# REPORT ON MEASURES TO COMBAT DISCRIMINATION
# Directives 2000/43/EC and 2000/78/EC

## COUNTRY REPORT

## Austria

**Dieter Schindlauer**

**State of affairs up to 29 February 2008**

This report has been drafted for the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

human european consultancy
Hooghiemstraplein 155
3514 AZ Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

the Migration Policy Group
Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

All reports are available on the European Commission's website:

http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm

This report has been drafted as part of a study into measures to combat discrimination in the EU Member States, funded by the European Community Action Programme to combat discrimination. The views expressed in this report do not necessarily reflect the views or the official position of the European Commission.

# INTRODUCTION

## 0.1 The national legal system

*Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.*

The Republic of Austria is a **federal state**. According to the Austrian Constitution, first enacted in 1920, legal powers are exercised either by the Bund (Federation) or the Länder (federal states or provinces, namely: *Burgenland, Kärnten, Oberösterreich, Niederösterreich, Salzburg, Steiermark, Tirol, Vorarlberg, and Wien*). Legislative powers are divided between the federal parliament called Nationalrat (acting together with the Bundesrat) and federal state parliaments called Landtage.
Legislative powers are - in principle - clearly defined by the Constitution: matters due to be regulated by the Nationalrat (federal parliament) are explicitly listed in the Constitution. With regard to these matters, provincial parliaments do not have legislative power. Matters not (explicitly) designated by the Constitution as federal matters belong to the jurisdiction of the Landtage (provincial parliaments).
Under the Constitution, **neither the Federation nor the states have the exclusive power to regulate "anti-discrimination"**. The Federation may — and has done so in 1997 regarding disability — introduce a new clause to the (constitutional) catalogue of human rights prohibiting discrimination. Amending the Federal Constitution is strictly a federal matter. The Federation may also implement the anti-discrimination clause if and insofar as implementation is linked to matters coming within the legislative powers of the Federation (such as labour law, public transport law, civil law).
**Labour law legislation** falls into the competency of the Federation (Art. 10 par. 1 lit. 11 Federal Constitutional Law [*Bundes-Verfassungsgesetz*], *B-VG*). Just in the area of labour law of agricultural workers and the labour protection of agricultural workers and agricultural salaried employees the legislative powers are divided between the federation and the states: legislation of principles by the federation and implementing legislation by the states (Art. 12 *B-VG*).
Legislation in respect of employees (civil servants) of the nine states and of local authorities (regional public employment) rests exclusively with those federal states alone (Art. 21 *B-VG*); with the notable exceptions of teachers at public compulsory schools (Art. 14 par. 2 *B-VG*) and of teachers at certain agricultural schools and educators at certain agricultural students' hostels (Art. 14a par. 2 lit. e and Art. 14 a par. 3 lit. b *B-VG*).
Legislative power regarding self-employment, education/training and workers/employers/occupational organisations is divided between the federal states and the Federation; the states hold legislative power, for instance, in areas such as *kindergartens* and juvenile educational institutions, hospitals, nursing homes, ambulance services, funeral-services, fire-brigades and chambers[1] of agricultural workers/employers (Art. 10 – 15 *B-VG*).

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

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

## 0.2 State of implementation

*List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.*
*Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?*

*a)* **Timeline**: Austria has not taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability and therefore not met the timeline for implementation. It is important to note this delayed implementation to understand that so many issues are in a very early stage of development.

Generally it can be stated that with the new provisions on disability the Directive 2000/78 is **completely transposed** and implemented into the Austrian legal framework in regard **to federal competences**.

The federal legal framework basically consists of:

*a)* **Equal Treatment Act** – ETA (Gleichbehandlungsgesetz)
[ Federal Equal treatment provisions binding private entities and fiscal activities]

*b)* **Federal-Equal Treatment Act** – F-ETA (Bundes-Gleichbehandlungsgesetz, BGBl. I Nr. 65/2004), Federal Law Gazette I Nr. 65/2004
[Federal equal treatment provisions binding the federal administration]

*c)* **Act on the Equal Treatment Commission and the Equal Treatment Office** – ETC/O (Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, BGBl. I Nr. 66/2004), both Federal Law Gazette I Nr. 66/2004 last amended by BGBl. I Nr. 82/2005

*d)* **Act on the Employment of People with Disabilities,** Behinderteneinstellungsgesetz, BGBl. Nr. 22/1970, last amended by Federal Law Gazette I Nr. 82/2005

*e)* **Federal Disability Equality Act,** Behindertengleichstellungsgesetz, BGBl I Nr. 82/2005, Federal Law Gazette I Nr 82/2005
[Regulation on the non-employment part of protection against discrimination on the ground of disability]

*f)* **Federal Disability Act**, Bundesbehindertengesetz, BGBl Nr. 283/1990, last amended by Federal Law Gazette I Nr. 82/2005
[Installing the Ombud for Disabled Persons (Behindertenanwalt)]

Shortcomings on Federal Level:

- **Burden of proof:** The (federal) Equal Treatment Act lowers the burden of proof for the plaintiff but in a way that is different from the way stated in the directives. The burden of proof does not completely switch over to the respondent, when the plaintiff established facts from which it may be presumed that there has been direct or indirect discrimination. The law states that the respondent has to prove that "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". So the respondent is obliged to prove the likelihood of established facts. In my view this does not constitute a clear shift of the burden of proof the way the directive demands, - even though the burden of proof is lowered. It still continues to be a strange legal construction. Practice and case-law will have to show if the application of this provision meets the requirements of the Directives.
- The existing provincial pieces of legislation state a shift of the burden of proof that is in line with the directives.
- **Penalties:** a maximum administrative fine of as low as EUR 360, and exclusion of punishment for employers as first-time-offenders (admonition only) in cases of discriminatory job-advertisements. This sanction is not effective, dissuasive and proportionate, neither.
- **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; in case of termination no compensation if victim does not return to the (discriminatory) employer. This sanction is not effective, dissuasive and proportionate.
- **Victimisation:** the ETA just states a general prohibition of victimisation but there is no duty to compensate for material or immaterial damages. This also does not constitute a effective, dissuasive and proportionate sanction.
- **Harassment:** The legislation is falling short in implementing the Directives as the prohibition of harassment is restricted to the (successful) violation of dignity and the creation of a certain environment and unsuccessful conduct with (only) the purpose of violating dignity and creating the specific environment is not covered.
- **Independent bodies:** Following an amendment[2] to Art. 20/2 of the Federal-Constitution (B-VG) in January 2008 the "independent bodies" are finally independent in performing their functions. Nevertheless, practice shows that there is independence but for resources and budget. The financial resources for these bodies are still marginal in relation to the tasks assigned to them.
- There is no **legal standing for NGOs** in the courts under the Bundes-Gleichbehandlungsgesetz [Federal-Equal Treatment Act].
- **Limited NGO legal standing:** Third party intervention within the regime of the Equal Treatment Act (nota bene: different from Federal-Equal Treatment Act) is only allowed for one specific NGO ('Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern' [Litigation Association of NGOs Against Discrimination]) in the courts (§. 62 GIBG [ETA]). This association is open for all specialised NGOs to join in but all NGOs not joining the Litigation Association are excluded from any special procedural rights.

[2] Amendment by Federal Law Gazette I Nr. 2/2008, 04.01.2008

- The same construction was chosen under the amended Act on the Employment of People with Disabilities — the *Behinderteneinstellungsgesetz*, here the Österreichische Arbeitsgemeinschaft für Rehabilitation [Austrian National Council of Disabled Persons] is the NGO entitled to intervene in court cases. In addition, for the purposes of the new *Behindertengleichstellungsgesetz* [Federal Disability Equality Act], there is a limited competence for this NGO to initiate a class action.

*a)* **Levels of implementation within the federal structure – provincial implementation**: Finally, with the Salzburg Equal Treatment Act, Provincial Law Gazette Nr. 31/2006, which entered into force on May 1st 2006, all provinces have enacted implementing legislation.
The general implementation in the provinces is done by enforcing different legal acts, whereby one is usually concerning equal treatment within the provincial and municipal (Gemeinden) workforce (civil servants and contracted workers for the public authorities). (The competency to regulate private labour relationships lies only with the Federation.) This is either named Provincial Equal Treatment Act and/or Provincial Anti-Discrimination Act. These Acts also contain the prohibition of discrimination in regard to social security, social benefits, social security and health, education and access to and supply with goods and services including housing. The latter prohibition is targeting the public employees in fulfilment of their duties for the respective province. If they fulfil a duty for the Federation, the Federal-Equal Treatment Act is covering their behaviour.

Provinces are also competent to regulate the labour relations of forestry- and agricultural workers and therefore have to implement the rules of the Directives into their specific legislation (Usually: Agricultural Labour Relations Act). All provinces have respective legislation in place by now.
Still the scope of protection is varying – while in most Provinces a horizontal approach has been chosen to guarantee the same level of protection regarding all grounds, - Vorarlberg, and Lower Austria do not go beyond the minimum standards of protection of the Directives and Vienna does not cover disability.
All the Provinces are obliged to install specialised bodies, which meet the requirements of Art 13 of the Directive 2000/43/EC. These bodies are shaped quite differently throughout the country.

### 0.3 Case-law

*Provide a list of any <u>important</u> case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:*
*a)* Name of the court
*b)* Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.
*c)* Name of the parties
*d)* Brief summary of the key points of <u>law</u> (no more than several sentences)

➔Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the 2 Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

**sexual orientation/ harrassment**

*a)* Landesgericht Salzburg
*b)* Ref. Nr. 18Cga120/05t, date: 14.07.2006, available on the searchable database www.ris.bka.gv.at and a commentary (German) at http://www.klagsverband.at/fall/Falldoku_Ge-1.pdf
*c)* Name of the parties withhold due to respect of privacy
*d)* The court, acting as a labour tribunal of first instance ruled on a case of an openly homosexual truck driver who had been harassed by two employees of a cargo company.

The harassers are not direct colleagues of the victim but worked for the biggest client of the cargo company that employed him. The two respondents had been harassing the victim for a period of more than two years with intimidating verbal assaults. When they started to ask everybody whom they found talking to the victim, whether they were also gay, the truck driver became more and more isolated and decided to complain. The complaint was backed by his employer, who had intervened on behalf of the complainant, but to no permanent positive effect. So the driver decided to go to court. The Litigation Association of NGOs against Discrimination intervened in support of the claim.
The court found that this was a severe **case of harassment** on the basis of **sexual orientation** and also sexual harassment (under § 21/1/3 and § 7/1/3 Equal Treatment Act].
The victim was awarded compensation of 400 Euros from each harasser, which is the minimum amount set out by the Equal Treatment Act. The court nevertheless stated clearly that he would deserve much more than this. It was a decision of the victim himself to go for the minimum only as he wanted a "decision on the principle". There was no additional sanction.

**age discrimination – referral to ECJ for preliminary ruling**

*a)* Supreme Court (Oberster Gerichtshof)
*b)* Ref. Nr. 9ObA34/07a, date: 02.02.2008, available on the searchable database www.ris.bka.gv.at
*c)* David Hütter vs. Technische Universität Graz [Graz University of Technology]

Question to the ECJ:

Are Articles 1, 2 and 6 of Council Directive 2000/78/EC to be understood as precluding national legislation (§§ 3 (3) and 26 (1) of the Austrian Vertragsbedienstetengesetz [Law on contractual employees]) which excludes accreditable previous service from being taken into account in the determination of the reference date for salary increments in so far as such service was completed before the person concerned reached the age of 18 years?

The question here is whether it constitutes age discrimination if salary increments do ignore service which was completed before the contractual employee has reached the age of 18. It can be argued that these years are treated differently (- ignored) than those completed after reaching the age limit.

**age discrimination – equal pay – apprentice**

*a)* Supreme Court (Oberster Gerichtshof)
*b)* Ref. Nr. 9ObA76/07b, date: 07.02.2008, available on the searchable database www.ris.bka.gv.at
*c)* Melanie O. vs. Johann H.

The Supreme Court found no age discrimination in the case brought by a 17 year old apprentice against her employer because of an unequal pay regulation in § 1a of the Act on the Employment of Children and Youth [AECY]which demands for a different basic salary and calculation of overtime hours for apprentices below and above the age of 18.
The court held that the differential treatment is not based "only on the ground of age" but on the completely different potential of the two groups. This different potential is created by the AECY itself which has the basic aims to protect youth workers and therefore limits the ways the younger workers can be deployed. The court states that – referring to Art. 6 of Directive 2000/78/EC – this difference is objectively justified by legitimate aims of educational policy and necessary protection of youth.

**disability discrimination – reasonable accommodation**

*a)* Administrative Court (Verwaltungsgerichtshof)
*b)* Ref. Nr. 2006/12/0223, date: 17.12.2007, available on the searchable database www.ris.bka.gv.at
*c)* K. vs. Österreichische Post AG.

In this ruling the court held that the duty to reasonable accommodation does not comprise the duty to "empty" suitable posts which are held by able bodied civil servants in order to avoid disadvantages, including dismissal of a disabled person who has become unable to serve on his post. The court stated that such a dismissal of an able bodied person would constitute discrimination on the ground of disability.
Here "redeployment" was an issue - where an individual employee became disabled and could not continue to perform his existing job, but alternative suitable positions were already held by other (able bodied) employees.

**Ethnic origin discrimination – access to goods and services – harassment**

*a)* LG for ZRS Wien
*b)* Ref. Nr. 35R68/07w (35R104/07i, date: 30.03.2007, available on the searchable database www.ris.bka.gv.at ; commentary (German) on http://www.klagsverband.at/fall/gericht2.pdf
*c)* Hayet B. vs. Ferdinand S. intervention by Litigation Association of NGOs against Discrimination

The Court of appeal ruled in a case of a woman of Tunisian origin who had been physically kicked out of a fashion store with the words "we do not sell to foreigners" in Vienna. The court held that this constituted discrimination and harassment on the ground of ethnic affiliation and awarded 800,- Euros (vs. 400,-- Euros in the first instance) in compensation for immaterial damages. It stated that it was irrelevant whether the plaintiff was in fact a foreigner or an Austrian citizen of Tunisian origin.

Please describe trends and patterns in cases brought by Roma and Travellers , and provide figures – if available.

Generally, in Austria, discrimination cases brought to the authorities are still low in numbers and there is a lack of Roma related cases – so a trend cannot be nailed down.

The Equal Treatment Commission so far only dealt with two cases regarding anti-Roma behaviour.
In March 2007, the Equal Treatment Commission (ETC) published an expert opinion on the questions

*a)* whether the sign "No space for gypsies" ("Kein Platz für Zigeuner") at the reception of a campsite is discriminatory under the Equal Treatment Act and

*b)* whether the term "gypsy" ("Zigeuner") is discriminatory under the Equal Treatment Act.

The questions were brought up by the National Equality Body. Concerning the first question the ETC decided that the sign constituted discrimination and harassment because it did not only exclude a certain ethnic group from a service but also created a degrading and humiliating environment. The ETC noted that it would have come to the same finding if the term "Roma" would have been used instead. Furthermore, the ETC found the term "gypsy" ("Zigeuner") discriminatory under the Equal Treatment Act.

In another case in which the ETC found discrimination, a Czech woman of Romani origin had been insulted in Vienna when trying to purchase crops at a market. As the insult was "Go back to your home country!" the harassment seems to be more generally xenophobic than specifically hostile to Roma.

On the level of judiciary, no information is available with regard to anti-Roma offences or Roma as suspects or offenders. Generally, data are only collected with respect to nationality, gender and age of the perpetrators and victims. The Ministry of Justice reported that in 2007 the public prosecutors office initiated one criminal proceeding with regard to hate speech against the Roma community (§ 283 Criminal Code). No detailed information on this proceeding is available.

