshof), decision No. G119-120/2014, 11 December 2014.

⁷⁷ Austria, parliamentary materials, No. 307 of the appendices XXII GP, 26 November 2003, p. 16.

with by the Equal Treatment Act, although it always has to withstand the test of being a 'genuine occupational requirement.'

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

4.7.1 Direct discrimination

In Austria, national law provides for specific exception(s) for direct discrimination on the ground of age.

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

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

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

As we can see from the case law,⁷⁸ so far courts tend to be very strict in sticking to a narrow interpretation of these exceptions.

a) Justification of direct discrimination on the ground of age

In Austria, national law provides for justifications for direct discrimination on the ground of age.

⁷⁸ For example: Austria, Supreme Court, decision No. 60b246/10k, 18 July 2011.

The legal situation appears to be in compliance with the test in Article 6 of Directive 2000/78, taking account of the rulings by the European Court of Justice in *Mangold* (C-144/04) and *Kucukdeveci* (C-555/07).

The Supreme Court⁷⁹ has clearly stated that 'dismissal does not necessarily constitute discrimination but can be justified even if age is a decisive factor.'

b) Permitted differences of treatment based on age

In Austria, national law does not permit differences of treatment based on age for any activities within the material scope of Directive 2000/78.

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

- '(3) A different treatment does not constitute discrimination if
 - a) it is objective and appropriate;
 - b) it is justified by a legitimate aim especially from the fields of employment policy, labour market and vocational training;
 - c) the means of achieving that aim are appropriate and necessary.

- (4) Such differences of treatment may include, among others:
 - a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
 - b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
 - c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

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

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

The respective exception can be found in § 20(5) of the Equal Treatment Act:

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

⁷⁹ Austria, Supreme Court, *R.K. v. Österreichischer Rundfunk*, decision No. 9ObA113/12a, 25 June 2013.

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

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

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

4.7.3 Minimum and maximum age requirements

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

§§ 13b(3)-(4) of the Federal Equal Treatment Act and §§ 20(3)-(4) of the Equal Treatment Act state this clearly and by quoting verbatim Article 6 of Directive 2000/78/EC.

4.7.4 Retirement

a) State pension age

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

If an individual wish to work for longer, the pension can be deferred.

An individual can collect a pension and still work.

The general retirement (pensionable) age is currently 65 years for male and 60 years for female workers in the private sector; for civil servants it is set at 61.5 years for both sexes. These periods will be harmonised gradually from 2024 to 2033 when the general retirement age will be 65 years.⁸⁰

In general, individuals who have attained the necessary number of months of paying into the pension scheme⁸¹ can collect a pension and still work.

Age is not a permissible reason for dismissal and there is no upper age limit for protection against unfair dismissal. In practice, nevertheless, it is generally easier to make an employee redundant who is already entitled to a pension as, in order to be protected against socially unfair dismissal – enshrined in § 105(3)(2) of the Labour Constitution Law (*Arbeitsverfassungsgesetz*) – the employee needs to prove that the dismissal constitutes a social hardship.⁸²

⁸⁰ Law Accompanying the Budget (*Budgetbegleitgesetz*) (BGBl I 71/2003), *Federal Law Gazette* 71/2003, 20 August 2003.

⁸¹ The rules for taking into account periods of apprenticeship, work or studies before the age of 18 for grading and pension scheme have been subject to a series of preliminary judgments by the CJEU: judgment of 18 June 2009, *Hütter*, C-88/08; judgment of 16 January 2014, *Pohl*, C-429/12; judgment of 21 January 2015, *Felber*, C-529/13; judgment of 28 January 2015, *ÖBB Personenverkehr*, C-417/13.

⁸² See, for example, Austria, Supreme Court, decision No. 90bA13/16a, 26 January 2017.

b) Occupational pension schemes

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

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

An individual can collect a pension and still work.

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

c) State imposed mandatory retirement ages

In Austria, there is no state-imposed mandatory retirement age in the private sector while public employment provides for an automatic shift into the pension stage.

Civil servants can (could) *ex officio* be forced to retire after reaching an age of 738 months (= 61.5 years) if there are important official reasons (no legal definition of these reasons is provided) for that.⁸³ Age as such is not deemed a permissible reason. Since September 2017, public servants are automatically transferred into the pension when they reach the age of 65 years - employment can be extended only for one year, renewable up to a maximum of five years, if there is 'an important operational reason' for such a measure.

d) Retirement ages imposed by employers

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

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

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.

f) Compliance of national law with CJEU case law

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

In its decision No. 9ObA13/16a of 26 January 2017, the Supreme Court clarified that the fact that an employee has reached the pensionable age and is entitled to a pension does,

⁸³ See § 15a(1)(1) of the Civil Servants Duty Act (*Beamtendienstrechtsgesetz*) (BGBl 333/1979, last amended by BGBl I 120/2016). This provision has not been in force since 1 September 2017.

nevertheless, have an impact on the assessment of whether a dismissal is 'socially unfair'. It stated: 'Reaching the pensionable age and entitlement to pension does not preclude the protection against unfair dismissal in general, while the fact that the lawmaker tolerates reductions of income that are regularly the effect of retirement as well as the foreseeability of the time of pension demand a strict scrutiny in weighing the affected interests.'

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

Seniority as such is not a protected element in the Austrian labour law. Basically, the European Court of Justice (ECJ) stated in its judgment in the *Tyrolean Airways* case (C-132/11) that the employer was not acting in conflict with the prohibition of age discrimination when paying employees differently on the basis of experience acquired within versus outside his own company, even if 'outside' was still within the same group of companies. Seniority as such therefore seems to be a permissible reason for different treatment. Generally in Austria, age might be taken into account when applying a special provision declaring 'socially unfair' (*sozialwidrige*) dismissals illegitimate. This provision is to be found in § 105(3), figure 2 of the Labour Constitution Law (*Arbeitsverfassungsgesetz*),⁸⁴ which states:

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

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

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

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

b) Age taken into account for redundancy compensation

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

⁸⁴ Austria, Labour Constitution Law (*Arbeitsverfassungsgesetz*) (BGBl 22/1974, 15 January 1974, last amended by BGBl I 71/2013).

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

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

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

4.9 Any other exceptions

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

The problematic regulation on 'discrimination-free advertising of housing' (§ 36 of the Equal Treatment Act) allows for a justification of direct discrimination on the ground of ethnic affiliation (see above, Section 2.2.b)

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

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

a) Scope for positive action measures

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

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

The main legislation can be found in:

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

b) Quotas in employment for people with disabilities

In Austria, national law provides for a quota for people with disabilities in employment.

Under § 1(1) of the Act on the Employment of People with Disabilities, all employers who employ 25 employees or more are obliged to employ at least one person with disabilities for each group of 25 employees (the ratio of this quota, therefore, being 1:25).⁸⁵

This obligation is widely not complied with, but the law itself provides for the payment of a lump-sum compensation.⁸⁶ The so-called *Ausgleichstaxfonds*⁸⁷ is (well) filled with this money, which is used for a variety of disability-related measures.

⁸⁵ For certain economic sectors, the Minister for Social Affairs may, by regulation, increase the relevant ratio from 1:25 to up to 1:40; § 1(2) of the Act on the Employment of People with Disabilities.

⁸⁶ Figures for 2018: per month/not filled special post: EUR 257; for companies with 100 or more employees per month/ not filled special post: EUR 361; for companies with 400 or more employees per month/not filled special post: EUR 383.

⁸⁷ The name of the mechanism can be translated as 'compensatory fund'.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Austria, the following procedures exist for enforcing the principle of equal treatment:

The procedures consist of civil law/employment law procedures and a few administrative penal procedures and non-binding procedures before the Equal Treatment Commission, as well as compulsory mediated attempts for settlements in cases concerning disability.

With only a few exceptions, the generally used court procedures will be civil law procedures or employment law procedures. Civil law procedures are restricted to claims of compensation.

Administrative penal law is only a remedy against discriminatory advertisements.

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

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

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

- b) Barriers and other deterrents faced by litigants seeking redress

Generally, there is a great reluctance to take legal action against cases of discrimination, as there is a great psychological barrier to accepting that one has been victimised. Additionally, it is not helpful that there have been no cases against victimisation in the courts so far, as many people fear that standing up against discrimination will negatively affect their future and prosperity.

The legal situation regarding discrimination is very complicated and the laws are not intelligible for people without a legal education. Even in cases in which it is not compulsory to be represented by a lawyer, it therefore seems necessary for people to have access to legal aid. The powers of the National Equality Body are restricted to providing help in the procedure before the Equal Treatment Commission, but their help ends at the doors of the courts. One great obstacle is the absence of an established framework of case law – especially regarding the amount of compensation for non-

pecuniary damages. As the costs of civil law procedures are related to the amount in dispute,⁸⁸ this is a crucial question and it bears a lot of risks.

In addition, NGOs cannot provide for complete relief, as their procedural rights are limited to a supporting intervention in court, and there are very few additional opportunities to check the insurance terms of a contract or the possibility of filing a group litigation – this is limited to disability cases only (§ 13 of the Federal Disability Equality Act) – on behalf of an unidentifiable group of affected persons. Otherwise, their legal standing does not differ from that of any other private person or institution. In labour law cases, the trade unions or the Chamber of Labour can grant their members complete protection so that they do not have to fear any costs – if their cases are supported.

c) Number of discrimination cases brought to justice

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

d) Registration of discrimination cases by the national courts

Discrimination cases are not registered as such by the national courts.

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

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

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

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

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

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

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

At provincial level, the Viennese Anti-Discrimination Act (§ 4(2)); the Lower Austrian Anti-Discrimination Act (§ 18(3)); the Upper Austrian Anti-Discrimination Act (§ 8(3)); the Salzburgian Equal Treatment Act (§ 29(4)); and the Styrian Equal Treatment Act

⁸⁸ The amount in dispute has to be defined by the claimant and serves as a basis for further costs like court fees, advocates' fees. Another very costly procedural item could be the requirement of experts.