# 1. GENERAL LEGAL FRAMEWORK

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

*a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*
*b) Are constitutional anti-discrimination provisions directly applicable?*
*c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

The general principle of equality is enshrined in Art. 2 of the Basic Law of the State 1867 (*'Staatsgrundgesetz'*, *StGG*) and in Art. 7 of the Federal Constitutional Act 1929 (*'Bundes-Verfassungsgesetz'*, *B-VG*). Art. 2 *Staatsgrundgesetz* stipulates: 'All citizens are equal before the law'; Art. 7 *B-VG* also provides that all citizens are equal before the law and adds that privileges according to birth, sex, social standing, class and religion are excluded and that no one may be disadvantaged on the basis of his/her disability. The list in the latter sentence is merely a demonstrative one, as the first sentence provides for a full equal treatment obligation. The state is bound by the constitution and the fundamental rights enshrined therein in all its activities, also when it acts as an employer (for both categories of its employees: civil servants and employees with contracts of employment).
It is undisputed that the equal protection clause of the Constitution is legally binding for legislative powers as well as law enforcement agencies.[3] A decision of a law enforcing agency violates the equal protection clause if the decision is based on law violating the equal protection clause, if the agency has interpreted the law in a way that is not in harmony with the equal protection clause, or if the agency otherwise has acted arbitrarily. More importantly, acts of parliament violate the constitutional equal protection clause when differences in treatment or equality of treatment are not based on objective grounds or objective justifications. The constitutional equality clause can not be enforced against private actors as it binds the state.
The Constitutional Court does not use the word "discrimination" when ruling under the equal protection clause of the Austrian Constitution. The Court concentrates on asking whether or not the applicant was placed at a disadvantage, by different or equal treatment, as the case may be. If different or equal treatment is somehow disadvantageous, the Court proceeds scrutinising whether or not the applicant's treatment is objectively justified. Even when acknowledging indirect discrimination in sex discrimination cases in 1993, the Court refrained from using the term "discrimination".
According to the Constitutional Act *BGBl* (Federal Law Gazette) 1964/59, the **European Convention of Human Rights** (ECHR) and its protocols are forming part of the Austrian constitution. *Art. 14 ECHR* therefore is not only binding international law but also Austrian domestic constitutional law.
Besides these general equality-clauses Austrian constitutional law makes some *special provisions* banning discrimination on the basis of race, language or religion (Art. 66 & 67 *Treaty of St. Germain 1919*) and race, colour, descent or national or ethnic origin (Art. I *Federal Constitutional Act for the Implementation of the Convention on the Elimination of all Forms of Racial Discrimination 1973*).

[3] *Berka* 1999 no. 917; *Walter/Mayer* 2000 no. 1346.

The constitution also includes the commitment of the Republic of Austria to guarantee equal treatment of disabled and non-disabled persons in all areas of daily life (Art. 7 par. 1 *B-VG*) and to real equalisation of man and woman (Art. 7 par. 2 *B-VG*).
In addition to those provisions of the federal constitution, some of the constitutions of the nine Austrian states (‘*Bundesländer*’) contain fundamental rights, among them equality rights.

# 2. THE DEFINITION OF DISCRIMINATION

## 2.1 Grounds of unlawful discrimination

*Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.*

Federal level**:** gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation, part time employment, disability; additional in Constitution: class, birth, social standing.
So called "recognized 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 (sexuelle Orientierung)
**Carinthia**: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation (sexuelle Ausrichtung)
**Styria**: gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation (sexuelle Orientierung)
**Vienna**: gender, race, ethnic origin, religion, belief, age, sexual orientation (sexuelle Ausrichtung)
**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) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*

*b) Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?*
*Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion'; or a "disability", sometimes defined only in social security legislation)?Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

*c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

The notion of "race" was taken out of the text in the federal legislation and "race and ethnic origin" are now both represented by the term "ethnic affiliation" (ethnische Zugehörigkeit)[4]. 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.

The explanatory notes of the new Gleichbehandlungsgesetz (Equal Treatment Act) state:

*"The directive on anti-racism does not contain a definition of "race and ethnic origin". Theories which attempt to determine of separate race are rejected. The use of the term '"race" does not imply an acceptance of such theories. As benchmark for the interpretation of the open and broad directive we have to think of international norms, especially the Convention on the Elimination of all Forms of Racial Discrimination CERD, additionally Art. 26 of the ICCPR can be used. CERD deals with discrimination based on "race, colour, descent, or national or ethnic origin", Art. 26 ICCPR obliges the ratifying states to provide protection against discrimination inter alia on the grounds of race, skin-colour, language, religion, and national origin. As a back-up for interpretation, also ILO Convention Nr. 111 as well as Art. 14 of the Human Rights Convention shall be named.*

*Also Art. IX para. 1 fig. 3 of the Introductory Provisions to the Code of Administrative Procedure (EGVG) states an administrative penal sanction for discrimination of a person due to his/her race, skin-colour, national or ethnic origin, religious faith or disability and can therefore also be used to interpret the term "race". The use of the term "race" in the above mentioned instruments shows that the term "race" is quite commonly used in legal texts, albeit the terms "race and ethnic origin" – understood correctly according to international law – can not be seen in a way that they refer to biological relationships to a distinct ethnic group in the sense of a theory of descent. The above mentioned sources are rather useful to support a more culturally orientated view of the problem of ethnic discrimination. Addressees of discrimination are persons who are perceived by others as being "strange" because they are not seen as members of the regional majority population due to some distinct differences. Discrimination in these cases is related to differences which are perceived as natural due to myths of descent and affiliation and which can not be modified by the affected persons.*

*Common manifestations are discriminations on the grounds of skin-colour and other details of outward appearance as well as a mother tongue seen as "strange". Also ethnic groups are "imagined communities" formed either by self-commitment or attribution by others, which can not solely be based on biologic or other factual differences. Ethnic groups refer to commonalities stemming from skin-colour, descent, religion, language, culture, or customs."*[5]

[4] Nevertheless, some provincial legislation (Styria, Vienna, Upper-Austria) still sticks to the terms „race and ethnic origin". Both wordings are seen to be completely congruent in their scope – only differing in the level of language-sensitivity.

[5] So called "recognized (autochthonous) 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).

*Definition of religion and belief:*
The Austrian legal framework does not contain a legal definition of religion or belief. Nevertheless, the explanatory notes for the „Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften“ (The Federal Law on the Status of Religious Confessional Communities) contains the following (non binding) definition of the term religion: *“Religion: Historisch gewachsenes Gefüge von inhaltlich darstellbaren Überzeugungen, die Mensch und Welt in ihrem Transzendenzbezug deuten sowie mit spezifischen Riten, Symbolen und den Grundlehren entsprechenden Handlungsorientierungen begleiten.*„[Religion: A structure of convictions whose content is representable and has been growing in history to explain human kind and the world in its transcendent meaning and to accompany them with specific rites, symbols and give them orientation in accordance with basic principles and doctrine.]
The explanatory notes of the amended Equal Treatment Act state:
*“Also the terms “religion and belief” are not defined by European law. Regarding the aims of the “framework-directive” they must be interpreted in a broad manner. Especially “religion” is not restricted to churches and officially recognised religious communities. Nevertheless, it has to be noted that for a religion there are minimum requirements concerning a statement of belief, some rules for the way of life and a cult. Religion is any religious, confessional belief, the membership of a church or religious community. Brockhaus 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 ²unavailability² 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*[6]*. The term “belief” is tightly connected with the term “religion”. It is a classification for all religious, ideological, political and other leading perceptions of life and of the world as a construction of sense, as well as for an orientation of the personal and societal position for the individual understanding of life.*
*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.”*

[6] This is not in any way relating to any duty for reasonable accommodation but clarifying that no faith might be treated more favourably than another is.

*Definition of disability:*

Generally, in Austria, defining "disability" is a matter of statutory law rather than of case law. Several fields of law include lengthy definitions of the term "disability". Courts did not come up with definitions of their own. The subsequent definitions are the most important statutory definitions.

Act on the Employment of People with Disabilities — the *Behinderteneinstellungsgesetz* — defines "disability" as follows: "*Disability is the result of a deficiency of functions that is not just temporary and based on an physiological, mental, or psychological condition or an impairment of sensual functions which constitutes a possible complication for the participation in the labour market. Such a condition is not deemed temporary if it is likely to last for more than 6 months.*"

§ 3 of the Federal Disability Equality Act [Behindertengleichstellungsgesetz] defines: "*For the purposes of this Act, disability is the result of a deficiency of functions that is not just temporary and based on an 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.*"

- Under state law on public assistance the term "disabled people" (Behinderte) applies to "people who are, because of an impairment, permanently and severely restricted in their ability to live an independent life, especially with regard to adequate education, vocational training, and suitable employment" or to "people who, as a result of physiological, mental, psychological, or multiple impairments not specifically related to age, and because of the loss of essential functions, are permanently and severely restricted in their vital social relations, especially with regard to education, vocational training, development of personality, employment, and integration into society; the term also applies if these restrictions will, according to medical science, occur in the foreseeable future, in particular in the case of young children".
- The definition laid down by Austrian pension law (traditionally, a part of social security law) reads: "Persons insured under the ASVG 1955 are deemed disabled if — without rehabilitation — they would, because of an impairment, now or in the foreseeable future be likely to qualify for an invalidity pension; impairments primarily related to age are not deemed impairments under this paragraph."

These definitions are clearly shaped by the legal context they relate to. The first definition governs the employers' duty to employ people with disabilities without discrimination, the second one regulates prohibition of discrimination in the access to goods and services, the third one relates to means-tested benefits, the fourth one to medical, vocational, and social rehabilitation in the context of pension law. Differences in context generate different meanings. The third definition (context: pension law) is very narrow. The right to be granted invalidity pension remains limited to a rather small group of disabled people. The scope of the second definition (context: public assistance) is utterly broad, covering a wide range of individual needs. Notwithstanding the differences, the definitions share a common element: The definitions are all based on a medical understanding of disability. The definitions draw attention to deficiency and abnormality, the lack or loss of ability to conform with what is considered normal, and on measures to overcome those deficiencies or burdens.

At provincial level in disability is dealt with in the implementing legislation. For example, the Styrian Law [Steirisches Landes-Gleichbehandlunggsgesetz, Stmk. LGBl. 66/2004, vom 6.Juli 2006 [Styrian Provincial Equal Treatment Act of July 6th 2004, Styrian Provincial law Gazette 66/2004]) 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.*"
It can be stated that these definitions are (given the specific context of the respective areas of application) are in line with – or even considerably broader thanECJ case C-13/05, Chacón Navas, Paragraph 43, according to which "*the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life*".
Recital 17 of Directive 2000/78/EC is not reflected in legislation but the (above mentioned) ruling of the Administrative High Court Nr. 2006/12/0223 is clearly reflecting the spirit of this recital without quoting it. In this case the employment of a person who became unable to fulfil the duties of his post was discontinued and the court found no discrimination considering that redeployment to another post was not possible.
In the same ruling the Administrative High Court puts forward a symmetric view on disability discrimination. It states that a dismissal of an able bodied employee in order to empty the post for purposes of reasonable accommodation for a disabled employee would constitute discrimination on the ground of disability.
*Definition of age:*
The explanatory notes of the amended Equal Treatment Act state:
"*Regarding the criterion "age" all workers are protected irrespective of minimum or maximum ages, unless specific requirements of training require the establishment of a maximum age for recruitment. Regulations restricting the access to a certain career with a certain maximum age are inadmissible. The ground "age" also covers discrimination on the ground of young age.*"

*Definition of sexual orientation:*
The explanatory notes of the amended Equal Treatment Act state:
"*This law uses the term "sexuelle Orientierung" in translating the term "sexual orientation" used by the Directive. This is a commonly used and accepted term. The term is to be interpreted broadly and generally means "heterosexual, homosexual and bisexual". The main target of the law is to safeguard protection of gay and lesbian workers from discrimination. Discrimination of homosexual partnerships compared to unmarried heterosexual partnerships is prohibited; voluntary social benefits are to be granted to all partnerships or only to married couples. Privileges for marriage remain permissible.*"

*d) Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.*

There are no material but only procedural rules on how to deal with multiple discrimination. Those procedural rules only apply to the treatment of cases outside the courts.

The Act on the Equal Treatment Commission and the National Equality Body – ETC/NEB (Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, BGBl. I Nr. 66/2004), both Federal Law Gazette I Nr. 66/2004, last amended by BGBL I 82/2005 states in its § 1(3) that in the procedure before the Equal Treatment Commission, cases of multiple discrimination including the gender aspect (in the workplace) have to be dealt with by Senate I, which is in principle in charge of gender cases. The senate has to apply the rules on the other grounds accordingly.
§ 1 (4) states: If the case inter alia contains the allegation of discrimination on the ground of disability than the Equal Treatment Commission is not competent to deal with it, but – for the whole case – the procedure under the **Act on the Employment of People with Disabilities,** Behinderteneinstellungsgesetz, BGBl. Nr. 22/1970, last amended by Federal Law Gazette I Nr. 82/2005 or the **Federal Disability Equality Act,** Behindertengleichstellungsgesetz, BGBl I Nr. 82/2005, Federal Law Gazette I Nr 82/2005 has to be applied. So there has to be a compulsory attempt to settle the case before the Federal Social Service. Only if this conciliation process has ended unsuccessfully, a law-suit can be filed with the competent courts (civil and labour courts).

The law does not provide any specific rules on how to deal with cases of multiple discrimination. It will be up to the courts to develop rules on the determination of awarded compensation.

Only § 9 (4) of the Federal Disability Equality Act and §7j of the Act on the Employment of People with Disabilities 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.*"

### 2.1.2 Assumed and associated discrimination

*a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.*

*b) Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?*

In regard to assumed criteria for discrimination the explanatory notes to the Gleichbehandlungsgesetz (Equal Treatment Act) are very clear in stating:
*The principle of equal treatment is applicable irrespective of the fact whether the reasons for the discrimination (e.g. race or ethnic origin) are factually given or only assumed.*
This is also reflected in case law (see case LG ZRS Wien, Nr. Nr. 35R68/07w, above).
The wording of the Viennese Anti-Discrimination Act, Viennese Law Gazette 35/2004 [Wiener Antidiskriminierungsgesetz, LGBl 35/2004] seems to exclude assumed discrimination as its § 3 (1) defines direct discrimination: …, *when a person – on the ground of one of the attributes listed (*gender, race, ethnic origin, religion, belief, disability, age, sexual orientation*) - 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.*

*b) Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?*

No federal Austrian law expressly deals with the question of discrimination on the ground of association for discriminatory grounds other than disability. The idea of protecting this kind of possible discrimination is not very widespread in Austria but only the courts can give a clear answer. The formulation *"on the ground of…"* that is used by the Gleichbehandlungsgesetz (Equal Treatment Act) is in principle open to such an interpretation though there is no hint that the lawmakers had this meaning in mind when deciding on the bill.
On federal level the Federal Disability Equality Act states in its § 4 that the prohibition of discrimination is also extended to relatives (parents, children, siblings, partners) if they fulfil their caring duties in relation to their disabled relative or partner. This means that carers who are not family members would not be protected and neither would family members who are not carers. Also in cases of harassment, close relatives and partners have an individual entitlement towards the harasser.
The same is stated in § 7b of the Act on the Employment of People with Disabilities, which protects close relatives with caring responsibilities.
The Styrian Equal Treatment Act expressly prohibits discrimination of persons on the ground of the disability of a relative. As relatives the law defines[7]: the spouse, all relatives in direct line, the collateral relatives of second degree, even if the relation is illegitimate brothers and sisters-in-law, adoptive parents and adopted children as well as common law spouses and their children.

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

*a) How is direct discrimination defined in national law?*

Generally, with the exception of the Viennese Laws[8], all laws passed in transposing the directives so far use the wording of the Directives to define direct discrimination.

*b) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

According to this definition taken from the directives there is generally no way of justifying direct discrimination.

*c) In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

Also the exceptions to this general rule are strictly taken from the Directives. Also in regard to age discrimination the (Federal) Equal Treatment Act quotes the Directive.
The law does not give hints on how to test "less favourable treatment".

[7] See: § 4 (5) Styrian Equal Treatment Act, Styrian Provincial Law Gazette Nr. 66/2004
[8] *(see above 2.1.2)* The wording of the Viennese Anti-Discrimination Act [Wiener Antidiskriminierungsgesetz, LGBl 35/2004] Viennese Law Gazette 35/2004 seems to exclude assumed characteristics *in (…) is put on a disadvantage in a comparable situation compared to another person to whom this attribute does not apply.* The same definition is used in the 18th amendment to the Service Order 1994, Viennese Provincial law Gazette 36/2004

### 2.2.1 Situation Testing

*a) Does national law permit the use of 'situational testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court. For what discrimination grounds is situation testing permitted? If all grounds are not included, what are the reasons given for this limitation?*

The method of situation testing is not mentioned by any legislation. Generally there are no formal limits to establish evidence to a court as long as there is no explicit legal rule against it. So situation testing will be in principle permitted. There are no defined conditions for using this kind of evidence in court and as we do not have any case law yet, there is no information about how courts will handle such cases.

*b) Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

Situation testing has so far only been used by NGOs and only in relation to prove racist "entrance policies" in bars and restaurants. These testings end with a report of infringement to the authorities and can lead to an administrative fine for the perpetrators. The reporting person(s) only have the procedural standing of a witness and are not informed about the outcome of the administrative process. So it is impossible to assess how this type of evidence is dealt with. At the moment NGOs prepare to use situation testing in court procedures also. The examples from other countries are a motivating factor for NGOs.

*c) Outline <u>important</u> case-law within the national legal system on this issue.*

There is no case-law on this issue

*d) Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

NGOs are preparing situation testing but so far no such cases have been brought before a court. The process of preparation includes the introduction of a small handbook or guideline setting strict standards for testers and for documentation of the testing. The NGO ZARA has produced an unofficial short guide to testing but the use and usefulness of testing is still disputed among NGOs. Especially the potential allegation that NGOs would somehow "produce" discriminatory incidents by means of testing is one reason for the persisting reluctance to use testing. Courts are free in their consideration of evidence and might be quite hesitant in giving considerable weight to such evidence. Still, - as there is no experience and caselaw on that issue this is just speculation.

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

*a) How is indirect discrimination defined in national law?*

The Equal Treatment Act defines: "*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.*"[9]
*The legislation dealing with disability also states that barriers can constitute indirect discrimination (e.g. § 7 c Abs. 2 Act on the Employment of People with Disabilities and § 5 Abs. 2 Federal Disability Law)*

*b) What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

The explanatory notes of the Equal Treatment Act give no further help for the interpretation of a "legitimate aim", and "appropriate" and "necessary" means. So it will be up to jurisprudence to find a standard test for these criteria. It seems clear that "legitimate" has to be interpreted narrowly, not just meaning "legally allowed" and that necessary means a "conditio sine qua non".
For the ground of disability, see under the "reasonable accommodation" section.

*c) Is this compatible with the Directives?*

The wording is directly taken from the Directives so it is compatible. As there is no relevant jurisprudence on that provision up to now, we cannot say anything about practice.

*d) In relation to age discrimination, does the law specify how a comparison is to be made?*

No. The law quotes the Directive only in this respect. There is developing case law on age discrimination mainly in the areas of unfair dismissal and equal pay.

*e) Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

There is no case law on this issue so far but it seems quite clear that, for example, the still rather widespread practice of demanding "native speakers" for jobs where this requirement is not necessary constitutes discrimination on the ground of ethnic affiliation. (It could even be argued to be direct discrimination). As discriminatory advertisements constitute an administrative offence – no data on such cases is available.

[9] § 19 (2) Gleichbehandlungsgesetz, BGBl.: I 2004/66 [Equal Treatment Act, Federal Law Gazette Nr. I 2004/66] and similar or exactly alike is the wording of all the definitions in the existing provincial legislation (Styria, Carinthia, Lower Austria, Vienna)

### 2.3.1 Statistical Evidence

*a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*
*b) Is the use of such evidence commonly used? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*
*c) Please illustrate the most important case law in this area.*

There is no case law, but also no general restriction for the use of statistical data. Until now no case of discrimination was brought to court using statistical data as evidence. There is a general lack of awareness about indirect discrimination and the possibility or necessity to use statistical data as evidence. The Austrian courts usually do not care about developments in other countries. So there is no developed tradition to use examples from other jurisdictions in court. This can only be changed by a ruling of the ECJ or ECHR.

*d) Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

The Austrian Act on Data Protection (Datenschutzgesetz) defines in its § 4/2 as "sensitive data" the following: racial and ethnic origin, political opinion, membership of a trade union, religious or philosophic belief, health and sexual life. These data can only be collected after undergoing a detailed special procedure and assessment by the Data Protection Council (Datenschutzrat). So we can say that it is not completely prohibited by law to collect these data, but employers will generally not be able to prove any sufficient justification for being allowed to collect these data of their employees. They will nevertheless have records on the number and the classification of their disabled employees, as this is important information in regard to their specific labour law position (dismissals protection, quota limits). It is possible to collect data on country of birth, citizenship (employers have to have records on citizenship) and language.

In Austria some information of this kind is collected by nationwide censuses (at intervals of 10 years). The census contains questions about: county of birth, citizenship, colloquial language, age, marital status and religious faith; questions concerning ethnic origin, disability or sexual orientation are not included.

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

There is a whole set of different definitions of **disability** throughout the country due to the federalist structure. In regard to people with disabilities in the workforce there is a legal system to determine whether someone is disabled (resulting in a percentage classification; e.g. 75% disabled) according to the Behinderteneinstellungsgesetz (Act on Employment of People with Disabilities). As there is an obligation for all companies with more than 25 employees to employ at least one disabled person, this data is also collected and kept by the Federal Office for Social Affairs (Bundessozialamt).
Most other issues concerning disability are dealt with by the provinces, records and files are kept in the respective offices and not administered centrally.

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

## 2.4 Harassment (Article 2(3))

*a) How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

Harassment is dealt with in the workplace and the "other" scope of directive 2000/43/EC. So protection against harassment is provided for, when a person at the workplace is harassed by the employer himself/herself or if the employer is guilty not to use appropriate means given by legal act, norms of collective labour law 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[10] defines:
*Harassment is unwanted conduct related to one of the grounds listed in § 17 which*
*1. infringes a person's dignity,*
*2. is unacceptable, undesirable and offensive (indecent) to the person affected and*
*3. creates an intimidating, hostile or humiliating environment for the person affected.*
The provisions protecting against harassment on the ground of disability use the same wording.
The legislation falls short in implementing the Directives as it restricts the prohibition of harassment to the (successful) violation of dignity and the creation of a certain environment and does not cover (unsuccessful) conduct *with (only) the purpose* of violating dignity and creating the specific environment, as required by the Directives.
Only the Carinthian Anti-Discrimination Act [Kärtner Antidiskriminierungsgesetz] and the Lower Austrian Equal Treatment Act [Niederösterreichisches Gleichbehandlungsgesetz) do not demand to successful violation of dignity to safeguard protection against harassment.
Another provision coming close to racist or religious harassment is Art. 117 para. 3 of the Criminal Code in connection with § 115 Criminal Code (§ 117 Abs. 3 StGB/Strafgesetzbuch) that accepts the fact that verbal insults because of the membership to a certain ethnic, racial or religious group ask for a better protection than "normal" insults to a person's honour. This provision gives the victim of racist insults the possibility to enable the public prosecutor to prosecute the matter (Ermächtigungsdelikt) whereas "normal" insults (§ 115 StGB) have to be brought to court by the victim in private - facing a great risk of cost.

[10] and similar do all other federal or provincial pieces of legislation

*b) Is harassment prohibited as a form of discrimination?*

Yes, § 21 (1) Equal Treatment Act states that all forbidden forms of harassment are discrimination. This concept is basically taken over by all other specific pieces of legislation.

*c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

No. All the existing literature and research is not official.

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

*Does national law prohibit instructions to discriminate?*

Instruction to discriminate is defined as being deemed to be discrimination just as the directive demands. Instruction to harassment is also defined as being discrimination in the federal laws as well as by respective provincial laws.

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

*a) How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. ➔ does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

*b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

From 1.1.2006 Austrian law has imposed upon employers the duty to provide reasonable accommodation.
§ 6 of the Act on the Employment of People with Disabilities states:
"*Employers are obliged to take the appropriate and according to individual cases the necessary measures to enable persons with disabilities to enjoy access to employment or occupation, to promotion and to participate in vocational training as well as in in-service training, unless such measures would pose a disproportionate burden on the employer. Such burden shall not be deemed disproportionate if it can sufficiently be compensated by public aid funds according to federal or provincial regulations. "*
A failure to meet this obligation is deemed indirect discrimination.
§ 7c of the Act on the Employment of People with Disabilities states:
*"It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers[11] would be illegal or would pose an unreasonable and disproportionate burden on the employer. When testing whether a burden is disproportionate, the following has to be taken into account in particular:*

[11]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.

- *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.*

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

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

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

The idea of reasonable accommodation is not completely new to the Austrian legal system. Even without specific legislation, over the last decades, however, courts have developed guidelines involving aspects of "reasonable accommodation", at least in the context of dismissal. When ruling upon the lawfulness of a dismissal, the Administrative Court (VwGH) as well as the Supreme Court (OGH)[12] has consistently held that an employer may not dismiss instantaneously if the employee has lost the physical or mental aptitude necessary to carry on with the job.[13] The employers' duty to care for the employees (Fürsorgepflicht) demanded — so the courts ruled — otherwise. Under that duty, employers must first try to adjust the employee's duties (adjustments with regard to physical requirements of the job, stress factors, time, place, working environment, colleagues, technical appliances, etc.). Dismissal ought to be regarded as a last resort: "Dismissal on account of incompetence must take place only if the employee has lost the ability to do his or her former job and the ability to perform well in another position that is reasonable and adequate, both from the perspective of the employer and the employee".

The employers' duty to care (Fürsorgepflicht) is activated only when employees can be expected (if necessary: after re-training) to be able to fulfil the new terms of their contract.[14] The larger the number of employees is, the stricter is the employer's duty to make reasonable adjustments.[15] Dismissal must never be pronounced solely on account of an employee's disability.[16] If (suitable) other positions are in principle at hand the employer must even consider assigning a post that gives title to an increased rate of pay.[17]

[12]It is up to the *VwGH* (Administrative Court) to decide upon the lawfulness of a dismissal if the employee is covered by the *Behinderteneinstellungsgesetz*; otherwise the decision lies with the Supreme Court (OGH).
[13]See, e.g., *OGH* 29/04/1992, 9 ObA 18/92; *OGH* 11/01/2001, 8 ObA 188/00f; *VwGH* 22/02/1990, 89/09/0147; *VwGH* 25/04/1991, 90/09/0139; *VwGH* 04/10/2001, 97/08/0469.
[14]*OGH* 29/04/1992, 9 ObA 18/92.
[15]*OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions]
[16]*VwGH* 22/02/1990, 89/09/0147. [Administrative Court Decisions]
[17]*OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions]

Allowances and grants available under the Act on the Employment of People with Disabilities are to be taken into account when the "reasonableness" of adjustments is to be judged.[18] However: The employer is not obliged to create a "new" post in the company, specifically tailored to meet the needs of the employee. And if dismissal seems necessary to prevent the company's bankruptcy or other grave disturbances, the employee's interests are usually outweighed by the interests of the employer.[19]

To enhance predictability and publicity, parliament decided in 1998 to convert some of the courts' principles into statutory law. Since January 1999, the Act on the Employment of People with Disabilities explicitly demands that support available under § 6(2) Act on the Employment of People with Disabilities (grants, loans) is to be taken into account when the employers' and the employees' interests are to be balanced. The Act on the Employment of People with Disabilities also provides that an employer cannot reasonably be expected to continue employment if

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

Case law and statutory law, therefore, do cover "reasonable accommodation".
The above mentioned newer case decided by the Administrative High Court Nr. 2006/12/0223 is clearly in line with this strait of caselaw. In this case the employment of a person who became unable to fulfil the duties of his post was discontinued and the court found no discrimination considering that redeployment to another post was not possible.

*c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?*

*No,*

*d) Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

Yes, see above quotation of § 7c of the Act on the Employment of People with Disabilities. In addition the Federal Disability Equality Act also explicitly refers to accessibility of buildings and services. § 8 of this Act states a new obligation for the Federal Administration (Der Bund) to start a plan to safeguard accessibility of all premises used by the Federal Administration from December 31st 2006 on. This plan shall be implemented in stages (Etappenplan Bundesbauten).

*e) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

[18] *VwGH* 14/12/1999, 99/11/0246. [Administrative Court Decisions]
[19] See, e.g., *VwGH* 22/02/1990, 89/09/0147; *VwGH* 11/06/2000, 2000/11/0096; *VwGH* 04/10/2001, 97/08/0469. [Administrative Court Decisions]

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

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

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

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

In regard to reasonableness, § 6 Federal Disability Equality Act states:
*(1) It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers*[20] *would be illegal or would pose a disproportionate burden on the employer. When testing whether a burden is disproportionate, the following has to be taken into account in particular:*

- *the necessary effort to eliminate the conditions constituting the disadvantage,*
- *the economic capacity of the person denying the discrimination*
- *public financial assistance available for the necessary improvements*
- *the time span between the coming into force of this Act and the alleged discrimination*
- *the effect of the disadvantage in regard to the general interests of the persons protected by this act*
- *concerning access to housing: the need of the person for the particular accommodation. This need has to be demonstrated by the person claiming access.*

*(2) In case the removal of conditions which constitute the disadvantage turns out to be a disproportionate burden in this sense it shall still be deemed discrimination if the provider failed to improve the situation of the affected person at least in a considerable way in order to reach the best possible approximation to equal treatment.*
*(3) When assessing whether certain circumstances constitute indirect discrimination it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent it has been complied with.*
*(4) Premises or other facilities, means of transport, technical equipment, information systems or other dedicated spheres of life shall be deemed accessible [barrierefrei] if they can be accessed and used by people with disabilities in a customary way, unassisted and without extra difficulty."*

[20] 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.

So generally the protection is quite broad as it covers the whole direct competence of the Federation in regard to the services the Federation provides. It seems quite clear that this includes the areas of social security and healthcare, education, access to and supply of goods and services which are available to the public, housing, public spaces and infrastructures within Federal competence.
Although so far we have no court cases on the 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.

One specific problem of protection lies in the Federal structure of the Austrian legal order where the competences in the areas of social security and healthcare, education and infrastructure are split between the Federation and the Federal States. For most Federal States full protection is provided for in all the areas mentioned but in Vienna, Lower Austria and Vorarlberg there is no protection at all for these areas in respect to disability. So, for example, in a primary school maintained by the Federal State of Vorarlberg or a local community of Vorarlberg, no protection against discrimination in regard to disability in the field of education exists whereas in other institutions of the same kind in other Federal States a full protection is guaranteed.

In the Vienna province, disability is not at all enlisted with the protected grounds.

This is an important problem as the Federal States are important operators of pre-school education institutions (kindergartens), schools, hospitals and infrastructure and largely competent for matters of social security.