(§ 33(3)) state that the claimant can use the help of any legitimate non-profit organisation to be represented in all forms of legal proceedings under these acts, as long as the organisation's aims include the safeguarding of the adherence to the two EU non-discrimination directives.

b) Engaging in support of victims of discrimination (joining existing proceedings)

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

According to the Equal Treatment Act, third-party intervention is expressly allowed for one specific NGO, the Litigation Association of NGOs Against Discrimination in the courts (§ 62 of the Equal Treatment Act). As this NGO is an umbrella organisation of more than 50 member organisations and is very much open to potential members, there have been no problems with this choice so far. Access to third-party intervention is not monopolised by this NGO, as others (including trade unions) can intervene as well if they can prove their legal interest in a particular case.

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

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

The basic requirement is therefore a 'legal interest' in one party's victory. In practice, this requirement is not very hard to fulfil for NGOs that are working actively in the field of anti-discrimination.

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

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

In penal administrative proceedings, there is no legal standing for interest groups (indeed, there is no legal standing even for the victim of discrimination themselves) at all. In some cases involving discriminatory advertising, the National Equality Body has a legal standing and can oppose the abatement of the proceedings.⁸⁹

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

⁸⁹ See Austria, Equal Treatment Act (*Gleichbehandlungsgesetz*), 2004, § 24(3), which states: 'In cases which were induced by the Office for Equal Treatment, the Office has a legal standing in the administrative penal proceeding. The office has the right to appeal against penal decisions.'

c) Actio popularis

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

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

In December 2017, a new possibility was created by the so-called 'inclusion package' in amendment BGBl I 155/2017 to file a group litigation under § 13 of the Federal Disability Equality Act. It creates the possibility for three organisations – the Austrian National Council of Disabled Persons, the Litigation Association of NGOs Against Discrimination and the Ombud for People with Disabilities – to sue a perpetrator independently on behalf of an unidentifiable group of affected persons. The action is limited to a declaratory judgment in principle, while against big companies the litigants can go for an action for injunction and removal of the discrimination. This will be quite helpful in the future and is a new right for those potential litigators, as an 'ordinary' individual victim of discrimination has no legal right to ask for injunction and removal (of barriers, for example).

This possibility has been used by the Litigation Association of NGOs Against Discrimination and the Ombud for People with Disabilities so far very successfully to reach useful settlements against new policies/measures of big companies such as the post office and a big insurance company.

There are frequent demands by NGOs and experts to expand such important legal tools to other grounds of discrimination, but the political will to do so does not seem strong at the moment.

The relevant provision reads:

§ 13(1) of the Federal Disability Equality Act:

'In case the legal duties and restrictions set out by this law are infringed, and thereby, the general interests of the persons protected by this regulation are significantly and sustainably negatively affected, the Austrian National Council of Disabled Persons, the Litigation Association of NGOs Against Discrimination and the Ombud for People with Disabilities can bring a lawsuit for a declaratory judgment and – regarding big capital corporations⁹⁰ - also for injunction and removal of the discrimination on the ground of disability.'

⁹⁰ Those are defined in § 221(3) of the Company Law Code (*Unternehmensgesetzbuch*) (BGBl I 114/1997, last amended by BGBl I 107/2017) as follows – a minimum of two of the following characteristics are true: more than € 1.5 million balance sheet total, more than € 10 million annual revenue, more than 250 employees.

d) Class action

In Austria, national law does not allow associations/organisations/trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

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

In Austria, national law requires a shift of the burden of proof from the complainant to the respondent.

The respective regulations can be found in:

1. §§ 26(12), 38(3) of the Equal Treatment Act;
2. § 20a of the Federal-Equal Treatment Act;
3. § 7p of the Act on the Employment of People with Disabilities;
4. § 12 of the Federal Disability Equality Act.

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

For harassment, the provision reads: '(...) it is for the respondent to prove that, taking into account all circumstances, it is more likely that the facts established by the respondent are true.'

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

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

By way of amendment (BGBl I 81/2013 of 27 December 2013) the regulation on the burden of proof has been changed in the Federal Equal Treatment Act (nb: this is different from the Equal Treatment Act, which is also a federal piece of legislation). Before this amendment, the same construction as quoted above had been used in this Act as well. Now, to conform with the directive, it reads: '§ 20a Burden of Proof: In order to invoke discrimination in court the claimant has to establish facts that allow the assumption of direct or indirect discrimination. The respondent then has to prove that no breach of the principle of equal treatment has occurred.' It remains unclear why the legislator chose to change the wording in one act while retaining the older phrasing in the other.

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

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

Victimisation is prohibited. It is deemed to be any adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment. Victimisation in the workplace sphere (defined as 'dismissal, notice to quit and

any other detriment in reaction to a complaint or to the opening of proceedings enforcing the principle of equality') is prohibited in all bills/drafts, and all of them also cover other employees acting as witnesses or supporting the complaint of a victim. This is enshrined in:

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

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

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

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

There are still no court cases on the matter.

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

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

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

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

In a case of discriminatory termination of employment, a victim can challenge the termination or take the option to accept the termination and claim pecuniary and non-pecuniary damages.⁹¹

According to the Equal Treatment Act, compensation for non-pecuniary damage in the case of non-recruitment and non-promotion is limited to a maximum of EUR 500 if the employer proves that the victim would not have been recruited or promoted if no discrimination had occurred (so that discrimination did not have the effect of non-promotion or non-recruitment but caused only exclusion from the selection procedure).

⁹¹ Austria, Equal Treatment Act, 2004, § 26(7).

In the light of CJEU case law,⁹² this restriction⁹³ might be questionable. As a Member State has to choose a sanction or remedy that is effective, proportionate and dissuasive, a symbolic compensation that does certainly not deter financially powerful employers or undo the personal harm suffered as a result of discrimination is surely problematic if it is the only possible legal remedy for the claimant. A maximum amount of EUR 500 can only be considered purely nominal compensation, while it must be taken into account that general Austrian civil and labour law does not provide for similar non-pecuniary damage claims.

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

In the event that the discrimination proves decisive in non-employment, the Equal Treatment Act sets out the minimum compensation of two months' salary.⁹⁴ In court, the claimant can demand only financial compensation, and not to be employed.

In the case of discrimination against university students, the legislation needs judicial clarification to determine whether any sanctions apply if the discrimination does not comprise harassment.

The Equal Treatment Act establishes a (in principle) very effective sanction for companies that do not observe the prohibition of discrimination: exclusion from public funding granted by the Federation⁹⁵ but it does not extend the exclusion to public procurement, which would render the effectiveness of this sanction perfect.⁹⁶ It is, nevertheless, quite unclear in practice how these provisions are surveyed and how the sanction is triggered.

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

b) Ceiling and amount of compensation

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

There are no established rules and no firm legal tradition in compensating for non-pecuniary damages, which leads in general to rather low levels of compensation being awarded by the Austrian courts.

⁹² Judgment of 22 April 1997, *Nils Draehmpaehl v. Urania Immobilienservice OHG*, C-180/95, ECR I-2195, paras. 25 and 29.

⁹³ Judgment of 10 April 1984, *Von Colson and Karmann v. Land Nordrhein-Westfalen*, C-14/83, ECR 1891, paras. 23 and 24.

⁹⁴ Austria, Equal Treatment Act, 2004, § 26(1).

⁹⁵ Austria, Equal Treatment Act, 2004, §§ 14, 26, 37.

⁹⁶ See: European Commission (2001), *Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*, COM (2001)0566 final, Brussels, 28 November 2001, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2001:333:TOC>.

In 2016, for the first time, the Supreme Court, while rejecting extraordinary revision in a gender discrimination case in the employment field, came up with a general guideline on how to assess the immaterial damages in discrimination cases.⁹⁷ The language is still quite vague, but it states that the compensation has to go beyond the mere compensation of 'loss of pleasure or amenities of life' in compensation for physical injury or pain and suffering.⁹⁸

c) Assessment of the sanctions

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

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

While the very low numbers of victims who actually bring their cases to court might not be an indicator as to whether the sanctions are effective, proportionate and dissuasive, they indicate that the route to justice seems to be much harder than is justified by the benefit expected from winning a court case.

The case law reflects the uncertainties mentioned above that the claimants face regarding the amount of compensation. To illustrate this,⁹⁹ see two decisions issued by the same court – the Viennese Commercial Court (Handelsgericht Wien) – in more or less identical cases with highly contradictory outcomes concerning the assessment of the amounts awarded in compensation.

Judgment 1: Viennese Commercial Court, Case No. 1R129/10g, names withheld, 19 January 2011

Issue: A dark-skinned man had been not admitted into a restaurant to celebrate someone's birthday, while his partner and her colleagues (all white) had been admitted

⁹⁷ Austria, Supreme Court, decision No. 9ObA49/16w, 29 September 2016.

⁹⁸ 'In general, when assessing compensation for discrimination suffered, it is especially necessary to take into account the length and the gravity of the disturbance. When determining this compensatory amount it will be necessary to take into account the psycho-physical situation of the victim, his or her emotional world [*Gefühlswelt*], his or her sensitiveness, the limits of variability of his/her psyche [*Schwankungsbreite seiner Psyche*] and to consider that the compensation is not just balancing the loss of the pleasures or amenities of life but shall also remedy the feeling of having been hurt and, thereby, rebuild the disturbed balance of his/her personality.' (Austria, Supreme Court, decision No. 9ObA49/16w, 29 September 2016).

⁹⁹ Although the detailed description of the cases might look more descriptive than analytic, it is a rather effective way of demonstrating the main challenges faced by courts and their unsystematic approach to it, which creates a major obstacle to the usage of the legislation.

without any problem. The court of first instance found that there had been discrimination and awarded the EUR 1 000 that the claimant had demanded.

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

Result: Compensation of EUR 1 000 upheld. All procedural costs have to be paid by the respondent.