Delay:

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

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

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

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

- the removal of the barrier does not cost more than 1000,-- Euros;

or regarding buildings, traffic facilities and rail vehicles, if

- the alleged discrimination happens after January 1st 2010 and the removal of the barriers does not cost more than 3000,-- Euros; or
- the alleged discrimination happens after January 1st 2013 and the removal of the barriers does not cost more than 5000,-- Euros.

## 2.7 Sheltered or semi-sheltered accommodation/employment

*a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*
*b) Would such activities be considered to constitute employment under national law?*

Generally, sheltered employment is possible under the requirement that the person with disability is still able to achieve half the productivity of a regular worker [Normalarbeitskraft]. In this case the employment is treated in the same way as any other employment, so the protection against discrimination will apply to those contracts and working conditions. Below this level of ability people with disabilities will not be treated as employees, but will live on social security and their activities will not constitute employment.

# 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)

*Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?*

No. The Laws apply to all persons irrespective of their nationality, although nationality itself is not a prohibited ground of discrimination. The explanatory notes to the amended Equal Treatment Act state clearly: "*The prohibition of discrimination also protects third country nationals. Provisions regulating the entrance and the residence of third country nationals as well as their access to employment and self employment are not affected by the new regulations.*"

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

*Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?*

Generally the laws do not make a difference between natural persons and legal persons. From the formulation of the legal texts we can assume, that the protection against discrimination is provided for natural persons only but both natural and legal persons can be held liable for offences.

### 3.1.3 Scope of liability

*What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

Generally, employers or service-providers can be held liable for the actions of employees according to the general norms in civil law in cases where a contractual relationship already exists between the service-provider and the client. For cases of an employment relationship § 21 of the Equal Treatment Act states in sub.para. (1) fig. 2 that it is deemed a form of discrimination if the employer culpably neglects to produce relief in cases of harassment through third persons (including co-workers and clients). The individual harasser or discriminator can be held liable in any case. The employer is always liable for discriminatory decisions of superiors affecting their subordinates. There is no specific regulation for trade/professional associations, so mere membership of a perpetrator will not activate the union's liability.

## 3.2 Material Scope

### 3.2.1 Employment, self-employment and occupation

*Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?*

*In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.*

### 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)) Is the public sector dealt with differently to the private sector?

The material scope of the new federal legislation is generally covering the whole material scope of directive 2000/78/EC and 2000/43/EC.
The federal legal framework basically consists of:

- **Equal Treatment Act** – ETA (Gleichbehandlungsgesetz)
- **Act on the Equal Treatment Commission and the Equal Treatment Office** – ETC/O (Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, BGBl. I Nr. 66/2004), both Federal Law Gazette I Nr. 66/2004 as last amended by Federal Law Gazette I Nr. 82/2005
- **Federal-Equal Treatment Act** – F-ETA (Bundes-Gleichbehandlungsgesetz, BGBl. I Nr. 65/2004), Federal Law Gazette I Nr. 65/2004
- **Act on the Employment of People with Disabilities,** Behinderteneinstellungsgesetz, BGBl. Nr. 22/1970, last amended by Federal Law Gazette I Nr. 82/2005
- **Federal Disability Equality Act,** Behindertengleichstelungsgesetz, BGBl I Nr. 82/2005, Federal Law Gazette I Nr 82/2005
- **Federal Disability Act**, Bundesbehindertengesetz, BGBl Nr. 283/1990, last amended by Federal Law Gazette I Nr. 82/2005
- **Provincial Equal Treatment Acts and/or Provincial Anti-Discrimination Acts**

The Equal Treatment Act (ETA) contains three sections containing material provisions. One containing equal treatment conditions for the workplace for gender, a second one all the criteria of directive 2000/78/EC except disability and the third contains the new conditions for equal treatment outside the sphere of workplace for the race and ethnic origin grounds. In taking on a federal competence to give principle regulations for some fields of competence (Grundsatzgesetzgebung) - the ETA also regulates that the nine federal provinces have to enact some legislation to safeguard equal treatment in the following areas:

- social protection, including social security and healthcare;
- social advantages;
- education;
- access to and supply of goods and services which are available to the public, including housing.

In an extra section the ETA enacts principle regulations on equal treatment of agricultural and forestry workers – using the same system as for all the other work sphere norms.

For the scope of federal government civil servants, the Federal – Equal Treatment Act – F-ETA (Bundes-Gleichbehandlungsgesetz) was amended and the grounds mentioned in directives 2000/43 and 2000/78 were added to the scope of protection.
So mainly (on Federal level) there is now a separation into one act concerning the material scope and one act dealing with the specialised institutions.
With the last province, Salzburg, implementing necessary legislation in 2006, eventually the Directives are implemented in all the federal provinces.
Concerning material scope, the federal acts are covering all discrimination in employment. The Equal Treatment Act also prohibits discrimination in access to vocational guidance, vocational training, advanced vocational training and retraining outside of employment, and discrimination concerning membership and involvement in an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided for by such organisations. In self-employment the Equal Treatment Act[21] covers only access to self-employment.
For the disability ground, the Act on the Employment of People with Disabilities covers the prohibition of discrimination in the workplace, whereas the Federal Disability Equality Act is directed against the state and contains provisions to safeguard equal access to goods and services within the scope of competences of the Federation and the Federal Disability Act mainly introduces the Ombud for People with Disabilities as a specialised body.
Austrian administrative penal law protects social groups characterised by their 'race', ethnicity, nationality, religion and (since 1997) disability against disadvantage[22] (Art. IX par. 1 lit. 3 Introductory Law to the Administrative Procedures Code 1925; [Einführungsgesetz zu den Verwaltungsverfahrensgesetzen' 1925, EGVG]. Since 'disadvantage' is not in any way restricted to certain fields, also disadvantage in employment and occupation is theoretically covered. But it has never been used for such cases in practice.

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

*a) Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.*
*b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?*

The Equal Treatment Act (as well as § 7b of the Act on the Employment of People with Disabilities) defines the areas where protection against discrimination shall be granted in § 17: *"… in relation to a working relationship nobody must be directly or indirectly discriminated against, especially not in relation to*

1. *access to employment*
2. *pay*
3. *voluntary social benefits*
4. *measures of vocational training, advanced vocational training and retraining*
5. *professional career, especially promotion*
6. *other working conditions*
7. *ending of the working relationship (including dismissal)"*

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

[21] § 18 fig. 3 Equal Treatment Act
[22] Until 1997 the offence covered only public disadvantage. Since 1997 also non-public disadvantage is an offence (Federal law Gazette I 63/1997).

### 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))

*Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national Anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning course?*

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 (außerhalb eines Arbeitsverhältnisses) (§ 18)
The Act on Employment of People with Disabilities (§ 7b) also deals with the whole scope of protection.

The Federal-Equal Treatment Act explicitly protects the access to university without clarifying whether this is defined as vocational training, education or access to a service.

### 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 relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.*

This protection clause was literally taken from the directive and incorporated into the Equal Treatment Act in § 18 fig. 2 and in § 7a Act on Employment of People with Disabilities. This provides for protection on all grounds covered by Directive 2000/78/EC.

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

On federal level § 31 of the Equal Treatment Act restricts the protection to discrimination on the ground of ethnic affiliation. The norm quotes the Directive literally without giving a clear interpretation of the terms used and without clearly defining the addressees of the regulations. Only the explanatory notes try to give hints on the interpretation of the scope.

*In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?*

On provincial level, most provinces explicitly cite the Directive and fully forbid discrimination in all these fields on the grounds of ethnic affiliation, religion or belief, disability, age, sexual orientation and gender. This implementation goes quite far beyond the minimum requirements of the Directives. Only Lower Austrian and Vorarlbergian legislation restrict the protection to ethnic affiliation, whereas Viennese Anti-Discrimination Act[23] also provides for protection against discrimination on the grounds of race and ethnic origin, religion, belief, age and sexual orientation but not for disability and gender.

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

*This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.*

The scope of social advantages is generally covered by the federal legislation (§ 31 Equal Treatment Act). The explanatory notes state that "*among the social advantages in the sense of this law we count for example cost-free or reduced in price use of public transport, price reductions for admission tickets for cultural or other events or price reductions for meals in school for children from low-income families.*"
So in this case the Equal Treatment Act binds the state as well as private actors of all kinds to refrain from discriminatory practices on the ground of ethnic affiliation in regard to social advantages.
The provincial legal acts, which deal with the issue, generally, do not explicitly mention social advantages but protect the broad scope of "social affairs" (Soziales). It must be assumed that also the issues of social advantages are covered by this formulation. Note that – different from the Federal regulations - most provincial acts (except in Lower Austria and Vorarlberg) extend protection also to other grounds of discrimination.

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

*This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

Education is covered by § 31 (1) fig. 3 of the Equal Treatment Act in regard to the wide federal competences. The provision succinctly states that nobody must be directly or indirectly discriminated against on the ground of ethnic affiliation in regard to education. This binds the state and private actors equally. The term education comprises all forms of education including higher and further education. The protection covers both state-run and private educational institutions.

[23] Wiener Antidiskriminierungsgesetz, LGBl. Für Wien, 35/2004 (CELEX Nr. 32000L0043)

It is unclear whether the protection in the area of access to goods and services granted by the Federal Disability Equality Act (§ 2) also comprises Federal education in regard to the ground of disability. If education is regarded as a service available to the public then disability is also covered by its protection in relation to Federal competences.
In regard to policy towards disability and education the last decade has brought a clear shift into the direction of integration not separation. Many schools host so called "Integration classes" where able bodied and pupils with disabilities are educated together. There are additional specialised teachers performing in such classes in order to safeguard progress and tailor made assistance.
On provincial level (with the exception of Lower Austria and Vorarlberg) the legal acts state that organs (civil servants and public contracted workers) under their legislation must refrain from any form of discrimination in regard to education. These general norms seem to be broad enough to cover the protection the Directives demand for.
Segregation in schools is not a topic touched upon intensively by public or scientific discourse in Austria. ECRI finds in its report on Austria that the disadvantaged position of Roma, for the most part non-autochthonous Roma, in education at all levels plays a central role in excluding them from most other areas of public life. ECRI criticises that funds available for local initiatives to improve access of Roma youth to education are reportedly extremely limited.
Segregation is also discussed in relation to primary schools where – especially in Vienna - there are concentrations of pupils (up to 80%) who are not German native speakers in some areas. The main political discourse on this issue is xenophobic. Right-wing parties demand for upper limits of migrant children in schools and for comprehensive (German) language tests before admitting migrant children to school. Only a few schools try to address this situation with innovative and affirmative methods.
Research[24] indicates that 50 per cent 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 per cent of younger Roma children (born after 1985) were doing well pursuing upper secondary and one (born in 1980) even higher education. Most adult Roma suffer from serious education deficits. Education policy towards Roma is concentrating on youth whereas there are very few attempts to remedy the education deficits of adult Roma.
Since the late 1990's some projects and initiatives try to improve the situation of the Roma in Oberwart. There are projects to bring Roma back into employment or self employment and extracurricular private tutoring for Roma pupils.

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

*Does the law distinguish 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)? If so, explain the content of this distinction.*

[24] See for this section: EUMC, Roma and Travellers in public education, report 2006

In this respect the Equal Treatment Act only cites the text of the Directive literally[25]. So it applies to goods and services available to the public only and in regard to ethnic affiliation.
The Federal Disability Equality Act also provides for protection in the area of access to goods and services (§ 2).
The protection provided by the Provinces is generally (again except in Lower Austria and Vorarlberg) also covering the other grounds of the Directive 2000/78/EC. (Vienna is not covering disability)
There is no case law or public debate on the meaning of "available to the public".

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

*To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups.*

In regard to housing the Equal Treatment Act (§ 31/1) quotes the Directive saying "… *regarding access to and supply of goods and services which are available to the public, including housing."*
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 protection is limited to the ground of ethnic affiliation.
The provincial laws use the same quotation from the Directive but in most cases[26] 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 extremely important landlords. For example the Vienna Province is Austria's biggest owner of housing space and the most important landlord in eastern Austria.
Segregated Roma settlements do exist in Austria, especially in Burgenland.
To trace down discrimination of Roma is especially complicated as most Roma living in Austria are primarily perceived by others as "foreigners" and not as Roma in the first place. Only in regions with a longstanding tradition of Roma settlements (in the Burgenland province) a more specific anti-Roma tension is widespread among the population.

The equal treatment legislation does apply to the access to and supply of housing without any legal restrictions or exceptions. It will, nevertheless, be up to the courts to decide whether and how far these provisions also protect from harassment by neighbours.
There is no specific legislation regarding housing segregation.
Generally, housing segregation is not discussed under this topic, but described as a concentration of "foreigners" (meaning migrants regardless of citizenship) in certain areas of larger towns and cities. So, 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.

[25] § 31 (1) fig. 4. Equal Treatment Act (Gleichbehandlungsgesetz)
[26] again: except in Lower Austria and Vorarlberg (Vienna without protection for disability)

# 4. EXCEPTIONS

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

*Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?*

All existing pieces of legislation for the implementation of the Directives quote the Directives in this respect. So for example § 20 (1) of the Equal Treatment Act reads: *"Different treatment in relation to the grounds mentioned in § 17 shall not constitute discrimination where, by reason of the of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."* § 7c(3) of the Act on the Employment of People with Disabilities uses the same quotation.
The explanatory notes state: *"These specific requirements shall be understood in a narrow sense, meaning that they only cover such occupational requirements which are essentially necessary to conduct the specific occupation. The justification refers to the means and the context in or under which the respective occupation has to be carried out. We can in this respect think of a case where for reasons of authenticity an actor or actress affiliated to a certain ethnic group is needed. 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."*

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

*a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

Yes, this exception is transposed inter alia by § 20 (2) Equal Treatment Act, stating: *"In the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. "*
The law does not explicitly mention that this exception should not justify discrimination on another ground. Still, the provision could be interpreted well in line with the Directive. As there is no case law so far, it is just an area to pay attention to, as there might be also a potential breach of the requirements of the Directive.
The explanatory notes state in regard to the scope of this exception: "Also the usage of self-contained forms of enterprises is not exempt from the application of this exception in fulfilment of the legitimate aims of the above mentioned churches and organisations, where ethos is inseparably connected with the object of the enterprise." Especially in rural areas the Catholic Church is a very influential employer. It seems that the lawmakers want to grant the benefit of the exception also to such enterprises as breweries, lumber-mills and hotels.

*b) Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?*

No. It remains to be seen how jurisprudence will handle cases of conflicting rights. Especially cases regarding sexual orientation might easily bring conflict with the ethos of the Roman Catholic and other churches.

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

*a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*
*b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

There is no specific regulation concerning the armed forces, police, prison or emergency services, but the general exceptions of § 13b (3)-(5) of the Federal-Equal Treatment Act [Bundes-Gleichbehandlungsgesetz[27]]. (connected to age). The relevant § 13b (3)–(5) read:
*"(3) A different treatment does not constitute discrimination if*
*1. it is objective and appropriate*
*2. it is justified by a legitimate aim especially from the fields of employment policy, labour market and vocational training.*
*3. the means of achieving that aim are appropriate and necessary.*
*(4) Such differences of treatment may include, among others:*
*1. the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*
*2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*
*3. the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.*
*(5) The fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those 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.*
It seems that the legislator saw no need to mention further exceptions (especially regarding disability) in this respect and relied on the genuine occupational requirement test only.

[27] Das Bundes-Gleichbehandlungsgesetz, BGBl. Nr. 100/1993, zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 65/2004 [Federal-Equal Treatment Act, Federal Law Gazette Nr. 100/1993, as last amended by Federal Law Gazette I Nr. 65/2004]

*c) Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity, or in an entity financed by the State (example: the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done ? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both ?*

Here we have a similar situation like in Italy and Spain. Generally, religious teachers are selected by the respective faith community. This is governed by an international agreement with the Holy See for catholic teachers as well as by national law. In principle, teachers for religion of all officially recognised faith communities are employed by the state (Federal or Provincial) according to the "mission" by the religious community. So the selection and the refusal or withdrawal of the permission to teach lies entirely with the religious communities. The state has to make the teachers redundant or at least cannot use them as teachers of religion without this "missions".
The relevant legal basis for this lies with § 6 of the Act on the Relations of School and Church (for Catholic Faith) [RGBl. Nr. 48/1868]
For all religious faiths:
§ 3 of the Schools Regulation [Schulwesen-Regelung, BGBl Nr. 273/1962]
§3 of the Act on Religious Education [Religionsunterrichtsgesetz, BGBl. Nr. 190/1949]

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

### 4.4 Nationality discrimination (Art. 3(2)

*Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).*
*a) How does national law treat nationality discrimination? Does this include stateless status? What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?*
*Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well) ?*

*b) Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

The Equal Treatment Act states in §§ 17 (2) and 31 (2) that the principle of equal treatment *"does not cover difference of treatment based on citizenship* [author's remark: equivalent with nationality in this context] *as well as the treatment which arises from the legal status of the third-country nationals or stateless persons."*
The explanatory notes to the Equal Treatment Act state: *"This provision shall clarify that different treatment based on citizenship is not prohibited when it is based on objective reasons, but and not where racist behaviour is the aim. This exception can not be used to legitimate discriminations on the grounds covered in this act. The prohibition of discrimination also protects third country nationals. Provisions regulating the entrance and the residence of third country nationals as well as their access to employment and self employment are not affected by the new regulations."*

In any way uncertain is the relation between these provisions in the Equal Treatment Act and the older provision of Art. IX para. 1 fig. 3 of the Introductory Provisions to the Code of Administrative Procedure, Federal law Gazette 50/1991 as last amended by Federal law Gazette I Nr. 63/1997 [Art. IX Abs. 1 Z, 3 EGVG, Einführungsgesetz zu den Verwaltungsverfahrensgesetzen, BGBl 50/1991 idF. BGBl I Nr. 63/1997] which states an administrative penal sanction for discrimination of a person due to his/her race, skin-colour, national or ethnic origin, religious faith or disability. The interpretation of the term national origin [nationale Herkunft] is seen by many experts in relation to the ICERD and is generally not seen as protection against discrimination on the basis of citizenship.

The issue of protection against discrimination on the basis of nationality or citizenship is crucial for the Austrian situation as most of the racist discourse is not labelled with terms like race or ethnic origin, but the scapegoats and concept of the enemies is to a very large extent about "foreigners", "asylum seekers", "asylum-frauds". Especially discriminatory small-ads, advertising for jobs or housing regularly demand for "Austrians", "genuine Austrians" or state "no foreigners". These cases will be rather difficult to deal with in courts if the courts will interpret the exemption for the nationality ground broadly. The first judgement on that issue (see above case Hayet B. vs. Ferdinand S.) was very clear in stating that "we do not sell to foreigners" was indeed racial discrimination and not covered by the nationality exception. This discrimination was obviously seen as a direct one.

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

*Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.*

*a) Does national law permit an employer to provide benefits that are limited to those employees who are married?*

*b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

The explanatory notes to the Equal Treatment Act state*: "The main target of the law is to safeguard protection of gay and lesbian workers from discrimination. Discrimination of homosexual partnerships compared to unmarried heterosexual partnerships is prohibited; voluntary social benefits are to be granted to all partnerships or only to married couples. Privileges for marriage remain permissible. This results from Recital 22 of the Framework Directive stating that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon."* So preferable treatment for married workers remains permissible while unmarried heterosexuals may not be put on advantage in comparison to homosexuals.
There is (still) no legally recognised partnership for same-sex couples in Austria.

### 4.6 Health and safety (Art. 7(2) Directive 2000/78)

*Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*
*Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?*

In regard to the exception for "genuine occupational requirements" the explanatory notes to the Equal Treatment Act[28] 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."* So this exception is not restricted to the ground of disability as permitted by the Directive, but valid for all the grounds dealt with by the Equal Treatment Act but it always has to stand the test to be a "genuine occupational requirement".

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

#### 4.7.1 Direct discrimination

a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*
b) *Does national law 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 [Bundes-Gleichbehandlungsgesetz[29]] and in §§ 20 (3)-(5) of the Equal Treatment Act [Gleichbehandlungsgesetz[30]]
*"(3) A different treatment does not constitute discrimination if*
*1. it is objective and appropriate*
*2. it is justified by a legitimate aim especially from the fields of employment policy, labour market and vocational training.*
*3. the means of achieving that aim are appropriate and necessary.*
*(4) Such differences of treatment may include, among others:*
*1. the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*
*2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*
*3. the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.*

[28] 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien, p. 16
[29] Das Bundes-Gleichbehandlungsgesetz, BGBl. Nr. 100/1993, zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 65/2004 [Federal-Equal Treatment Act, Federal Law Gazette Nr. 100/1993, as last amended by Federal Law Gazette I Nr. 65/2004]
[30] Gleichbehandlungsgesetz, BGBl I Nr. 66/2004 [Federal Law Gazette 66/2004]

*(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 these provisions are literally transferred from the Directive and the courts have decided no cases we must assume that the implementation is in principle in line with the Directive. As the text contain a lot of rather ambiguous terms and leaves a broad scope open for interpretation, the case law will show us the factual scope and limits of these exceptions.

c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?*

Yes, § 20(5) of the Equal Treatment Act is literally copying the possibility provided by Art. 6(2) of Directive 2000/78/EC.

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

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

*Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.*

There are frequently positive action measures to support younger or older people and people with caring responsibilities in regard to their opportunities on the labour market. There is a rather wide range of different governmental policies in this respect. There are tax advantages for single-parents educators, and special programs to promote the employment of younger or older workers. These policies are mainly coordinated and financed by the Labour Market Service [Arbeitsmarktservice – AMS]. Such regulations and programs now have to stand the test stipulated in the above mentioned §§ 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

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?*

Yes, §§ 13b (3)-(4) of the Federal-Equal Treatment Act and §§ 20 (3)-(4) of the Equal Treatment Act state this clearly.

### 4.7.4 Retirement

*In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).*

*a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*
*b) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*
*c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?*
*d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*
*e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?*

*For these above questions, please indicate whether the ages are different for women and men.'*

Still the general retirement (pensionable) age is 65 years for male and 60 years for female workers in the private sector, for civil servants it is for both sexes at 61,5 years. These periods will be harmonised gradually until 2024 when the general retirement age will be 65 years[31]. A very vague political discussion on the possibility of increasing the general retirement age has started recently without any immediate conclusions or effects. The requirements of Directive 2000/78 did not influence the discussion.
Workers in the private sector are not required to retire at the pensionable age mentioned above and cannot be forced into retirement. Only for older people who are unemployed, special regulations force them to change into the pension system. A (minimum) 62-year-old worker, who has lost or is losing his/her job, can stay unemployed for one more year. Then if he/she has not found a new job, the forced pension starts. Age is not a permissible reason for dismissal and there is no upper age limit for protection against unfair dismissal.
The possibility to retire civil servants against their will was declared unconstitutional by the Constitutional Court in 2003. But still civil servants can ex officio be forced to retire after reaching an age of 738 months (=61,5 years) if there are important official reasons (no legal definition of these reasons provided) for that. Age as such is not deemed a permissible reason.

[31] Budgetbegleitgesetz 2003,BGBl 71/2003, [Law Accompanying the Budget 2003, Federal Law Gazette 71/2003]

### 4.7.5 Redundancy

*a) Does national law permit 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. Age might be taken into account as there is a special provision declaring "socially unfair" [sozialwidrige] dismissals illegitimate.
§ 105 (3) Z 2. Arbeitsverfassungsgesetz, ArbV, BGBl Nr. 22/1974, idF. BGBl I Nr. 4/2006 [§ 105 (3) fig. 2 Labour Constitution Law, Federal law Gazette Nr. 22/1974, as last amended by Federal Law Gazette I Nr. 4/2006] 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."*

*c) If national law provides compensation for redundancy, is this affected by the age of the worker?*

No, usually all forms of compensation refer to seniority but not to age. The Equal Treatment Act now clarifies that age as such must not be a criterion for different treatment also in this respect.

### 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)

*Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?*

No provision explicitly refers to these issues.
Only in regard to the exception for "*genuine occupational requirements*" the explanatory notes to the Equal Treatment Act[32] 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."* So this exception is not restricted to some grounds but valid for all the grounds dealt with by the Equal Treatment Act.

### 4.9 Any other exceptions

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.*

All the pieces of legislation strictly stick to the exceptions stated in the Directives.

[32] 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien, p. 16

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

*a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic*

*b) Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted., classifying them into broad social policy measures, quotas, ~~reasonable accommodation for people with disabilities~~ or preferential treatment narrowly tailored.*

*Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.*

Though the legislation now allows positive measures on all protected grounds of discrimination, in fact, positive measures do exist in Austria for recognised national minorities, disabled persons and women. As the gender aspect is not part of this compilation, I will shortly describe the situation concerning the other two grounds. So far, there is no discussion on further positive measures.

*National minorities*

Protection of recognized national minorities (Volksgruppen: Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma) is provided according to the state treaties of 1919 and 1955, their legal status and rights is guaranteed by various constitutional provisions and partly implemented by the National Minorities Act of 1976 (Volksgruppengesetz)[33].

A national minority is defined by the National Minorities Act (Volksgruppengesetz) as an ethnic group that comprises Austrian citizens with a non-German mother tongue and a common autonomous cultural heritage who have their residence and home in a part of the Austrian federal territory. Everyone is free to declare his/her affiliation with an ethnic group. The law explicitly states that no one belonging to an ethnic group must be put at a disadvantage as a result of the assertion or non-assertion of their rights as members of that ethnic group. Moreover, nobody can be forced to provide evidence of his or her affiliation with an ethnic group. The National Minorities Act in its § 8f provides for specific measures to ensure the continuing existence of the ethnic minority group, their characteristics and rights by means of financial contribution, education and assistance.

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

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

[33] Bundesgesetz über die Rechtsstellung von Volksgruppen in Österreich. BGBl. 396/1976, last amended by BGBl. I Nr. 35/2002.

Research[34] indicates that Roma born before 1985 suffer from serious education deficits whereas the educational situation of younger Roma seems to improve considerably.
In 1993, the "Romani Project" a co-operative effort of the Roma community and the Linguistics Department of Graz University developed writing conventions and teaching material for Roman (the Burgenland variety of the Roma language). An amendment of the Burgenland Minority School Act laid the legal basis for the language to be taught in schools in the federal state of Burgenland. Since 1999, Roman is offered as a voluntary subject for groups of at least five pupils. Classes are held jointly by a non-Roma school teacher and a language competent Romani. In the school year 2004/2005, classes were held in two primary schools and one main general secondary school. In some Vienna schools with a high concentration of immigrant Roma pupils, Roma teaching assistants were assigned to support teachers, pupils, and parents and facilitate interaction between Roma and non-Roma since 2000.
Following a racist bomb attack in February 1995, which had killed four Roma men from the Oberwart Roma settlement, the efforts have been significantly increased to improve the general situation of these Roma: Specific vocational training projects and general counselling services were installed and improved and the whole infrastructure and the housing in the Roma settlement were improved.
Nevertheless, these activities followed a mere welfare approach not an anti-discrimination approach. The Roma were left – following their own wish – in their segregated settlement outside the borders of the city of Oberwart. An explanation for this wish to stay cannot be found in reports, but maybe the history of the Oberwart Roma might help to understand. As early as under Empress Maria Theresia they have been forcefully settled and resettled and under the Nazi-Regime most of them were transferred and killed in concentration camps. So maybe the idea of "being resettled" might give rise to considerable fear.
*Disability*
In Austria, measures specifically promoting employment of disabled people are closely related to social or labour law:

- Measures are associated with *social security law* if they are accorded to persons participating in a system of public insurance based on contributions and administered by non-state legal entities (acting under state control). For instance: Legal entities administering pension law (*Pensionsversicherungsträger*) are authorised to provide, *inter alia*, vocational rehabilitation (*berufliche Rehabilitation*). When persons covered by the insurance loose their earning capacity on account of disability (caused by defined risks), the entities may, at their discretion, organise or fund training courses or grant loans or other assistance in order to ensure that the persons are re-employed by their former or a different employer. The measures are (at least partly) funded by contributions of employees and employers. Similar provisions apply in case of industrial accidents.

[34] See for this section: EUMC, Roma and Travellers in public education, report 2006

- Measures are associated with *compensation law* (*Versorgungsrecht*) if they have their basis in laws addressing disabled people of defined classes, such as invalids of World Wars I and II (*Kriegsopferversorgung*), victims of Nazi persecution (*Opferfürsorge*), people disabled on account of military service (*Heeresversorgung*), or victims of crimes (*Verbrechensopferversorgung*). When disability is related to one of the defined causes, the persons are entitled not only to invalidity pensions and medical treatment, but also to vocational and social rehabilitation (*berufliche und soziale Maßnahmen*), including vocational training with a view to re-gaining earning capacity and employment. The body administering the law may also grant payments in order to compensate either the employer or the disabled person for the loss in productivity (*wage subsidies*). The measures are not means-tested and financed by the *Bund* (federal government).
- Measures are linked with *public assistance law* on state level (*Sozialhilferecht, Behindertenrecht*) if disabled persons are entitled neither to insurance benefits nor to benefits provided for by compensation law, yet in need and not able to take care of themselves. Based on a means-test, all states arrange for "assistance for people with disabilities" (*Hilfe für behinderte Menschen*), including vocational integration (*berufliche Eingliederung*) and sheltered workshops (*geschützte Werkstätten*). Vocational integration encompasses measures enabling disabled people to find suitable employment (training, re-training, or work trial, each in close co-operation with the employment agencies). Sheltered workshops, again, are designed for people with disabilities who — on account of their disability — cannot (or can no longer) compete with non-disabled people. Employment in a sheltered workshop is supposed to provide specially equipped working places or master-tailored working conditions with a view to optimising individual productivity (if need be: on the basis of a state subsidy). Measures under public assistance law are funded by the *Länder* (states).
- Measures organised by the employment agencies (*Arbeitsmarktservice*) under the *AMSG 1994* are closely related to *unemployment insurance* and *labour law*. The purpose of these measures is to prevent or shorten unemployment and to help to find employment. Employment agencies are explicitly required by law to pay special attention to people with disabilities when rendering their services. Employment agencies may also grant payments (*Beihilfen*) with a view to overcoming the costs for taking up employment, promoting training or re-training, or integrating people in the labour market. Provisions on payments (*Beihilfen*) are general in terms; employment agencies are not required treat disabled people favourably. Measures under the *AMSG 1994* are not means-tested and funded by contributions of employers and employees, by the Federation, and by the European Social Fund.
- The most pertinent legal source on employment of people with disabilities is, however, the Behinderteneinstellungsgesetz (Act on the Employment of People with Disabilities). The Act on the Employment of People with Disabilities imposes (upon employers) a duty to employ disabled people (according to a quota system), confers protection against dismissal, and arranges for grants or loans. The Act on the Employment of People with Disabilities applies to employment in private sectors and employment in public services:

- Under § 1(1) *Act on the Employment of People with Disabilities*, all employers employing 25 employees or more in Austria are obliged to employ at least 1 person with disabilities for each group of 25 employees (the ratio, therefore, being 1:25).[35] People classify as employees if they are gainfully employed and subjected to personal and economic dependency or subordination, with the exception of apprentices, yet including home workers and trainees.[36]
- The duty to employ does not relate to all people with disabilities. The duty only relates to disabled people who qualify under a certain standard: To qualify under the *Act on the Employment of People with Disabilities*, disabled people must be Austrian nationals or nationals of one of the Member States of the European Economic Area; third country nationals only qualify if they were granted asylum.[37] Furthermore, the degree of disability must reach at least 50 percent.[38]
- If employers do not comply with their duty under § 1(1) *Act on the Employment of People with Disabilities*, they are obliged to pay a fee (*Ausgleichstaxe*). The fee amounts to 209 Euro (year 2007) per month and person that ought to be employed.[39] These fees go to a special fund designated to sponsor measures promoting the employment of people with disabilities (*Ausgleichstaxfonds*).[40] The Minister for Social Affairs administers the fund. This possible exception is widely used by both private companies and public authority. People seem to prefer paying the tax to employing people with disabilities.
- Employers who employ (or are willing to employ) people with disabilities of the relevant class may qualify for support under § 6(2) *Act on the Employment of People with Disabilities*. Allowances or loans granted under § 6(2) *Act on the Employment of People with Disabilities* aim at (a) facilitating technical appliances making the working place suitable to people with disabilities, (b) promoting working or training places suitable to people with disabilities, (c) subsidising the wages of disabled employees or trainees, (d) alleviating the costs for personal assistance (*Arbeitsassistenz*), (e) facilitating training, re-training, or work trial, (f) contributing to the costs linked with taking up employment, or (g) promoting self-employment of people with disabilities. The measures are funded by the *Ausgleichstaxfonds*.