Judgment 2: Viennese Commercial Court, Case No. 60R101/10y, names withheld, 14 September 2011

A dark-skinned woman had been not admitted into a restaurant, as the bouncer refused to let her in, with a reference to her skin colour. The court of first instance found that there had been discrimination and awarded the EUR 1 500 that the claimant had demanded.

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

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

Result: Compensation reduced from EUR 1 500 to EUR 250, which at the same time means that the claimant (the victim) has to fully pay the cost of the whole proceeding¹⁰⁰ – in this case, the costs of the respondent alone, which had to be paid by the claimant in addition to her own costs, amounted to EUR 925.61. As a result, the victim of discrimination suffered a financial loss of a minimum of EUR 675.61.

In 2016, the Supreme Court took the opportunity to issue some initial guidelines for courts on how to assess the amount for compensation in discrimination cases:¹⁰¹ 'In general, when assessing compensation for discrimination suffered, it is especially necessary to take into account the length and the gravity of the disturbance. When determining this compensatory amount it will be necessary to take into account the psycho-physical situation of the victim, his or her emotional world [*Gefühlswelt*], his or her sensitiveness, the limits of variability of his/her psyche [*Schwankungsbreite seiner Psyche*] and to consider that the compensation is not just balancing the loss of the pleasures or amenities of life but shall also remedy the feeling of having been hurt and, thereby, rebuild the disturbed balance of his/her personality.' This guidance clearly goes beyond mere compensation for pain and suffering.

¹⁰⁰ Under the general Civil Procedure Code, the burden of procedural costs shifts totally to the claimant if the amount awarded by the court is lower than half the amount of his or her claim.

¹⁰¹ Austria, Supreme Court, decision No. 9ObA49/16w, 29 September 2016.

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

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

At the federal level, the Act on the Equal Treatment Commission and the National Equality Body establishes an Equal Treatment Commission¹⁰² and the National Equality Body.¹⁰³ In transposing Article 13 of the Racial Equality Directive, Austria extended the functions of the existing quasi-judicial Equal Treatment Commission (then for gender issues only) and created a separate Federal Equal Treatment Commission¹⁰⁴ (dealing with cases of federal employees only). The then existing Ombud for Equal Employment Opportunities (gender) was transformed into the new National Equality Body consisting of three specialised Ombuds dealing with their respective fields (gender and employment, employment other grounds, other grounds outside employment). In short, the two existing institutions previously dealing with gender discrimination in the workplace only were given extended mandates to deal with discrimination on the ground of gender and on all other grounds mentioned in Article 19 of the Treaty on the Functioning of the European Union (TFEU) except disability. Disability is addressed with a completely separate set of laws and institutions – none of which claims to be a fully fledged equality body.

In 2005, the additional Ombuds necessary for the new version of the National Equality Body were appointed and took office in the Federal Chancellery. In late April 2005, two new senates within the Equal Treatment Commission started operating. The findings of the Commission on general issues and cases are published in an anonymous and condensed form online.¹⁰⁵

At the provincial level, provinces are obliged to set up specialised bodies to promote equal treatment in their own field of competence as some important areas of law and administration are not covered by federal legislation. The provincial bodies are therefore not linked to each other¹⁰⁶ and share no responsibilities with the federal structures. As is apparent from the impressive list of different bodies, it might not always be easy for victims of discrimination to find out where to turn to.

In Vienna, an Office for the Fight against Discrimination (Stelle zur Bekämpfung von Diskriminierungen) was set up. The position was set up independently by provincial constitutional law.¹⁰⁷ The duties are not very broad – it is mainly a counselling service with a vague responsibility for mediating conflict as well as writing reports and studies. These tasks were given to an existing independent body of the Vienna Province, the Commissioner for the Safety of Employees (Bedienstetenschutzbeauftragter) – a position that had nothing to do with issues of discrimination previously but was responsible for safety issues concerning the employees of the City of Vienna.

Styria has set up a range of bodies for equal treatment, including the Styrian Equal Treatment Commission; the Commissioner for Equal Treatment;¹⁰⁸ and Contact Persons. The Commission's main task is to give statements in individual cases of alleged

¹⁰² https://www.bmgf.gv.at/home/Frauen_Gleichstellung/Gleichbehandlung/Gleichbehandlung_s-kommissionen/Gleichbehandlungs-kommission/.

¹⁰³ <https://www.gleichbehandlungsanwaltschaft.gv.at/gleichbehandlungsrecht-in-osterreich>.

¹⁰⁴ <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungs-kommissionen/bundes-gleichbehandlungskommission.html>.

¹⁰⁵ <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungs-kommissionen/bundes-gleichbehandlungskommission.html>.

¹⁰⁶ Although there are annual meetings of the provincial bodies.

¹⁰⁷ Austria, Viennese Anti-Discrimination Act (*Wiener Antidiskriminierungsgesetz*), 2004, § 7(3).

¹⁰⁸ And a separate Commissioner for the City of Graz.

discrimination (in connection with employment by the province) and to comment on specific legal drafts. The Commissioner(s) for Equal Treatment are mainly counselling bodies and they are entitled to issue independent reports and initiate disciplinary proceedings. The Contact Persons are established in all major municipalities and offices of the Styrian Government. Their task is mainly to counsel individual civil servants. The Commissioners and the Contact Persons are independent in fulfilling their functions; a provincial constitutional provision safeguards this.¹⁰⁹ Since May 2012, the Styrian Government and the City of Graz have also funded a general Anti-Discrimination Office, which offers individual counselling to everybody and issues statements and expert opinions.

Carinthia has set up an Anti-Discrimination Office¹¹⁰ (Antidiskriminierungsstelle) in the section for civil law within the Office of the Provincial Government. This office is entitled to support (counsel) victims of discrimination and to issue recommendations as well as to conduct independent surveys on discrimination. This body is not independent.

Lower Austria has set up a Lower Austrian Commission for Equal Treatment¹¹¹ (Niederösterreichische Gleichbehandlungskommission) whose main tasks are to give recommendations in individual cases of alleged discrimination (in connection with employment by the province) and to comment on specific legal drafts. The chairperson of the Commission is also the Lower Austrian Commissioner for Equal Treatment (Niederösterreichische/r Gleichbehandlungsbeauftragte/r) and heads the Anti-Discrimination Office. This Commissioner is mainly a counselling body with powers to initiate proceedings. The Office can conduct surveys and issue reports. Lastly, Co-ordinators for Equal Treatment and Promotion of Women are established in all major municipalities and offices of the provincial government. Their task is mainly to counsel individual civil servants and notify grievances to the Commissioner. The members of the Commission and the Commissioner are independent in fulfilling their functions; this is safeguarded by a provincial constitutional provision.

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

Burgenland has set up an Anti-Discrimination Office (Stelle zur Bekämpfung von Diskriminierungen). It is mainly a counselling service and has been given a vaguely described responsibility for mediating conflict as well as writing reports and studies. The independence of the head of this office within the Office of the Provincial Government is safeguarded by a constitutional provision.

Salzburg has set up five Commissions for Equal Treatment whose main tasks are to issue expert opinions and give recommendations in individual cases of alleged discrimination (in connection with different areas of employment by the province) and to comment on specific legal drafts. A Commissioner for Equal Treatment is set up mainly as a counselling body with powers to initiate proceedings. Additionally, for the City of Salzburg, a Commissioner for Equal Treatment was established within the Magistrate with similar duties and powers referring to equality affairs at municipality level. These Commissioners can conduct surveys and issue reports. Lastly, Co-ordinators for Equal Treatment and Promotion of Women are established in all offices of the provincial government. Their task is mainly to counsel individual civil servants and notify grievances to the Commissioner. The members of the Commissions and the Commissioners as well

¹⁰⁹ Austria, Styrian Equal Treatment Act (*Steiermärkisches Gleichbehandlungsgesetz*), § 44.

¹¹⁰ Austria, Carinthian Anti-Discrimination Act (*Kärntner Antidiskriminierungsgesetz*), §§ 32, 33.

¹¹¹ Austria, Lower Austrian Equal Treatment Act (*Niederösterreichisches Gleichbehandlungsgesetz*), §§ 11, 12.

as the Co-ordinators are independent in fulfilling their functions; this is safeguarded by a provincial constitutional provision.

Tyrol has appointed a Commissioner for Equal Treatment. It is set up mainly as a counselling body with powers to initiate proceedings and conciliation mechanisms. The Commissioner can also conduct surveys and issue reports. Independence is safeguarded by a provincial constitutional provision.

Vorarlberg has used the existing Provincial Ombudsman (Landesvolksanwalt) and the Provincial Ombud for Health Care (Patientenanwalt) to serve as anti-discrimination bodies as well. They are already established by provincial constitutional law and have been assigned the tasks of providing legal counsel; investigating cases of alleged discrimination; and issuing independent reports and conducting independent surveys.

b) Political, economic and social context for the designated body

For both national bodies, there has been some reluctance by governments to allocate the necessary resources and pave the way for the bodies to evolve. Nevertheless, the National Equality Body has been growing in terms of staff and independence through the years.

There have been no dramatic increases or cutbacks in budget for the equality bodies in recent years. The staff of the National Equality Body has been gradually expanding in recent years to a level that is still not regarded as sufficient by the body itself but which has been a relieving improvement.

There is a lot of public debate in Austria that is generally hostile towards many groups – especially immigrants and refugees at the moment, but also all other groups that are regularly targeted by discrimination. The discourse regarding (physical and sensory) disability might be a positive exception here. The equality bodies usually do not play any role in these popular debates. They are generally not widely known or at least are not seen as the driving force behind developments or feared, loved or hated by the general public. So far, they have not been prominent among the targets of populists or the tabloid media.

c) Institutional architecture

In Austria, the designated body does not form part of a body with multiple mandates.

The mandates of the NEB are only multiple in the sense that all grounds of discrimination, except disability, are covered. They do not deal with issues beyond discrimination.