[35] For certain economic sectors, the Secretary of State for Social Security may, by regulation, increase the relevant ratio from 1:25 to up to 1:40; § 1(2) *Behinderteneinstellungsgesetz* idF. BGBl. I Nr. 71/2003 [Act on the Employment of People with Disabilities 1969, as last amended by Fedeeral Law Gazette I Nr. 71/2003]

[36] § 4(1) *Behinderteneinstellungsgesetz.*

[37] § 2(1) *Behinderteneinstellungsgesetz.*

[38] § 2(1) *Behinderteneinstellungsgesetz.* The "degree of disability" is essentially a medical concept first employed in the context of *Kriegsopferversorgung* (war veterans). Regulations under the *KOVG 1957* associate a list of impairments with a corresponding list of degrees of disability. According to these regulations, the loss of the right hand, for instance, equals a degree of disability of 50% if the person concerned is right-handed. For further details see *Ernst/Haller* 2000 p. 577. This concept is also applied in the context of *Behinderteneinstellungsgesetz*.

[39] § 9(2) *Behinderteneinstellungsgesetz.*

[40] § 10 *Behinderteneinstellungsgesetz.*

- Protection against dismissal under the *Act on the Employment of People with Disabilities* is twofold. Firstly: It is proscribed by law that the termination of the contract takes effect only after a notice period of at least 4 weeks has passed.[41] Secondly: Dismissal may be pronounced only if the Disability Board, established with the *Bundesamt für Soziales und Behindertenwesen* (federal office for social affairs and matters relating to people with disabilities) has given prior consent to the dismissal.[42] When deciding upon dismissal, the panel has to weigh the employer's interests militating for dismissal against the interests of the disabled person, the main question being: Can the employer reasonably be expected to carry on with employment?
- With effect from January 1, 2001, the Austrian government launched an additional programme on employment of people with disabilities (worth 1 billion ATS = 72,7 millions EUR), financed mainly by the Bund. The programme concentrates on the employment of young people with disabilities, disabled people aged 50 or more, and disabled people whose employment proves especially difficult. The programme arranges for a wide variety of measures, such as wage subsidies, job coaching, vocational counselling in the framework of supported employment, training, creation of jobs, or incentives to self-employment. The programme and other programmes were eventually included into a nation-wide initiative to promote employment of people with disabilities and re-launched in 2003/04. Measures relating to social security law, compensation law or public assistance law are accorded by administrative agencies on the basis of individual entitlements. Disabled people meeting the legal requirements may claim a "right", namely the right to be granted the benefit or, at least, the right not to be denied the benefit arbitrarily. Measures under the AMSG 1994, the Act on the Employment of People with Disabilities or the special programme launched in 2001, however, are not rights-based. Neither people with disabilities nor employers do have standing when applying for grants, loans, or wage subsidies. They cannot appeal to court for judicial review. While all these measures are — from a systematic point of view — connected with social or labour law, they may also be coined "positive action". By and large, these measures are exclusively designed for disabled people in order to facilitate employment (benign intent), and the measures do — in fact — serve this purpose (benign effect). Or, to cite Article 7 of the Framework Directive 2000, the measures are "specific measures to prevent or compensate for disadvantages linked to" disability.

[41] § 8(1) *Behinderteneinstellungsgesetz.*
[42] § 8(2) *Behinderteneinstellungsgesetz.*

# 6. REMEDIES AND ENFORCEMENT

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

*a) What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?*
*b) Are these binding or non-binding?*
*c) Can a person bring a case after the employment relationship has ended?*

*In relation to each, please note whether there are different procedures for employment in the private and public sectors.*
*In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?*
*Are there available statistics on the number of cases related to discrimination brought to justice ? If so, please provide recent data.*

With only a few exceptions the generally used procedures will be civil law procedures or employment law procedures.
Administrative penal law is only a remedy against discriminatory advertisement.
The decisions of the civil and labour courts are the only legally binding decisions as the procedures at the Equal Treatment Commission only result in a non-binding "opinion" [Gutachten, Einzelfallprüfung]. However, the Equal Treatment Act states in its § 61 that courts have to take these opinions into consideration and that they have to give clear reasons in case they come to a dissenting decision.
For the area of public employment there exists a different treatment of civil servants [Beamte] and contractual employees [Vertragsbedienstete]. While the latter have to bring their claims to the courts, civil servants have to claim their rights before the public office in charge of these issues – so they have to start an administrative procedure against their employer. Claims against (individual) harassers are always to be brought before a court.
All claims are subject to strict time limits. The normal time limit for bringing civil-law claims is three years, whereas dismissals have to be challenged in court within two weeks.
The legal situation regarding discrimination is very complicated and the laws are not intelligible for people without legal education. So also in cases where it is not compulsory to be represented by a lawyer, it seems necessary to have access to legal aid. The powers of the National Equality Body are restricted to help in the procedure before the Equal Treatment Commission, but their help ends at the doors of the courts. Also NGOs cannot provide for a complete relief, as their procedural rights are limited to side intervention at court. In labour law cases the trade unions or the Chamber of Labour can grant their members a complete protection so that they do not have to fear any costs.
For all claims based on the disability ground the legislation demands a compulsory attempt to mediate the conflict. The local outlets of the Federal Social Service [Bundessozialamt] are assigned with the task to conduct these conciliation procedures. Professional mediators can be provided. Claimants have to undergo such a procedure and can only access the courts after the conciliation process has failed within three months. This process has been the most used tool (133 cases handled in 2007) and seems to be quite successful in achieving settlements[43].

[43] Find more details about these cases under section 7. specialised bodies

One great obstacle for the next few years is the absence of an established framework of case law – especially regarding the amount of compensation of non-pecuniary damages. As the costs of civil law procedures are related to the amount in dispute this is a crucial question and it bears a lot of risks.

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

*Please list the ways in which associations may engage in judicial or other procedures*
*a) in support of a complainant*
*b) on behalf of one or more complaints (please indicate if class actions are possible)*

In court cases, associations, organisations or other legal entities may engage on behalf of their clients within the scope of the directive in proceedings, where no representation through an attorney is compulsory (Anwaltszwang). This is compulsory for most civil procedures at court and before the courts of public law so there is extremely few place for NGO representation in civil law courts but more at lower levels of administrative proceedings. In these cases associations, organisations etc. as other physical persons can represent parties in so far as these parties have formally mandated them. The Equal Treatment Act expressly allows NGOs to represent alleged victims of discrimination in the rather informal proceedings before the Equal Treatment Commission; nevertheless this is not a special right, as every adult physical person is allowed to do the same. The **Federal-Equal Treatment Act** does not foresee any special third party intervention.
According to the **Equal Treatment Act**, third party intervention is only allowed for one specific NGO ('**Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern**' [Litigation Association of NGOs Against Discrimination]) in the courts (§. 62 GIBG [§ 62 Equal Treatment Act]). The Litigation Association is a body set up by several NGOs dealing with different grounds of discrimination. This association is open for all specialised NGOs to join but all NGOs which are not members of the Litigation Association are not granted any special procedural rights: If they want to use the tool of legal intervention, they have – like all other legal parties - to prove their legal interest in the case. The Litigation Association is an NGO-tool to safeguard best quality counsel and legal representation for victims of discrimination. The form of the intervention is rather limited by law. It only allows the Association to intervene in court proceedings if the plaintiff wants so. This right to intervention as a third party in support of the plaintiff is a rather weak construction as it generally does not allow taking over costs and risks from the plaintiff, but needs action by the victim of discrimination first and the right to independent action or remedies is not included.
For the scope of discrimination on the ground of disability the NGO "**Austrian national Council of Disabled Persons**" (Österreichische Arbeitsgemeinschaft für Rehabilitation – ÖAR) has been given a similar position in regard to the right of intervention in court cases as well as a **restricted** position to file a **class action** [§ 13 Federal Disability Equality Act] on behalf of an unidentifiable group of affected persons.

On provincial level, the **Viennese Anti-Discrimination Act** [§ 4 (2)], the **Lower Austrian Anti-Discrimination Act** [§ 18(3)], the **Upper Austrian Anti-Discrimination Act** [§ 8(3)], the **Salzburgian Equal Treatment Act** [§ 29(4)], **Styrian Equal Treatment Act** [§ 33(3)] state that the plaintiff can use the help of any legitimate non-profit organisation to be represented in all forms of legal proceedings under this act, as long as the organisations aims include the safeguarding of the adherence of the two EU-Anti-Discrimination Directives. 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)] are weaker in this point they only give the right to intervene [Nebenintervention] to associations whose statutes state their interest in the adherence of the prohibition of discrimination.
In penal administrative proceedings there is no legal standing for interest groups (indeed not even legal standing for the victim of discrimination itself) at all. In some cases of discriminatory advertising the National Equality Body [Gleichbehandlungsanwaltschaft] has a legal standing and can oppose to the abatement of the proceedings[44].
Class actions (Verbandsklagen) are not possible in the area of discrimination in Austria (with a limited exception for the disability ground, see above), they do exist in the area of consumer protection (Konsumentenschutzgesetz).

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

*Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).*

The amended federal acts lower the burden of proof for the plaintiff - but in a way that is different from the way stated in the directives. The burden of proof does not completely switch over to the respondent, when the plaintiff establishes facts from which it may be presumed that there has been direct or indirect **discrimination**. The law states that the respondent has to prove that "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 (in cases of indirect discrimination)". In cases concerning **harassment**, the respondent has to prove that – taking into account all the circumstances – it is more likely that the facts established by the respondent are true. So in any case the respondent is obliged to prove the likelihood of established facts.
For cases of **victimisation** the same burden of proof provision applies.
On provincial level, a full shift of the burden of proof applies, stating that in court the plaintiff only has to establish facts about the discrimination or victimisation and then the respondent has to prove that no infringement of the prohibition of discrimination or victimisation has occurred.

[44] See § 24 (3) Gleichbehandlungsgesetz [Equal Treatment Act], *„ In cases which were induced by the Office for Equal Treatment, the Office has a legal standing in the administrative penal proceeding. The Office has the right to appeal against penal decisions."*

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

*What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, ➔ or person that help the victim of discrimination to present a complaint)*

The Equal Treatment Act as well as the Act on the Employment of People with Disabilities state that any adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment is forbidden (**victimisation**). Victimisation in the workplace sphere (defined as 'dismissal, notice of quit and any other detriment in reaction to a complaint or to the opening of proceedings enforcing the principle of equality') is prohibited in all bills/drafts, and all of them cover also other employees acting as witnesses or supporting the complaint of a victim. 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.
Also for cases of victimisation the shift of the burden of proof is provided.
The federal law does not state any consequences for the violation of this rule for the scope of the "race ground" outside the workplace-sphere. Also for victimisation that does not consist of dismissal the law does not provide for an explicit legal consequence. The consequences might be found by way of analogy but they are not clearly stated.

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

*a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*
*b) Is there any ceiling on the maximum amount of compensation that can be awarded?*
*c) Is there any information available concerning:*
- *the average amount of compensation available to victims*
- *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?*

None of the bills 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 advertisement; the maximum penalty however is EUR 360 and punishment for employers is excluded for first time offenders (admonition only). It must be doubted that this level of sanction meets the Directive's requirement of 'effective, proportionate and dissuasive' sanctions.
All of the implementing laws provide for civil sanctions, and – as a principle – a victim of discrimination can choose between undoing of the act of discrimination or compensation of pecuniary damage (in the case of non-recruitment or non-promotion: only damage claim), with in both cases the option to claim non-pecuniary damage. So § 26 (3) Equal Treatment Act states that the worker who was deprived of social benefits can choose either to get the respective benefits or compensation for the damage, both possibilities comprise the possibility to get compensation for non-pecuniary damages.

This basic rule is subject to the following exceptions:
In the case of termination of employment a victim can only challenge the termination without the option to accept the termination and claim non-pecuniary damages.[45] As many victims, for good reasons, refuse to go back to a discriminatory employer, discrimination of such victims would be left widely unsanctioned (no reinstatement, no compensation). This (and the absence of a claim to non-pecuniary damage if reinstated) is not a full implementation of the directives.

According to the Equal Treatment Act compensation for non-pecuniary damage, in the case of non-recruitment and non-promotion, is limited to a maximum of EUR 500 if the employer proves that the victim would not have been recruited or not promoted if no discrimination had occurred (so that discrimination did not have the effect of non-promotion or non-recruitment but caused only exclusion from the selection procedure). In the light of the case law of the European Court of Justice[46] this restriction[47] might be questionable. A maximum amount of EUR 500 can only be considered purely nominal compensation, while we have to take into account that general Austrian civil and labour law does not provide for similar non-pecuniary damage claims.
The mere concept of punitive damages is unknown to the Austrian legislation, while from a dogmatic point of view the minimum non-pecuniary damages in cases of harassment (EUR 400 minimum compensation) can be seen as of a punitive nature or having a punitive element as the court does not have to appraise the value of the concrete damage in case only the minimum is claimed. Due to the low amount of this minimum this is, nevertheless, a mainly academic or dogmatic issue.
The case law on this issue (2 cases!) is not too helpful but underlines the practical risk for plaintiffs. In one case [Landesgericht SalzburgRef. Nr. 18Cga120/05t, date: 14.07.2006, sexual orientation, harassment] the plaintiff just claimed the minimum compensation of 400 Euros of both harassers. The court stated that he would have had a right to demand more.

In the second case [LG for ZRS Wien, Ref. Nr. 35R68/07w (35R104/07i, date: 30.03.2007, ethnic affiliation, discrimination, harassment] the court of second instance was needed to raise the amount of compensation from originally 400 Euros to 800 Euros in a case involving clear harassment and physical attack. In this case, the plaintiff had claimed 4000 Euros. For losing the case in regard to 3200 Euros, she had to pay the full cost of the proceeding which would have exceeded the amount awarded to her if her representation and risk would not have been taken over by the Litigation Association of NGOs against Discrimination. In this case, the appeal court argued with a rather strange connection to the settled case law of Austrian courts awarding compensation for unjust detention [100 Euros per day]. It argued that the effect of this discrimination was to be considered equal to eight days of unjust detention without giving further reasoning on the issue.