The only exception is the structure in Vorarlberg, where the provincial bodies act as general Ombuds for the administration.

d) Status of the designated body/bodies – general independence

i) Status of the body

Both national bodies are set up by one piece of legislation – the Act on the Equal Treatment Commission and the National Equality Body. The Equal Treatment Commission has been set up within a ministry of the Federal Chancellery (its name has changed from 'Federal Ministry for Health and Women and Minister of Education and Women' to 'Minister of Women's Affairs and Equal Status', to today's title, 'Minister for Women, Family and Youth') while the NEB has been integrated into the Federal Chancellery since 2014.

The structure of the ETC consists of three specialised senates. The first senate deals with issues related to the equal treatment of women and men in the workplace; the second senate is responsible for discrimination in employment and occupation covering all other grounds mentioned in Article 19 of the TFEU, except disability. The third senate is responsible for the non-employment related scope of the Racial Equality Directive.

The functions of the chairpersons, who head the three senates, are held by federal civil servants appointed by the respective federal minister. The chair of Senate I has a coordinating function among the senates, but the three chairs are in principle equal as the highest officials of the ETC. The members of the Commission perform their functions on an unsalaried voluntary basis; this means that they simply receive the salaries from their delegating institutions, which are ministries and social partners only¹¹² (Ministries: Labour and Social Affairs, Federal Chancellery, Justice, Economics; Social Partners: Chamber of Commerce, Chamber of Labour, Austrian Industry Association, Trade Union Federation). Although the members can act independently as members of the Commission, the image is that the Commission consists of persons sent by institutions to represent those institutions' attitudes and political opinions rather than give their individual expertise. The law does not contain any requirements regarding their knowledge or expertise regarding discrimination. The only requirements are that they have to be delegated by the listed institutions and that a minimum quota of 50 % members of the Commission shall be women.

The National Equality Body, which has been set up at the Federal Chancellery, is structured similarly to the Commission's senates (including the different material scope) and consists of three Ombuds with their respective staff and scope as well as regional Ombuds. All staff, including the Ombuds, are public servants and are included in the salary scheme of the Federal Chancellery. The Ombuds head the NEB and one of them is the overall head of the NEB – traditionally the Ombud for equal treatment of men and women in the workplace.

The act creating the NEB broadened the mandate of the institution that existed in 2004 (and had existed since 1979), the Office of the Ombud for Equal Employment Opportunities (Gleichbehandlungsanwältin) which was responsible for equal treatment of women and men in the workplace only. There are four regional offices of the NEB in addition to its headquarters in Vienna.

The Federal Chancellor has a crucial role in appointing the heads of the senates of the ETC and the three Ombuds of the NEB. He (so far, no female Chancellor has ever been the operative head of government in Austria) also has to provide the budget. Although, in an organisational manner, a ministry (usually with responsibility for 'women') within the Federal Chancellery is in charge of both institutions, these ministries are in the special situation of having no separate budget, and budgetary decisions are made by the Federal Chancellor.

Although detailed information about the budgets of all specialised bodies is not readily available, the National Equality Body seems to be the body where the discrepancy between resources and tasks is most obvious. Only few persons are employed to fulfil all the duties of the body related to all

¹¹² Austria, Act on the Equal Treatment Commission and the National Equality Body (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*), 2004, §§ 2(1)-(4).

protected areas and all grounds except disability. In its latest report,¹¹³ the NEB complains clearly about the lack of adequate resources, especially for litigation, awareness raising, data processing and new challenges presented by the adoption of Directive 2014/45/EU.

The power to recruit and manage staff lies with the head of the NEB, who is traditionally the holder of the position of the Ombud for equal treatment of men and women in the workplace. This position has authority over the employment and basic management issues of the whole NEB and is its highest representative – without authority over the budget and without full independence in organisational matters. Both bodies are not directly obliged to issue a report to the Parliament – this is officially done by the Federal Chancellor and the Minister of Labour and Social Affairs, who are obliged by § 24 of GBK-GAW-G to issue a report to the National Council every two years about the implementation of the Equal Treatment Act.

The Federal Chancellor can remove members of the ETC or the Ombuds of the NEB from office if they are no longer deemed fit to serve (regarding their health) or for gross or frequent breach of duty (§ 10(1c) of GBK-GAW-G for the ETC and § 3(7) of GBK-GAW-G for the NEB).

ii) Independence of the body

Both national bodies have functional independence, fully legally safeguarded since 2008, when a new Article 20(2) of the Federal Constitutional Act¹¹⁴ allowed the setting up of independent institutions. The independence clauses are enshrined in § 3(3) of GBK-GAW-G for the NEB and in §§ 10(1a)-(1b) of GBK-GAW-G for the ETC.¹¹⁵ Functional independence means that nobody can interfere with what they do in their positions. In terms of organisation and budget, however, they are fully dependent on the Federal Chancellery.

It is not easy to come to a clear judgment on whether this amounts to independence for the Ombuds of the NEB as required in Article 13 of the Racial Equality Directive. On the one hand, it is clear that they are free from direct intervention in their duty to assist victims, conduct surveys and issue reports and recommendations, while on the other hand the extent to which they are able to do all this in practice is fully dependent on a governmental structure.

For the ETC, the optics do not point very much to independence, as the main feature of all the members is that they are emissaries of 'interest groups', as the law calls them, while classic grass-roots NGOs or independent experts are not represented. This set-up follows the very specific logic of the Austrian model of social partnership that trusts in a reasonable outcome for negotiations if social partners from both sides (workers/employers) are represented in equal numbers. However, the results of the Commissions, their findings in individual cases brought before them and their published opinions do in fact uphold a picture of functional independence. So far, no trace of outside interference or structural bias can be diagnosed.

¹¹³ See: https://www.gleichbehandlungsanwaltschaft.gv.at/documents/340065/720923/GAW+Tatigkeitsbericht+2016_17/ae93f363-c4ad-4ea6-8496-b979a7647519.

¹¹⁴ Amendment by Federal Law Gazette I 2/2008, 04 January 2008.

¹¹⁵ The functional independence of the Federal Equal Treatment Commission is regulated in the Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*), 2004, § 24(5).

e) Grounds covered by the designated body/bodies

Both bodies deal with gender, ethnic affiliation, religion, belief, age, and sexual orientation. They do not set priorities for their work as they respond mainly to complaints by individuals who feel that they have been discriminated against.

Given the history of both bodies as the original specialist bodies with responsibility for acting against discrimination on the ground of gender in the workplace, there might still be some bias towards putting more effort into the gender ground than other areas. It remains striking, for example, that within the workforce of the NEB and its regional offices, out of around 30 staff, there is not a single male employee. Aside from a visible inclination towards the gender ground, the institution has built up expertise on all grounds.

Given the current situation, migrants are a central target group for discrimination. Many migrants bring cases to both bodies.

f) Competences of the designated body/bodies – and their independent exercise

i) Independent assistance to victims

The NEB has the competence to provide independent assistance to victims.

The National Equality Body is responsible for counselling and supporting victims of discrimination. To fulfil these functions, the Ombuds can hold consultation hours and consultation days in the whole federal territory (§ 5(1) of GBK-GAW-G).

The assistance from the NEB entails legal advice, some degree of investigation and confronting the alleged discriminator with the allegation (§§ 5(4)-(5) of GBK-GAW-G). The NEB can directly address the Equal Treatment Commission and ask for an opinion in an individual case or a case of general interest. In the proceedings before the ETC, the Ombuds of the NEB can participate and argue a case.

This function is exercised in an independent manner, although there are severe restrictions regarding adequate funding and resources. The existing resources are concentrated on this part of the mandate, as the numbers of requests and applications to the NEB are high.

The NEB deals effectively with many cases in which its Ombuds are in practice trying to solve individual cases by means of conciliation. In cases in which the perpetrator totally refuses to see reason, the NEB is not effective as the right to bring cases to court is so limited that it is practically impossible to use it. In conjunction with the fact that opinions of the ETC are not binding, many cases cannot be successfully resolved. The rate of cases with a positive outcome for the victim is still relatively high, as negotiation and conciliation skills within the NEB have been improved in recent years. One of the main functions of the NEB is to give a first explanation and advise persons who intend on invoking the Equal Treatment Act, and to guide people through the proceedings before the ETC.

According to their own assessment, the Ombuds at the NEB do not consider the resources they have adequate for fulfilling their mandate. They feel obliged to invest the vast majority of their resources on this part of the mandate, as otherwise they would have to reject persons seeking advice and counselling. To date, they have not refused any individual seeking advice

ii) Independent surveys and reports

The National Equality Body has the competence to conduct independent surveys and publish independent reports. It can conduct independent inquiries and surveys and publish independent reports¹¹⁶ and recommendations concerning all questions related to discrimination. Practice so far has shown that the Ombuds receive quite a respectable number of requests and complaints but do not have enough time (resources) for all other parts of their mandate. Reports are scarce, and few surveys¹¹⁷ have been conducted so far; the newest is from 2012 and all of them deal with advertising and use data that is readily available.

The report to Parliament¹¹⁸ about the work of the NEB is not independent as it is a report of the Federal Chancellor. In practice, it is obvious that the report is in fact written by the NEB and reaches the Parliament unfiltered, as the assessment of shortcomings is usually bold and direct. In their publications on their own website, the Ombuds of the NEB can also address recent developments.

iii) Recommendations

In Austria, the designated bodies have the competence to issue independent recommendations on discrimination issues. While the NEB has a general mandate to issue recommendations (§ 5(2) of GBK-GAW-G), the ETC issues recommendations in its expert opinions on individual cases or cases of general interest on how to end and remedy specific issues of discrimination. The NEB also publishes expert opinions on issues of particular interests¹¹⁹ and its own recommendations.¹²⁰

The effectiveness of independent recommendations by the NEB comes mainly from a generally used principle of participation. The NEB usually prepares the recommendations in cooperation with members or representatives of the main target group of the recommendation (e.g. owners of restaurants and bars, hairdressers, driving schools). This guarantees an unerring dissemination of the information and acceptance and hence a good level of effectiveness.