In case the discrimination proves crucial for non-employment, the Equal Treatment Act states a minimum compensation of one month's salary[48].

[45] § 26 (7) Equal Treatment Act
[46] European Court of Justice, 22 April 1997, Case C-180/95, *Nils Draehmpaehl v. Urania Immobilienservice OHG* [1997] ECR I-2195, paras. 25 and 29.
[47] European Court of Justice, 10 April 1984, Case 14/83, *Von Colson and Karmann v. Land Nordrhein-Westfalen* [1984] ECR 1891, paras. 23 and 24.
[48] § 26 (1) Equal Treatment Act

In some areas the legislation lacks any sanction. This is the case for discrimination of university-students [apart from access to university], for victimization of employees in both federal acts.

The Equal Treatment Act establishes a very effective sanction for companies not observing the prohibition of discrimination: exclusion from assistance granted by the Federation[49] but it does not extend the exclusion to public procurement, what would render the effectiveness of this sanction perfect.[50]

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

[49] § 28 Equal Treatment Act

[50] See 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). See also the Addendum at the start of this Chapter.

## 7. SPECIALISED BODIES

*Body for the promotion of equal treatment (Article 13 Directive 2000/43)*
*When answering this question if there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.*

*a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?*

The Act on the Equal Treatment Commission and the National Equality Body establishes an ***Equal Treatment Commission*** and the ***National Equality Body***. In transposing Art. 13 of the Race Equality Directive, Austria extended the functions of the present Equal Treatment Commission and the Ombud for Equal Employment Opportunities to deal with discrimination on the ground of gender and on **all other grounds** mentioned in art 13 ECT **except disability**. In March 2005 the two new Ombuds for the National Equality Body were appointed and took office in the Ministry of Health and Women. In late April 2005 two chairpersons for new senates within the Equal Treatment Commission were appointed by the Minister. The findings on general issues and cases are published in an anonymous and condensed form. [http://www.frauen.bka.gv.at/site/5542/default.aspx]
For the ground of **disability** a separate structure has been set up since 1.1.2006. The ***Ombud for Persons with Disabilities*** (Behindertenanwalt) has been appointed by the Minister of Social Security, Generations and Consumer Protection and is responsible for advice and support of people with disabilities. The Ombud can conduct surveys on the situation of people with disabilities and give and publish statements and opinions on this issue. For Disability, there is no body equivalent to the Equal Treatment Commission, but a compulsory attempt to settle individual cases in a joint dispute resolution process before the ***Federal Social Service*** (Bundessozialamt). This form of despute resolution turned out to be substantially effective and used by people affected. A first report [http://www.gleichundgleich.gv.at/cms/gleich/dokument.html?channel=CH0655&document=CMS1150787940837 ] shows that end of October 2007 there have been 243 applications for joint dispute resolution since January 2006. In 84 cases the matter was settled, in 91 cases the parties did not reach a settlement, 33 applications have been withdrawn and 35 cases were still open. 62% of the cases dealt with the workplace sphere and 38% with the protected areas outside employment.
The reason for withdrawal of the application was in the majority of cases referred to a settlement reached outside the formal setting at the Federal Social Service.
In only one single case professional mediation was required, all other case were dealt with by the Federal Social Service.

**Provincial bodies**

The provinces are obliged to set up specialised bodies to promote equal treatment in their own field of competence. The provincial bodies are therefore not linked to each other and have no shared responsibilities with the federal structures.

In **Vienna**, an "***Office for the battle against Discrimination***" (Stelle zur Bekämpfung von Diskriminierungen) was set up. The position was set up independently by Provincial Constitutional Law[51]. The duties are not very broad – it is mainly a counselling service and a vague possibility for mediating conflict as well as writing reports and studies. This tasks were given to a already independent body of the Vienna Province, the so called "Bedienstetenschutzbeauftragter" [***Commissioner for the Safety of Employees***], a position that had nothing to do with issues of discrimination before but was responsible for safety issues concerning the employees of the City of Vienna.

**Styria** sets up a range of bodies for Equal Treatment: ***The Styrian Equal Treatment Commission***, the ***Commissioner for Equal Treatment***[52] and ***Contact Persons***. The Commissions main task is to give statements in individual cases of alleged discrimination (in connection to employment with the province) and to comment on specific legal drafts. The Commissioner(s) for Equal Treatment are mainly counselling bodies and they are entitled to issue independent reports and initiate disciplinary proceedings. The Contact Persons are established in all major municipalities and offices of the Styrian Government. Their task is mainly to counsel individual civil servants.

The Commissioners and the contact Persons are independent in fulfilling their functions; a Provincial Constitutional Provision safeguards this[53].

**Carinthia** has set up an ***Anti-Discrimination Office***[54] [Antidiskriminierungsstelle] at the section for civil law within the Office of the Provincial Government. This office entitled to support (counsel) victims of discrimination and to issue recommendations as well as to conduct independent surveys on discrimination. This body is not independent.

**Lower Austria** has set up up a ***Lower Austrian Commission for Equal Treatment***[55] [Niederösterreichische Gleichbehandlungskommission] whose main tasks are to give recommendations in individual cases of alleged discrimination (in connection to employment with the province) and to comment on specific legal drafts. The chairperson of the Commission is at the same time ***the Lower Austrian Commissioner for Equal Treatment*** [Niederösterreichische/r Gleichbehandlungsbeauftragte/r] and heads the ***Anti-Discrimination Office*** [Niederösterreichische Antidiskriminierungsstelle]. This Commissioner is mainly a counselling body with powers to initiate proceedings. The Office can conduct surveys and issue reports. Lastly ***Coordinators for Equal Treatment and Promotion of Women*** are established in all major municipalities and offices of the provincial government. Their task is mainly to counsel individual civil servants and notify grievances to the Commissioner. The members of the Commission and the Commissioner are independent in fulfilling their functions; this is safeguarded by a Provincial Constitutional Provision.

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

[51] see § 7 (3) of the Viennese Anti-Discrimination Act [Wiener Antidiskriminierungsgesetz]
[52] and a separate Commissioner fort he City of Graz
[53] see § 44 of the Styrian Equal Treatment Act [Steiermärkisches Gleichbehandlungsgesetz]
[54] see §§ 32, 33 of the Carinthian Anti-Discrimination Act [Kärntner Antidiskriminierungsgesetz]
[55] see §§ 11 and 12 of the Lower Austrian Equal Treatment Act [Niederösterreichisches Gleichbehandlungsgesetz]

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

**Salzburg** has set up five ***Commissions for Equal Treatment*** whose main tasks are to issue expert opinions and give recommendations in individual cases of alleged discrimination (in connection to different areas of employment with the province) and to comment on specific legal drafts. A ***Commissioner for Equal Treatment*** is mainly set up as a counselling body with powers to initiate proceedings. Additionally, for the City of Salzburg a Commissioner for Equal Treatment was established within the Magistrate with similar duties and powers referring to equality affairs on municipality level. These Commissioners can conduct surveys and issue reports. Lastly ***Coordinators for Equal Treatment and Promotion of Women*** are established in all offices of the provincial government.. Their task is mainly to counsel individual civil servants and notify grievances to the Commissioner. The members of the Commissions and the Commissioners as well as the Coordinators are independent in fulfilling their functions; this is safeguarded by a Provincial Constitutional Provision.
**Tyrol** appointed a ***Commissioner for Equal Treatment***. It is mainly set up as a counselling body with powers to initiate proceedings and conciliation mechanisms. The Commissioner can also conduct surveys and issue reports. Independence is safeguarded by a Provincial Constitutional Provision.

**Vorarlberg** has used the existing ***Provincial Ombudsman*** (Landesvolksanwalt) and the ***Provincial Ombud for Healthcare*** (Patientenanwalt) to serve as Anti-Discrimination Bodies as well. They are already established by Provincial Constitutional Law and have been assigned the tasks to provide legal counsel, to investigate cases of alleged discrimination and to issue independent reports and conduct independent surveys.

*b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*

The Equal Treatment Commission (Gleichbehandlungskommission) has been set up at the Federal Ministry for Health and Women [now Federal Ministry for Women, Media and Public Service located at the Federal Chancellery]. The Commissions structure consists of three specialised senates. The first senate is supposed to deal with issues related to equal treatment of women and men in the workplace; the second senate is responsible for discrimination in employment and occupation covering all other grounds mentioned in art 13 ECT except disability. The third senate is responsible for the non-employment related scope of the Racial Equality Directive.
The functions of the chairpersons, who are heading the three senates, are held by federal civil servants appointed by the Minister of Health and Women [since March 1st 2007: Federal Minister for Women, Media and Public Service]. The members of the commission are performing their functions on an unsalaried voluntary basis. It took the minister until April 2005 to appoint the two new chairpersons. The new structures started to work in May 2005.

*c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

*d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?*

*Equal Treatment Commission*

The Equal Treatment Commission is divided into three senates, dealing with

- Equal treatment of men and women in the workplace.
- Equal treatment within the scope of directive 2000/78/EC excluding disability, including race and ethnic origin.
- Equal treatment within the (rest) scope of directive 2000/43/EC for race and ethnic origin.

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

The senate has to act in individual cases upon request of an employer or an employee, a member of a works council, of a representative of those social partners represented in the relevant senate or the Office for Equal Treatment.

Senate III, dealing with cases falling under the non-employment related scope of the directive 2000/43/EC also has to act upon request of an alleged victim. Victims of discrimination can decide to be represented before the Commission by a representative of one of the interest groups represented in the responsible senate or by a NGO or by any other person he/ she trusts in.

If the senate comes to the conclusion that a violation of the principle of equal treatment has occurred, it has to issue a written proposal to the employee or to the person responsible for the non-employment-related discrimination on how the obligation under the act can rightly be fulfilled. The senate has to call upon the person responsible to end the discrimination.

In case the addressee does not follow the instructions of the commission, the institutions represented in the senate or the National Equality Body can file a civil action for a declaratory judgment concerning the violation of the obligation to equal treatment. The commission has the right to demand from the person, who is alleged of discrimination a written report concerning the assumed discrimination. The Commission can also order expert opinions on any company concerned.

*The Federal-Equal Treatment Commission* is modelled similar to the described Equal Treatment Commission.

*National Equality Body (Anwaltschaft für Gleichbehandlungsfragen)*

The National Equality Body, which has been set up at the Federal Ministry of Health and Women, is structured similarly to the Commissions' senates. The already existing institution, called "*Gleichbehandlungsanwältin*" (Office of the Ombud for Equal Employment Opportunities) remains responsible for equal treatment of women and men at the workplace. Out of the two other so called "*Gleichbehandlungsanwälte (*Ombuds for Equal Treatment) one is responsible for discrimination on the basis of race, ethnic affiliation, religion, age and sexual orientation in relation to employment, and the other for discrimination based on ethnic affiliation outside the working environment. The Federal Minister for Health and Women has appointed the two new members of the National Equality Body.

The National Equality Body is responsible for counselling and supporting victims of discrimination. To fulfil these functions, the Office can hold consultation-hours and consultation days in the whole federal territory.
Most importantly, they can conduct independent inquiries and surveys and publish independent reports and recommendations concerning all questions related to discrimination. So far no such reports have been published. Practice so far has shown that the new Ombuds already receive quite a respectable number of requests and complaints but do not have time (resources) for all other parts of their mandate.
In cases of alleged discrimination in relation to employment the NEB can call upon the employee or enterprise concerned to comment on the case in writing. In further investigation, the NEB can request information from the concerned employee, the organisation, the works council or other employees.
All persons involved are obliged to co-operate with the NEB. If the NEB finds a violation of the obligations lay down by the amended Equal Treatment Act likely in a single case, they can establish the case before the Commission for Equal Treatment. The Commission is obliged to take up the case in its next session but at least within one month and can assign the NEB with the necessary inquiry. In this case the NEB is allowed enter company premises and inspect company documents. A planned inspection has to be notified to the employer in due time. The non-binding decision about the question of a possible infringement of the equal treatment obligation rests with the Commission.

*e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

The basic concept of the national bodies implies that the NEBs power to complain ends at the Equal Treatment Commission. It has a limited power to bring cases to court in order to demand a decision in principle – meaning that the court has to decide whether or not discrimination has occurred. This opportunity has been very rarly used so far.

*f) Is the work undertaken independently?*

Following an amendment[56] to Art. 20/2 of the Federal-Constitution (B-VG) in January 2008 the "independent bodies" are finally independent in performing their functions. Nevertheless, practice shows that there is independence but for resources and budget. The financial resources for these bodies are still marginal in relation to the tasks assigned to them.Although detailed information about the budgets of all specialised bodies is not readily available, the NEB seems to be the body where the discrepancy between resources and tasks is most obvious. Only three persons are employed to fulfil all the duties of the body related to all protected areas and all grounds except gender and disability.
A major point of criticism in connection with independence is the composition of the senates of the Equal Treatment Commission. Senate II and Senate III are composed of members nominated by Ministers and Social Partners only.

[56] Amendment by Federal Law Gazette I Nr. 2/2008, 04.01.2008

*g) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

At the moment, there are no such priorities by the specialised bodies. Both, the National Equality Body and the Equal Treatment Commission are just relating their work to complaints they receive. Given the very poor equipment and budget of the National Equality Body, setting specific priorities seems hardly possible for them. Only an increase of their resources might trigger such activities. The Equal Treatment Commission only performs its quasi-judicial role and the National Equality Body employs three persons to handle all issues except gender and disability grounds.
Most provincial bodies are quite invisible. The Burgenland body, for example, cannot even be found via the website of the provincial government.

# 8. IMPLEMENTATION ISSUES

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

*Describe briefly the action taken by the Member State*

*a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

The duty to disseminate information about the issues at stake is not given a high priority by the Federal Government though there are some activities in this field. The Ministry for Economy and Labour has issued a brochure providing basic information about the principle of equal treatment as set down in the Equal Treatment Act. There was some governmental support for projects to sensitise judges and judges-in-training as well as lawyers and to discuss the new legislation with them. In 2004there was also an awareness raising project targeting pupils. In 2007 some activities and projects dealt with dissemination of knowledge and awareness raising. The Ministry of Education, Art and Culture financed some valuable trainings and brochures for educationalists and pupils.
Austria also took part in the European wide campaign against discrimination.
In regard to disability a much more ambitious information campaign has been launched in the beginning of 2006, including spots in TV, cinemas and various other media.
The media campaign and other activities in the framework of the European Year of Equal Opportunities 2007 were heavily criticised by NGOs as being not useful enough in relation to the cost.

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

The dialogue started informally, when the National Equality Body accepted the invitations of specialised NGOs and entered into a frequent informal exchange of thoughts and cooperation in individual cases in 2005. A first (and so far last) official dialogue meeting was held with the Minister of Health and Women on May 8th 2006. A small number of NGOs was invited but the response to the meeting was generally positive. The Minister promised to continue the dialogue and her successor held another meeting in 2008.
NGOs dealing with disability are in constant contact with the competent Minister for Social Affairs and consider themselves well informed and involved.

In all the Provincial pieces of legislation such a dialogue is at least mentioned. There seems to be, though, a rather weak dialogue at the moment.

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

There is regular contact between the social partners and governmental officials but no procedure was set up to ensure regular meeting specifically concerning issues of discrimination or equal treatment. Generally, social partners have a strong standing in Austrian politics and are involved in most spheres concerning discrimination.

*d) to specifically address Roma and Travellers*

The NGO dialogue and the social dialogue have not specifically addressed Roma issues. In the dissemination of information no specific focus was put on Roma issues. The general debate on discrimination and equal opportunities is more focused on immigrants, especially on Muslim and black communities.