The recommendations by the ETC are of varying quality and concreteness. Very often, these recommendations are very general and hard or impossible to verify (for example: 'make yourself and your employees familiar with the principle of equal treatment as enshrined in the Equal Treatment Act'). In principle, they could be very effective, as in § 12(4) of GBK-GAW-G the law gives every interest group represented in the ETC the right to bring a case to court in the event that the recommendation has not been fulfilled in time. In a case brought before the Commission by the NEB, the latter also has the right to bring the case to court for a decision on whether the principle of equality has been breached. The effectiveness of this process is severely hampered by lack of resources.

¹¹⁶ See their publications at:

<https://www.gleichbehandlungsanwaltschaft.gv.at/taetigkeitsberichte>.

¹¹⁷ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/untersuchungen>.

¹¹⁸ See, for example, the latest report – National Equality Body (2018), *Equal Treatment Report for the Private Sector 2016-17 (Gleichbehandlungs-bericht für die Privatwirtschaft 2016 und 2017)*, available at: https://www.gleichbehandlungsanwaltschaft.gv.at/documents/340065/720923/GAW+T%c3%a4tigkeitsberic ht+2016_17/ae93f363-c4ad-4ea6-8496-b979a7647519.

¹¹⁹ See commissioned expert opinions at <https://www.gleichbehandlungsanwaltschaft.gv.at/>.

¹²⁰ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/>.

The NEB could issue many more good recommendations if more resources were available. For this part of the mandate, the resources are not sufficient, as the recommendations are very useful but very time-consuming.

iv) Other competences

The NEB has a specific role given to it by §§ 24 and 37 of the Equal Treatment Act, as it has an active legitimacy and legal standing to start administrative penal proceedings against perpetrators before local administrative departments regarding the duty to advertise jobs (§ 23 of the ETA) and housing (§ 36 of the ETA) without discrimination. Given the budgetary restrictions, the resources of the NEB are clearly not sufficient to allow for it to monitor and follow up all breaches of these duties. It can only act occasionally in that regard.

In addition, the NEB gets involved in the assessment process for proposed legislation¹²¹ and in awareness-raising activities through workshops¹²² and events. The Ombuds also offer preventive consultations for employers.

g) Legal standing of the designated body/bodies

In Austria, the designated bodies do not have legal standing to:

- bring discrimination complaints (on behalf of identified victims) to court;
- bring discrimination complaints (on behalf of non-identified victims) to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination, such as *amicus curiae*.

Only in the event that the opinion of the NEB diverges from the result of the proceeding before the ETC (§ 5(5) of GBK-GAW-G) or the alleged discriminator does not comply with the recommendations of the ETC in a case brought to the ETC by the NEB (§ 12(5) of GBK-GAW-G), the NEB can bring a case to court for a ruling on principle. The lawsuit requires the consent of the individual affected. According to § 12(6) of GBK-GAW-G, any resulting decision of a court has to be published on the website of the respective senate of the ETC. To date, no such publication can be found. There is, however, one judgment by the Supreme Court (Austrian Supreme Court, decision No. 9ObA44/06w of 09 April 2007) in a case that the NEB lost due to deadlines. In its report for 2014-15¹²³ the NEB reports that bringing cases to court is practically almost impossible as the resources are not available and the legal requirements are restrictive (for example: there is no way to go to court if the ETC rightly finds that there has been discrimination in a specific case).

h) Quasi-judicial competences

In Austria, the Equal Treatment Commission is a quasi-judicial institution.

According to GBK-GAW-G, the ETC has to deliver expert opinions (§ 11) or issue a decision in an individual case (§ 12). The ETC, through its three senates, does so in a quasi-judicial manner using the right to summon involved persons and experts before the

¹²¹ See, for example, comments on the amendments to the Upper Austrian Anti-Discrimination Act (*ÖO Antidiskriminierungsgesetz*): <https://www.gleichbehandlungsanwaltschaft.gv.at/>.

¹²² See a list of workshops here: <https://www.gleichbehandlungsanwaltschaft.gv.at/veranstaltungen-und-workshops>.

¹²³ National Equality Body (2016), Equal Treatment Report for the Private Sector 2014-15 (*Gleichbehandlungs-bericht für die Privatwirtschaft 2014 und 2015*), available at: https://www.gleichbehandlungsanwaltschaft.gv.at/documents/340065/441457/161125_GAW_Bericht_2015_15.pdf/b5f2f5da-c901-4dc2-9ded-519cbbec254d, p. 8.

senates, which issue their findings in a very court-like language. In decisions on individual cases, when finding that discrimination has occurred, they have to include a recommendation on how to apply the principle of equal treatment and demand an end to the discrimination.

The decisions are not binding, and their German names do not even point towards a decision (*Gutachten* = expert opinion, for general issues, and *Einzelfallprüfung* = scrutiny of an individual case, for individual cases). The ETC cannot impose any sanctions. The only kind of connection with enforceable decisions is the possibility for the interest groups represented in the Commission to take a case to court if the perpetrator of the discrimination does not abide by the recommendation of the Commission within two months. There are no traces that show that this possibility has ever been used. In any case, this possibility is not a power of the Commission itself and it does not lead to a directly enforceable court decision either, as it can only lead to a decision on principle, or a declaratory judgment (*Feststellungsklage*), which can then be used in an additional proceeding to claim sanctions and remedies.

The decisions cannot be appealed against. It is unclear how the ETC follows up on its recommendations as the law is silent on the matter.

It is impossible to reliably assess to what extent the decisions of the ETC are respected. Their undisputed benefit lies in the fact that an official body in an official proceeding finds that there has been discrimination and the proceedings are free of charge. For many victims of discrimination, this is an important issue. It seems that in certain cases, the perpetrators really do return from such proceedings having had a learning experience – although all information on this is anonymous and confidential. It is clear, on the other hand, that hardliners or people who just disrespect and ignore the ETC get away without any sanction. The only kind of sanction that the GBK-GAW-G gives the Commission is in § 13, which obliges alleged discriminators to disclose certain information and report to the ETC. If they do not comply with such a request, the Commission has to publish this fact (of non-compliance) on its website.¹²⁴ Not many such announcements can be found there, and it is doubtful that the sanction has a deterrent effect as it is not easy to stumble across these publications by chance due to their non-prominent placement on the website.

i) Registration by the body/bodies of complaints and decisions

In Austria, the bodies register the number of inquiries received, complaints of discrimination made and decisions (by ground, field, type of discrimination, etc.). These data are available to the public.

Probably the most important source of information on the work of the Equal Treatment Commission is the inclusion of its decisions in the general official searchable database of the Federal Chancellery at <https://www.ris.bka.gv.at/Gbk/>, where the decisions (since 2014) can be searched by keyword, date, commission, senate, type of decision, ground of discrimination, decision number and article. As this is the most-used online tool for practising lawyers, judges, and researchers, it has really improved the visibility of the decisions a lot.

The other comprehensive source of information is the biannual report to the Parliament, which comprises two separate parts: one for the ETC and a second one for the NEB. The

¹²⁴ See, for example, for Senate III: https://www.bmgf.gv.at/home/Frauen_Gleichstellung/Gleichbehandlung/Gleichbehandlung_s-kommissionen/Gleichbehandlungs-kommission/Senat_III/Veroeffentlichungen/.

latest published report is for 2016-17. For the NEB,¹²⁵ the data is disaggregated by the internal system of three parts (gender/workplace, other grounds/workplace, gender plus ethnicity/beyond workplace), gender, type of discrimination and geographical distribution throughout the provinces. In total, there were 3020 requests/inquiries and consultations in 2016 (733 discrimination cases) and in 2017 there were 3113 (709 discrimination cases). Of those reported discrimination cases, 36 % and 43 % respectively concerned gender, and 21 % and 15 % dealt with ethnic affiliation.

The Equal Treatment Commission – in the same period¹²⁶ – received 253 applications and issued 88 decisions in all three senates. Senate I (gender/workplace) received 133 applications and issued 47 decisions; Senate II (other grounds/workplace) received 61 applications and issued 31 decisions; while Senate III (gender plus ethnicity/beyond workplace) received 28 applications and made a decision in 12 cases. Given its nature as a quasi-judicial body, the ETC does not receive or not record any informal inquiries.

All this information is easily accessible on the internet – however, it is not very up-to-date given the biannual nature of the reports. Nonetheless, the reports are very detailed and allow for an in-depth understanding of the activities of both bodies.

j) Stakeholder engagement

In Austria, the designated bodies engage with stakeholders as part of implementing their mandate.

Generally, all engagement with civil society associations is unofficial for both equality bodies as the law does not give them a role. In practice, the exchange of information and experiences between the NEB and specialised NGOs has been well organised since 2004. Regular meetings are held and are well attended and appreciated by all involved.

The ETC consists of members from the ministries, the chamber of labour, the chamber of commerce, the trade union federation and the association of industry – they are directly involved and pay the salaries of their members of the ETC.

k) Roma and Travellers

Roma and Travellers are not a priority for either of the equality bodies, mainly due to the fact that they do not set priorities by themselves but mainly react to applications. Not many Roma apply.

¹²⁵ See report 2016-17: https://www.gleichbehandlungsanwaltschaft.gv.at/documents/340065/720923/GAW+Tatigkeitsbericht+2016_17/ae93f363-c4ad-4ea6-8496-b979a7647519.

¹²⁶ See report 2016-17: https://www.parlament.gv.at/PAKT/VHG/XXVI/III/III_00207/imfname_715439.pdf.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The duty to disseminate information about the issues at stake is not given a high priority by the Federal Government, although there are some activities¹²⁷ in this field. Most of the widely visible activities have taken place between 2004 and 2007.

In general, basic information about the main functions of the federal anti-discrimination legislation is now readily available on the internet. Information about provincial legislation, bodies and structures is somewhat more complicated to find for some provinces (Burgenland, Vorarlberg) than others (Vienna, Upper Austria, Styria).

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 of Directive 2000/43 and Article 14 of Directive 2000/78)

The dialogue with NGOs started informally when the National Equality Body accepted the invitations of specialised NGOs to enter into a frequent informal exchange of thoughts and cooperation in individual cases, which has been going on since 2005.

The first official dialogue meeting at ministerial level was held with the Minister of Health and Women on 8 May 2006. A small number of NGOs were invited, but the response to the meeting was generally positive.

The minister in charge continued this meeting policy, and her successors held other annual meetings. As these meetings are short single events that are planned to be held once a year, it is a bit hard to call this a dialogue, but it seems that both sides do not strive very actively for a tighter relationship.

Apart from this formal 'dialogue', the interested NGOs are always invited to comment officially on legal drafts and they do so regularly. There is some bilateral discussion between the ministries and several NGOs.

Many NGOs dealing with disability are in regular contact with the Minister for Social Affairs.

In all the provincial pieces of legislation, such dialogue is at least mentioned. However, there seems to be rather weak formal dialogue in practice.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 of Directive 2000/43 and Article 13 of Directive 2000/78)

There is regular contact between the social partners and governmental officials, but no procedure has been set up to ensure that there are regular meetings specifically concerning issues of discrimination or equal treatment. Generally, social partners have a strong standing in Austrian politics and are involved in most spheres concerning discrimination. However, they do not represent the diversity of the current population.

¹²⁷ Some informative brochures were financed by the Government – including guidance in discrimination cases. (e.g. <https://www.gleichbehandlungsanwaltschaft.gv.at/informationmaterial>).

d) Addressing the situation of Roma and Travellers

In general, Roma issues are still quite invisible and are usually not in the spotlight of public debates. Only in the course of the prohibition of public begging have the Roma played an important role in recent public discourse – as a target for stereotyping and repression.

Apart from this, the development of a national strategy for Roma integration¹²⁸ started in 2011, and the strategy was formulated in 2012. As one visible outcome of this, the Federal Chancellery set up a so-called national contact point for Roma integration in June 2012. This contact point mainly coordinates governmental activities regarding the Roma strategy and looks after a corresponding 'dialogue platform' which maintains contacts with NGOs. This platform continued its work in 2018.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

None of the bills meant to implement the directives contain provisions on that matter. Although the general principles of law, *lex specialis derogat legi generali* and *lex posteriori derogat legi priori*, apply to the Austrian legal system, it is still necessary to question and challenge each individual provision before a competent authority or court in order to find out whether it still prevails or is obsolete.¹²⁹

b) Rules contrary to the principle of equality

A comprehensive and conclusive assessment of the situation with regard to the whole legislation is not possible.

No general assessment has been made with regard to this aspect, so it is highly likely that, in the course of time, several provisions will show up whose compliance with the principle of equal treatment appears questionable.

Only the legislator or the Constitutional Court can abolish such discriminatory laws. Civil servants can challenge decisions by administrative authorities based on such discriminatory legislation in the Constitutional Court. Other employees have to challenge decisions by their employers based on such discriminatory legislation in the labour courts, and they can only ask the court (of second or higher instance) to refer the matter to the Constitutional Court.

Discriminatory application of neutrally worded provisions can be challenged before the administrative authority (in the case of civil servants) or in the labour courts (in the case of other employees).

Discriminatory provisions in secondary legislation (decrees implementing primary legislation) can only be abolished by the issuing administrative authority or by the Constitutional Court.

¹²⁸ See: <https://www.bundeskanzleramt.gv.at/themen/volksgruppen/roma-strategie.html>.

¹²⁹ Primacy of application of European Union law: since the CJEU judgment of 15 July 1964 in *Costa vs ENEL*, Rs 6/64, national law conflicting with European legislation must not be applied; there is also a direct effect between private contractual partners.

9 COORDINATION AT NATIONAL LEVEL

In principle, it is the task of the Federal Chancellery to coordinate the activities for the implementation of the directives within the ministries and the provinces. The specialised bodies are also coordinated by the Federal Chancellery.

The Equal Treatment Act and the Federal Equal Treatment Act are both coordinated and fleshed out by the Federal Ministry for Labour, Social Affairs, Health and Consumer Protection (Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz) and the Minister for Women, Family and Youth in the Federal Chancellery. The Federal Minister of Constitution, Reforms, Deregulation and Justice (Bundesministerium für Verfassung, Reformen, Deregulierung und Justiz) has a rather limited role in the implementation of these regulations.

The implementation regarding disability is in the hands of the Federal Ministry for Labour, Social Affairs, Health and Consumer Protection.

The provincial regulations are in the hands of the Offices of the Provincial Governments (Ämter der Landesregierungen).

There is no national action plan on anti-racism or discrimination. There were some ideas in this direction in 2009, but nothing has actually happened. Some political parties are still interested in developing this idea further.

There is, nevertheless, a *National Action Plan on Disability 2012-2020*,¹³⁰ which was adopted by the Council of Ministers on 24 July 2012. In this paper, protection against discrimination, accessibility and awareness raising are prime topics.

There are plans for a national action plan on human rights that might include anti-discrimination issues. However, these plans remain vague and are not a priority for the government.

¹³⁰ Austria, Ministry of Social Affairs (2015), *National Action Plan 2012-2015 – Interim Report*, available at: <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=362>.

10 CURRENT BEST PRACTICES

- Continuous – though shrinking - support for the Litigation Association of NGOs Against Discrimination.

As a rather unique mechanism, the Litigation Association of NGOs Against Discrimination¹³¹ is one of the driving forces in the creation of case law and legal development in Austria. It is an umbrella organisation focusing on strategic litigation and legal knowledge involving NGOs dealing with all protected grounds, and is highly effective in its impact. Through long-term agreements on financial support, the Government has acknowledged this importance and safeguarded the organisation's existence in the past, but the support from the Minister for Women, Family and Youth in the Federal Chancellery has been cut in half in 2018, which has posed a first real threat to the continuation of its activities.

- The compulsory reconciliation attempts in cases concerning discrimination on the ground of disability.

In all cases concerning discrimination on the ground of disability, a compulsory reconciliation attempt is prescribed by law before a suit can be filed to the regular courts. This mechanism does not involve any cost for the parties, and quite frequently it helps to close the case through an agreement. It avoids the purely controversial attitude necessary in a court case, and the discussions and negotiations involved might be useful to make perpetrators understand discrimination better than they would through the court process. This mechanism appears to be highly useful and well accepted by claimants. As it is free of risks of cost and done in a respectful manner by the competent authorities, this can be regarded as an example of best practice.

- The newly introduced possibilities for *actio popularis* with regard to cases of discrimination on the ground of disability brought by the Litigation Association of NGOs Against Discrimination and the Ombud for Disabled Persons.

Even if it is limited to the disability ground and action against big companies, this mechanism is very useful to relieve individual victims or potential victims of discrimination of their burden to start and uphold legal procedures. The fact that, so far, all procedures have led to quick negotiations and a settlement with big and powerful companies underlines the usefulness of such legal possibilities.

¹³¹ See the website for the Litigation Association of NGOs Against Discrimination (Klagsverband Mit Recht gegen Diskriminierung) at: <http://www.klagsverband.at/english>.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Federal level:

- Burden of proof: The wording of the (federal) Equal Treatment Act does lower the burden of proof for the claimant but in a way that is different from the way stated in the directives, and this continues to be a strange legal construction. The wording reads: 'In case the claimant claims a discrimination case in court, he/she has to establish facts that point to it. It is the respondent's obligation to prove that, taking into account all circumstances, it is more likely that a different motive – documented by facts established by the respondent – was the crucial factor in the case or that there has been a legal ground of justification.' Nevertheless, in its important decision 9ObA177/07f of 09/07/2008, the Supreme Court ruled that this regulation has to be interpreted in line with the directive. By way of the amendment (BGBl I 81/2013 of 27 December 2013), the regulation on the burden of proof has been changed within the Federal Equal Treatment Act (nb: this is different from the Equal Treatment Act, which is also a federal piece of legislation). Before this amendment, the same construction as quoted above had been used in this Act as well. Now – to conform with the directive – it reads: '§ 20a Burden of Proof: In order to invoke discrimination in court, the claimant has to establish facts that allow the assumption of direct or indirect discrimination. The respondent then has to prove that no breach of the principle of equal treatment has occurred.' It remains unclear why the legislator chose to change the wording in one act while sustaining the older phrases in the other ones. If – to take a dogmatic view - we presume that the legislator wants to uphold some different meaning to be adhered to by choosing different phrasing, this new development might point to the fact that the Equal Treatment Act, as well as the Act on the Employment of People with Disabilities and the Federal Disability Equality Act, are in breach of the directives.
- Exception for ethos-based employers. The text of § 20(2) of the Equal Treatment Act does not explicitly state that applying the exception regarding faith or religion may not lead to discrimination on the basis of another ground.
- Penalties: a maximum administrative fine of as low as EUR 360, and exclusion of punishment for employers as first-time offenders (warning only) in cases of discriminatory job advertisements and discriminatory housing advertisements. These sanctions are neither effective, dissuasive nor proportionate.
- The regulation on 'discrimination-free advertising of housing' (§ 36 of the Equal Treatment Act) allows for a justification of differentiation regarding ethnicity and gender if this is 'justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Especially, it is not deemed discrimination if the provision of housing constitutes a specially close or intimate relationship of the parties or their relatives'. While this might be in line with the Directive 2004/113/EC (Recital 16 and Article 4(5)) in regard to the gender ground and have some legitimate aspects in regard to Article 8 of the ECHR, it constitutes a breach of Directive 2000/43/EC concerning ethnic affiliation as it introduces an additional justification even for direct discrimination on that ground.
- Compensation: limitation to a maximum amount (as low as EUR 500) if the employer proves that the victim would not have been recruited or not promoted anyway. This sanction is not effective, dissuasive and proportionate.

Provincial level:

The implementation of Directive 2004/113/EC has been used to introduce a new possibility to justify direct as well as indirect discrimination regarding access to and provision of goods and services for all grounds. The formula for this was taken from the justification of indirect discrimination ('if justified by a legitimate aim and the means of

achieving that aim is appropriate and necessary'). As a result, even direct discrimination can now be justified in that way. § 4(6) of the Vorarlbergian Anti-Discrimination Act¹³² and § 2(7) of the Viennese Anti-Discrimination Act¹³³ are in clear breach of Directive 2000/43/EC, as they allow this kind of justification even for acts of direct discrimination on the basis of ethnic affiliation for the fields outside employment.

The Styrian Equal Treatment Act does not protect against victimisation effectively outside the field of employment as the respective regulations prohibiting victimisation are not in any way connected with sanctions (§ 32a of the Styrian Equal Treatment Act). This constitutes a breach of Article 9 of Directive 2000/43/EC.

11.2 Other issues of concern

No legal means of redress for cases similar to the *Feryn* case (ECJ case C-54/07), in which discriminatory statements without a known individual victim were found to be unlawful in the light of the directive. In Austria – without an individual claiming to have suffered damage from such conduct – no one has the legal right to sue or start a proceeding under the equal treatment legislation. Only limited administrative penal sanctions under Article III(1)(3) of the EGVG (Introductory Act on the Administrative Procedural Laws) can be imposed in such cases. The provision protects only race, colour, national or ethnic origin, religion and disability. People who feel offended can only notify the local authorities and expect them to act on their report. They have no procedural right – and are not even informed about the result (or even initiation) of the proceedings.

There is still an enormous lack of case law – in particular, there has so far been no court case on victimisation.

Provincial legislators have recently (starting in 2015) begun to create new legislation in the field of social protection and social benefits that tries to reduce the rights of migrants and refugees to these provincial allowances. It regularly takes the higher courts to find these provisions – or their application – discriminatory and unlawful. By that strategy, many victims of such discrimination are deprived of the respective benefits if they do not appeal against unlawful decisions.

¹³² Austria, Vorarlbergian Anti-Discrimination Act (*Vorarlberger Antidiskriminierungsgesetz*), 2005, § 4(6): 'A difference of treatment on the ground of one of the grounds mentioned in § 3(1) does not constitute discrimination if it is justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary.' (The list in § 3(1) includes ethnic affiliation).

¹³³ Austria, Viennese Anti-Discrimination Act, 2004, § 2(7): 'Furthermore, a difference of treatment on ground of one characteristic mentioned in subparagraph 1 does not constitute discrimination if it is objective and proportionate as well as justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary.' (The list in §2 (1) includes ethnic affiliation).

12 LATEST DEVELOPMENTS IN 2018

12.1 Legislative amendments

Federal level:

- The amendment of the Federal Equal Treatment Act in BGBl I 60/2018¹³⁴ (among adaptations regarding new names and competences of ministries) clarified that family status or whether or not someone has children shall not be a justification for any differential treatment. This adaptation followed the recent decisions of the Constitutional Court regarding the different treatment of homosexual couples in relation to adoption, fertilisation and marriage (see details in Chapter 4.5 of this report)
- The big Material Data Protection Adaptation Law (BGBl I 32/2018) affected the Federal Equal Treatment Act, the Act on the Employment of People with Disabilities, the Federal Disability Equality Act and the Federal Disability Act – it brought in mainly necessary adaptations regarding data collection in these fields, but no other relevant changes regarding equal treatment.

Provincial level:

In **Styria**, (LGBI 36/2018) and **Tyrol** (LGBI 144/2018), **Salzburg** (LGBI 82/2018) brought in adaptations regarding data collection and protection.

The amendments in **Vienna**, **Lower Austria**, **Upper Austria**, and **Burgenland** mainly involved the implementation of Directive 2016/2102/EU on the accessibility of the websites and mobile applications of public sector bodies on 26 October 2016. (see Chapter 2.6 of this report)

Salzburg amended its Equal Treatment Act by LGBI 1/2018 mainly regarding gender, while it explicitly included the prohibition of victimisation regarding provincial public employment in a new § 9a.

12.2 Case law

In 2018, only very few cases were decided by the Austrian courts that were directly linked to the remit of the anti-discrimination directives.

A.

Name of the court: CJEU

Date of decision: 21 November 2018

Name of the parties: Ahmad Shah Ayubi vs Bezirkshauptmannschaft Linz-Land

Reference number: CJEU case C-713/17

Address of the webpage:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=025AE6DB7D3C1C15F82F9C5C3E224578?text=&docid=207944&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4528533>

Brief summary: The preliminary ruling concerned a legal provision introduced in 2015 in the Upper Austrian social assistance legislation that reduced benefits for the claimant on the basis that his asylum status gave him only temporary residence permission. The decision was based on Directive 2011/95/EU and basically points out that EU law precludes national legislation, which provides that refugees with a temporary right of

¹³⁴ See parliamentary materials (in German) available at: https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00196/fname_698653.pdf.

residence in a Member State are to be granted social security benefits which are less than those received by nationals of that Member State and refugees who have a permanent right of residence in that Member State.

B.

Name of the court: Austria, Constitutional Court

Date of decision: 7 March 2018

Name of the parties: Official complaint by Lower Austrian Provincial Administrative Court to the Constitutional Court

Reference number: G136/2017

Address of the webpage:

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20180307_17G00136_00

Brief summary: The Lower Austrian Provincial Administrative Court (Landesverwaltungsgericht Niederösterreich) demanded that the Constitutional Court declare unconstitutional and set aside certain provisions of the Lower Austrian Act on Minimum Social Security (*Mindestsicherungsgesetz*) as they allowed for different treatment (under the heading of 'integration') for persons in need who have been residing in Austria for less than five years during the past six years. These persons were generally granted less allowance, and a 'ceiling' was introduced for all persons living together under one roof.

The Court found the respective provisions to be unconstitutional as they conflicted with the general constitutional equality clause and the International Convention on the Elimination of All Forms of Racial Discrimination as transposed into national constitutional law. The provisions were repealed.

Name of the court: Austria, Administrative High Court (Verwaltungsgerichtshof)

Date of decision: 24 April 2018

Name of the parties: Official complaint by the District Administration (Bezirkshauptmannschaft Gmunden) to the Upper Austrian Provincial Administrative Court

Reference number: Ro 2017/03/0016

Address of the webpage:

https://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2017030016_20180424J00/JWT_2017030016_20180424J00.html

Brief summary: The owner of a bar in Upper Austria had posted the following to the official Facebook page of the bar:

'## FROM NOW ON WE ARE FREE FROM ASYLUM SEEKERS [*Asylanten*, a derogatory term] ##

To stop this problem we reintroduced an admission fee of 2 Euros. In return you get a shot!! Hope to see you all again! Cheers, Your team'.

The Administrative High Court decided that this behaviour was indeed punishable under Article III(1)(3) of the EGVG (Introductory Act on the Administrative Procedural Laws) which makes it an (administrative) punishable offence to discriminate against or hinder persons on grounds of (i.e.) race, colour, national or ethnic origin, who wish to enter places or enjoy services that are available for public use. The Court stated that, even without an individual victim, the publication of the rejection of asylum seekers on the Facebook page was discriminatory as it publicly declared that asylum seekers had to expect negative treatment when entering the bar. In its reasoning, the Court also cited the *Feryn* case (CJEU case C-54/07) when coming to its conclusion.

There are no figures on Roma cases, or any reported Roma court case, in 2018. There is a shadow report on antigypsyism (covering 2015-2017),¹³⁵ however, which gives examples of incidents concerning Roma. The incidents have not usually led to court cases.

¹³⁵ Romano Centro (2017), *Antigypsyism in Austria: incident documentation 2015-2017*, Vienna, available at: http://www.romano-centro.org/downloads/Antiziganismus_in_Oesterreich_2015-2017_web.pdf.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Austria

Date: 31 December 2018

<p>Title of the law: Equal Treatment Act Abbreviation: GIBG Date of adoption: 23.06.2004 Latest relevant amendment: BGBl I No. 107/2013 Entry into force: 01.07.2004 Weblink: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation Mainly civil law with a few administrative penal provisions Material scope: Most important law, private employment, access to goods or services, education, principle legislation for provinces Principal content: prohibition of direct and indirect discrimination, harassment, victimisation</p>
<p>Title of the law: Federal-Equal Treatment Act Abbreviation: B-GIBG Date of adoption: 23.06.2004 Latest relevant amendment: BGBl I No. 60/2018 Entry into force: 01.07.2004 Weblink: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation Administrative and civil law Material scope: Public (Federal) employment Principal content: prohibition of direct and indirect discrimination, harassment, victimisation</p>
<p>Title of the law: Act on the Equal Treatment Commission and the National Equality Body Abbreviation: GBK/GAW-G Date of adoption: 23.06.2004 Latest amendments: BGBl I No. 107/2013 Entry into force: 01.07.2004 Weblink: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation Administrative law Material scope: Creation of specialised bodies Principal content: Creation of specialised bodies and procedures</p>
<p>Title of the law: Act on the Employment of People with Disabilities Abbreviation: BEinstG Date of adoption: 10.08.2005 Latest relevant amendment: BGBl I No. 32/2018 Entry into force: 11.08.2005 Weblink: www.ris.bka.gv.at Grounds covered: disability Civil (labour) law Material scope: Employment, public/private Principal content: Prohibition of discrimination, special protection</p>
<p>Title of the law: Federal Disability Equality Act</p>

Abbreviation: BGStG
Date of adoption: 10.08.2005
Latest relevant amendment: BGBl I No. 32/2018
Entry into force: 11.08.2005
Web link: www.ris.bka.gv.at
Grounds covered: disability
Civil law
Material scope: Goods and services
Principal content: accessibility, protection against discrimination beyond employment

Title of the law: Federal Disability Act

Abbreviation: BBG
Date of adoption: 10.08.2005
Latest relevant amendment: BGBl I No. 32/2018
Entry into force: 01.01.2006
Web link: www.ris.bka.gv.at
Grounds covered: disability
Administrative law
Material scope: Establishing Ombud for People with Disabilities and Monitoring Board Disability
Principal content: Specialised bodies

Title of the law: Styrian Equal Treatment Act

Abbreviation: Stmk-GIBG
Date of adoption: 28.10.2004
Latest relevant amendment: LGBl No. 104/2017
Entry into force: 01.11.2004
Web link: www.ris.bka.gv.at
Grounds covered: gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation
Civil and administrative law
Material scope: Public (provincial) employment
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation

Title of the law: Styrian Disability Act

Abbreviation: Stmk-BHG
Date of adoption: 25.06.2004
Latest relevant amendment: LGBl No. 63/2018
Entry into force: 01.07.2004
Web link: www.ris.bka.gv.at
Grounds covered: disability
Administrative law
Material scope: specialised institution
Principal content: Instalment of provincial "Ombud for people with disabilities" – general task to work on complaints. Discrimination not expressly mentioned

Title of the law: Styrian Agricultural Labour Relations Act

Abbreviation: STLAO
Date of adoption: 12.04.2002
Latest relevant amendment: LGBl No. 103/2018
Entry into force: 01.05.2006
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion, belief, disability age, and sexual orientation
Civil and administrative Law
Material scope: Employment of agricultural and forestry workers

Title of the law: Viennese Anti-Discrimination Act

Abbreviation: Wr-ADG

Date of adoption: 08.09.2004

Latest relevant amendment: LGBl No. 39/2018

Entry into force: 09.09.2004

Web link: www.ris.bka.gv.at

Grounds covered: race, ethnic origin, religion, belief, age, sexual orientation, sexual identity, gender, pregnancy, maternity

Title of the law: Viennese Service Order

Abbreviation: WDO

Date of adoption: 22.09.2006

Latest amendments: LGBl No. 63/2018

Entry into force: 09.09.2004

Web link: www.ris.bka.gv.at

Grounds covered: race, ethnic origin, religion, belief, disability, age, sexual orientation, sexual identity, gender, pregnancy, maternity

Civil and administrative Law

Material scope: Public (provincial) employment

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation

Title of the law: Viennese Contracted Officers Act

Abbreviation: W-BedG

Date of adoption: 11.12.2017

Latest relevant amendment: LGBl No. 63/2018

Entry into force: 01.01.2018

Web link: www.ris.bka.gv.at

Grounds covered: race, ethnic origin, religion, belief, disability, age, sexual orientation, sexual identity, gender, pregnancy, maternity

Civil and administrative Law

Material scope: Public (provincial) employment

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation

Title of the law: Viennese Agricultural Labour Equal Treatment Act

Abbreviation: -

Date of adoption: 08.09.1980

Latest amendments: LGBl No. 38/2013

Entry into force: 16.07.2005

Web link: www.ris.bka.gv.at

Grounds covered: gender, ethnic affiliation, religion, belief, disability age, and sexual orientation

Civil and administrative Law

Material scope: Employment of agricultural and forestry workers

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

Title of the law: Lower Austrian Equal Treatment Act

Abbreviation: NÖ GIBG

Date of adoption: 11.07.1997

Latest relevant amendment: LGBl No. 109/2011

Entry into force: 18.09.2004

Web link: www.ris.bka.gv.at

Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation

Civil and administrative Law

Material scope: Public (provincial) employment
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation

Title of the law: Lower Austrian Anti-Discrimination Act

Abbreviation: NÖADG
Date of adoption: 26.01.2017
Latest relevant amendment: LGBl No. 76/2018
Entry into force: 30.04.2005
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: anti-discrimination beyond employment
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation

Title of the law: Lower Austrian Agricultural Labour Relations Act

Abbreviation: NÖLAO
Date of adoption: 30.11.1973
Latest relevant amendments: LGBl No. 66/2017
Entry into force: 27.09.2006
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: Employment of agricultural and forestry workers
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

Title of the law: Carinthian Anti-Discrimination Act

Abbreviation: K-ADG
Date of adoption: 28.12.2004
Latest amendments: LGBl No. 44/2017
Entry into force: 29.12.2004
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: Public (provincial) employment and non-employment scope. Comprehensive Anti-discrimination legislation
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation

Title of the law: Carinthian Agricultural Labour Relations Act

Abbreviation: KLAO
Date of adoption: 11.09.2006
Latest relevant amendment: LGBl No. 77/2017
Entry into force: 12.09.2006
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: Employment of agricultural and forestry workers
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

Title of the law: Upper Austrian Anti-Discrimination Act

Abbreviation: OÖ-ADG

Date of adoption: 06.05.2005

Latest relevant amendment: LGBl No. 78/2018

Entry into force: 01.06.2005

Web link: www.ris.bka.gv.at

Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation

Civil and administrative Law

Material scope: Public (provincial) employment, goods & services, education, social matters (soziales), health

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised office

Title of the law: Upper Austrian Agricultural Labour Relations Act

Abbreviation: OÖ-LAO

Date of adoption: 07.04.1989

Latest relevant amendment: LGBl No. 84/2016

Entry into force: 30.07.2005

Web link: www.ris.bka.gv.at

Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation

Civil and administrative Law

Material scope: Employment of agricultural and forestry workers

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

Title of the law: Salzburg Equal Treatment Act

Abbreviation: S-GIBG

Date of adoption: 31.03.2006

Latest relevant amendment: LGBl No. 1/2018

Entry into force: 01.05.2006

Web link: www.ris.bka.gv.at

Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation

Civil and administrative Law

Material scope: Public (provincial) employment, goods & services, education, social matters (soziales), health

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised office

Title of the law: Salzburgian Agricultural Labour Relations Act

Abbreviation: S-LAO

Date of adoption: 22.04.2009

Latest relevant amendment: LGBl No. 57/2017

Entry into force: 23.04.2006

Web link: www.ris.bka.gv.at

Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation

Civil and administrative Law

Material scope: Public (provincial) employment, goods & services, education, social matters (soziales), health

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised office

Title of the law: Tyrolian Equal Treatment Act

Abbreviation: T-GIBG

Date of adoption: 11.01.2005
Latest relevant amendment: LGBl No. 144/2018
Entry into force: 12.01.2005
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: Public (provincial) employment,
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation

Title of the law: Tyrolian Anti-Discrimination Act

Abbreviation: T-ADG
Date of adoption: 31.03.2005
Latest relevant amendment: LGBl No. 144/2018
Entry into force: 01.04.2005
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: goods & services, education, social matters, health reasonable accommodation for disabled persons
Principal content: prohibition of direct and indirect discrimination, harassment, provincial specialised office

Title of the law: Tyrolian Equal Treatment Act for Municipalities

Abbreviation: T-GGIBG
Date of adoption: 11.01.2005
Latest relevant amendment: LGBl No. 144/2018
Entry into force: 12.01.2005
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: Public employment in municipalities
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation, (same as Equal Treatment Act)

Title of the law: Tyrolian Agricultural Labour Relations Act

Abbreviation: T-LAO
Date of adoption: 26.07.2005
Latest relevant amendment: LGBl No. 144/2018
Entry into force: 27.07.2005
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: Employment of agricultural and forestry workers
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

Title of the law: Tyrolian Provincial Teachers Employment Act

Abbreviation: TLDHG
Date of adoption: 01.12.2005
Latest relevant amendment: LGBl No. 144/2018
Entry into force: 01.01.2006
Web link: www.ris.bka.gv.at

Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Administrative Law
Material scope: Employment of provincial teachers
Principal content: provincial specialised institution for teachers (Equal Treatment Commission)

Title of the law: Vorarlbergian Anti-Discrimination Act

Abbreviation: V-ADG
Date of adoption: 19.05.2005
Latest relevant amendment: LGBl No. 16/2017
Entry into force: 01.06.2005
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: Public (provincial) employment, goods & services, education, social protection, health
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

Title of the law: Burgenlandian Anti-Discrimination Act

Abbreviation: B-ADG
Date of adoption: 05.10.2005
Latest relevant amendment: LGBl No. 39/2018
Entry into force: 06.10.2005
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: Public (provincial) employment, goods & services, education, social protection, health
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

Title of the law: Burgenlandian Agricultural Labour Relations Act

Abbreviation: B-LAO
Date of adoption: 16.05.1977
Latest relevant amendment: LGBl No. 3/2017
Entry into force: 17.06.2006
Web link: www.ris.bka.gv.at
Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
Civil and administrative Law
Material scope: Employment of agricultural and forestry workers
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Austria

Date: 31 December 2018

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	13.12.1957	03.09.1958	No	Yes	Yes, it is part of the Federal Constitution
Protocol 12, ECHR	04.11.2000	Not ratified, 01.01.2018	N/A	N/A	N/A
Revised European Social Charter	07.05.1999	20.05.2011	N/A	Ratified collective complaints protocol? No	N/A
International Covenant on Civil and Political Rights	10.12.1973	10.09.1978	Exclusion of Habsburg-Lorraine family. Different treatment of Austrian nationals and aliens.	Yes	No
Framework Convention for the Protection of National Minorities	01.02.1995	31.03.1998	Limitation to "national minorities" as defined by Law on Ethnic Groups	N/A	No
International Covenant on Economic, Social and Cultural Rights	10.12.1973	10.09.1978	No	No	No
Convention on the Elimination of All Forms of Racial Discrimination	22.07.1969	09.05.1972	No	Yes	No

Instrument	Date of signature	Date of ratification	Derogations/reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Elimination of Discrimination Against Women	17.07.1980	30.04.1982	No	Yes	No
ILO Convention No. 111 on Discrimination	10.01.1973	10.01.1973	No	N/A	No
Convention on the Rights of the Child	26.08.1990	06.08.1992	No	N/A	No
Convention on the Rights of Persons with Disabilities	30.03.2007	26.09.2008	No	Yes	No

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