Nevertheless, the government subsidizes or co-funds several projects targeting Roma. Some of them dealing with the long established Roma community in the state of Burgenland and some Equal projects. In 2007 especially in the course of the "Thara"-project (EQUAL) some events and publications have reached the interested public. In general, Roma issues are still quite invisible and usually not in the spotlight of public debates.

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

*a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

None of the bills meant to implement the directives contain provisions on that matter. Although both above mentioned general principles of law apply to the Austrian legal system it is still necessary to question and challenge each individual provision before a competent Authority or court in order to find out whether it is still prevailing or obsolete. Usually the prohibition of discrimination will be the more general norm, anyway.

*b) Are any laws, regulations or rules contrary to the principle of equality still in force?*

A comprehensive and concluding assessment of the situation in regard to the whole legislation is not possible at the moment. No general assessment has been made in regard to this aspect. So it is highly likely that in the course of time several provisions will show up whose compliance with the principle of equal treatment appears questionable.
Only the legislator or the Constitutional Court can abolish such discriminatory laws. Civil servants can challenge decisions by administrative authorities based on such discriminatory legislation in the Constitutional Court. Other employees have to challenge decisions by their employers based on such discriminatory legislation in the labour Courts and could only ask the Court (of second or higher instance) to refer the matter to the Constitutional Court.
Discriminatory application of neutrally worded provisions can be challenged before the administrative authority (in the case of civil servants) or in the labour Courts (in the case of other employees).

Discriminatory provisions in secondary legislation (decrees implementing primary legislation) can only be abolished by the issuing administrative authority or by the Constitutional Court.
The question referred to the ECJ by the Austrian Supreme Court [ Hütter vs. Technische Universität Graz] will also deal with a problematic regulation in a specific piece of legislation. The preliminary ruling will be essential in deciding whether that provision will be deemed derogated by EC-law.

## 9. OVERVIEW

*This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.*

*This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

With finally adopted legislation on Federal and Provincial level in the Austrian legal order now has reached a new dimension in regard to the protection against discrimination. The two specialised EU-Directives have been to a large extent implemented and the legislation on the disability ground has broadened the scope clearly beyond the minimum requirements of the framework directive. Most of the designated specialised bodies are operating and the dialogue with NGOs was at least initiated.
Nevertheless, there are still areas of concern:
The overall **awareness** concerning the new legislation in the population still seems very low. Also for specialised NGOs it is rather hard to find people who dare to use the new laws to claim their rights, as there are too many factors of uncertainty for them.
It is encouraging, that on **provincial** level most decision-makers did try to provide for protection against discrimination **beyond the minimum-level** of the Directives. All provinces have by now enacted their implementing legislation.
The persisting difference of the level of protection against discrimination between most Austrian Provinces and Lower Austria, Vorarlberg and Vienna remains an area of concern.
A positive reaction, visible in every-day-life, to the new legislation is a massive decline of discriminatory advertisements in the larger newspapers, though assessment by NGOs still shows that in some media there is still a very high percentage of openly **discriminatory advertisements** for jobs or accommodation. – And, although the actual application of law against perpetrators has proven to be hopelessly ineffective due to a useless legal construction in § 24 Equal Treatment Act in conjunction with an aching lack of resources and staff in the National Equality Body.

## 10. CO-ORDINATION AT NATIONAL LEVEL

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?*

In principle it is the task of the Federal Chancellery [Bundeskanzleramt] to coordinate the Activities for the implementation of the Directives within the ministries and the Provinces.
The Equal Treatment Act and the Federal Equal Treatment Act were both coordinated and elaborated by the Federal Minister of Economy and Labour [BMWA, Bundesministerium für Wirtschaft und Arbeit]. The Federal Minister of Justice [Bundesministerium für Justiz] has a rather limited role in the implementation of these regulations.
The specialised bodies are coordinated by the Minister for Women, Media and Public Service [Budesministerium für Frauen, Medien und Öffentlichen Dienst].
The implementation regarding disability is in the hands of the Federal Minister of Social Affairs and Consumer Protection [Bundesministerium für Soziales und Konsumentenschutz].
The provincial regulations are in the hands of the Offices of the Provincial Governments [Ämter der Landesregierungen].

## Annex

**1. Table of key national anti-discrimination legislation**
**2. Table of international instruments**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: **Austria** Date: 15-01-07

| Title of Legislation (including amending legislation) | In force from: | Grounds covered | Civil/Administrative/ Criminal Law | Material Scope | Principal content |
|---|---|---|---|---|---|
| This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address. | Please give month / year | | | e.g. public employment, private employment, access to goods or services | e.g. prohibition of direct and indirect discrimination or creation of a specialised body |
| Equal Treatment Act, Federal Law Gazette I Nr. 66/2004 as last amended by Federal Law Gazette I Nr. 82/2005 [Gleichbehandlungsgesetz, BGBl. I Nr. 66/2004 2004 idF BGBl I Nr. 82/2005] | July 1st 2004 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation | Mainly civil law with a few administrative penal provisions | Most important law, private employment, access to goods or services, education, principle legislation for provinces | prohibition of direct and indirect discrimination, harassment, victimsation |
| Federal-Equal Treatment Act, Federal Law Gazette Nr. 100/1993 as amended by Federal law Gazette. I Nr. 2/2008 [Bundes-Gleichbehandlungsgesetz, BGBl. | July 1st 2004 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation | Administrative and civil law | Public (Federal) employment | prohibition of direct and indirect discrimination, harassment, victimsation |

| | | | | | |
|---|---|---|---|---|---|
| Nr. 100/1993, idF BGBl. I Nr. 2/2008] | | | | | |
| Law on the Equal Treatment Commission and the Office for Equal treatment, Federal Law Gazette I Nr. 66/2004 as last amended by Federal Law Gazette I Nr. 2/2008<br><br>[Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, BGBl. I Nr. 66/2004 idF BGBl I Nr. 2/2008] | July 1st 2004 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation | Administrative Law | Creation of specialised bodies | Creation of specialised bodies |
| Federal Disability Equality Act Federal Law Gazette I Nr. 82/2005<br>[Bundesgesetz über die Gleichstellung von Menschen mit Behinderungen (Bundes-Behindertengleichstellungsgesetz ] | January 1st 2006 | disability | Administrative Law, Civil Law | Accessibilitiy of public buildings, access to goods and services | prohibition of direct and indirect discrimination, harassment, |
| (Amendment to) Act on the Employment of People with Disabilities, Federal Law Gazette I Nr. 2/2008<br><br>[Bundesgesetz über die Einstellung und Beschäftigung | January 1st 2006 | disability | Labour Law | public employment, private employment | Prohibition of discrimination in employment |

| | | | | | |
|---|---|---|---|---|---|
| Behinderter (Behinderteneinstellungsgesetz – BeinstG] BGBl I Nr. 2/2008 | | | | | |
| (Amendment to) Federal Disability Act Bundesgesetz über die Beratung, Betreuung und besondere Hilfe für behinderte Menschen (Bundesbehindertengesetz - *BBG)]*, BGBl I Nr. 82/2005 idF BGBl 1 Nr. 109/2008; Federal Law Gazette I Nr. 82/2005 as last amended by Federal Law Gazette I Nr. 109/2008 | January 1st 2006 | disability | Administrative Law | Ombud for People with Disabilities | Specialised Body |

All Austrian Laws can be found on the governmental searchable website www.ris.bka.gv.at
All legislation concerning anti-discrimination can be found at: http://www.klagsverband.at/recht.php
For the development and the text of legislation concerning the disability ground, see http://www.gleichstellung.at/ag/

**Annex 1b provincial laws**

| Title of Legislation (including amending legislation) | In force from: | Grounds covered | Civil/Administrative/ Criminal Law | Material Scope | Principal content |
|---|---|---|---|---|---|
| **This table contains additional (provincial) laws.** | Please give month / year | | | e.g. public employment, private employment, access to goods or services | e.g. prohibition of direct and indirect discrimination or creation of a specialised body |
| Styrian Equal Treatment Act, Styrian Provincial Law Gazette Nr. 24/2004 [Steiermärkisches Gleichbehandlungsgesetz, Streirisches Landesgesetzblatt Nr. 24/2004] | November 1st 2004 | gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation (sexuelle Orientierung) | Civil and administrative Law | Public (provincial) employment | prohibition of direct and indirect discrimination, harassment, victimisation |
| Styrian Disability Act, Provincial Law Gazette Nr. 26/2004 last amended by Nr. 74/2007 [Steiermärkisches Behindertengesetz, LGBl. 26/2004] idF 74/2007 | July1st 2004 | disability | Administrative Law | Specialised institution | Installment of provincial "Ombud for people with disabilities" – general task to work on complaints. Discrimination not expressly mentioned |
| Styrian Agricultural Labour Relations Act, Provincial Law Gazette Nr. 39/2002 as amended by Nr. 55/2006 [Steiermärkische Landarbeitsordnung Landesgesetzblatt Nr. 39/2002 | Amended version May 1st 2006 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Civil and administrative Law | Employment of agricultural and forestry workers | prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution |

| | | | | | |
|---|---|---|---|---|---|
| idF 55/2006 | | | | | |
| Viennese Anti-Discrimination Act, Viennese Provincial Law Gazette Nr. 35/2004 [Wiener Antidiskriminierungsgesetz, Landesgesetzblatt für Wien Nr. 35/2004] | September 9th 2004 | race, ethnic origin, religion, belief, age, sexual orientation (sexuelle Ausrichtung) | Civil and administrative Law | Non-employment scope of Directive 200/43/EC | prohibition of direct and indirect discrimination, harassment, victimisation |
| Viennese Service Order as amended by Viennese Provincial Law Gazette Nr. 42/2006 [Wiener Dienstordnung idF Landesgesetzblatt für Wien Nr.42/2006] | September 11th 2004 | gender, race, ethnic origin, religion, belief, disability, age, sexual orientation (sexuelle Ausrichtung) | Civil and administrative Law | Public (provincial) employment | prohibition of direct and indirect discrimination, harassment, victimisation |
| Viennese Agricultural Labour Equal Treatment Act, Viennese Provincial Law Gazette Nr. 25/1980, last amended by Nr. 45/2006 [Wiener Land-und forstwirtschaftliches Gleichbehandlungsgesetz LGBl.. 25/1980, zuletzt geändert durch LGBl. 45/2006] | Amended version September 27th 2006 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Civil and administrative Law | Employment of agricultural and forestry workers | prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution |
| Lower Austrian Equal Treatment Act, Lower Austrian Provincial Law Gazette Nr. 69/1997 as amended by Nr. 65/2004 [Niederösterreichisches Gleichbehandlungsgesetz, | September 18th 2004 | gender, ethnic affiliation, religion or belief, disability, age, sexual orientation (sexuelle Orientierung) | Civil and administrative Law | Public (provincial) employment | prohibition of direct and indirect discrimination, harassment, victimisation |

| | | | | | |
|---|---|---|---|---|---|
| Niederösterreichisches Landesgesetzblatt Nr. 69/1997 idF 65/2004 | | | | | |
| Lower Austrian Anti-Discrimination Act Lower Austrian Law Gazette Nr. 45/2005 [Niederösterreichisches Antidiskriminierungsgesetz LGBl 45/2005] | April 30th 2005 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation, disability | Administrative and civil law | All forms of discrimination which are not covered in the Lower Austrian ETA. Different protection for ethnic affiliation and other grounds. | prohibition of direct and indirect discrimination, harassment, victimsation |
| Lower Austrian Agricultural Labour Relations Act, Lower Austrian Provincial Law Gazette Nr. 185/1973 as amended by Nr. 5/2008 [Niederösterreichisches Landarbeitsordnung Niederösterreichisches Landesgesetzblatt Nr. 185/1973 idF 5/2008 | Amended version September 27th 2006 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Civil and administrative Law | Employment of agricultural and forestry workers | prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution |
| Carinthian Anti-Discrimination Act, Carinthian Provincial Law Gazette Nr. 63/2004 [Kärntner Antidiskriminierungsgesetz, Kärtner Landesgesetzblatt Nr. 63/2004] | December 29th 2004 | gender, ethnic affiliation, religion or belief, disability, age, sexual orientation (sexuelle Ausrichtung) | Civil and administrative Law | Public (provincial) employment and non-employment scope. Comprehensive Anti-discrimination legislation | prohibition of direct and indirect discrimination, harassment, victimisation |
| Carinthian Agricultural Labour Relations Act, Provincial Law Gazette Nr. 97/1995 as amended | Amended | gender, ethnic affiliation (ethnische Zugehörigkeit), | Civil and administrative Law | Employment of agricultural and forestry workers | prohibition of direct and indirect discrimination, |

| | | | | | |
|---|---|---|---|---|---|
| by Nr. 60/2006 last amended by Nr. 30/2007 [Kärntner Landarbeitsordnung Kärntner Landesgesetzblatt Nr. 97/1995 idF 60/2006 zuletzt geändert durch Nr. 30/2007 | version September 12th 2006 | religion, belief, disability age, and sexual orientation | | | harassment, victimisation provincial specialised institution |
| Upper Austrian Anti-Discrimination Act, Upper Austrian Law Gazette Nr. 50/2005 [ÖO Antidiskriminierungsgesetz, LGBl. 50/2005] | June 1st 2005 | gender, racial or ethnic origin religion, belief, disability, age, and sexual orientation | Administrative and civil law | Public (provincial) employment, goods & services, education, social matters (soziales), health | prohibition of direct and indirect discrimination, harassment, victimisation, provincial specialised office |
| Upper Austrian Agricultural Labour Relations Act, Provincial Law Gazette Nr. 25/1989 as amended by Nr. 73/2005 last amended by Nr. 136/2007 [Oberösterreichische Landarbeitsordnung, Landesgesetzblatt Nr. 25/1989 idF 73/2005 zuletzt geändert durch Nr. 136/2007 | Amended version July30th 2005 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Civil and administrative Law | Employment of agricultural and forestry workers | prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution |
| Salzburg Equal Treatment Act, Provincial Law Gazette Nr. 31/2006 [Salzburger Gleichbehandlungsgesetz, LGBl. 31/2006] | May 1st 2006 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Administrative Law and civil law | Public (provincial) employment, goods & services, education, social matters (soziales), health | prohibition of direct and indirect discrimination, harassment, provincial specialised office |
| Salzburgian Agricultural Labour Relations Act, Provincial Law Gazette Nr. 7/1999 as amended | Amended version | gender, ethnic affiliation (ethnische Zugehörigkeit), | Civil and administrative Law | Employment of agricultural and forestry workers | prohibition of direct and indirect discrimination, |

| | | | | | |
|---|---|---|---|---|---|
| by Nr. 21/2006 [Salzburger Landarbeitsordnung Landesgesetzblatt Nr. 7/1996 idF 21/2006 | April 1st 2006 | religion, belief, disability age, and sexual orientation | | | harassment, victimisation provincial specialised institution |
| Tyrolian Equal Treatment Act, Tyrolian Provincial law Gazette Nr. 1/2005 [Tiroler Landes-Gleichbehandlungsgesetz, LGBl. 1/2005] | January 12th 2005 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Administrative Law, Civil Law | Public (provincial) employment, | prohibition of direct and indirect discrimination, harassment, victimisation, |
| Tyrolian Anti-Discrimination Act, Tyrolian Provincial law Gazette Nr. 25/2005 [Tiroler Anti-Diskriminierungsgesetz, LGBl. 25/2005] | April 1st 2005 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Administrative Law, Civil Law | goods & services, education, social matters, health reasonable accommodation for disabled persons | prohibition of direct and indirect discrimination, harassment, provincial specialised office |
| Tyrolian Equal Treatment Act for Municipalities, Tyrolian Provincial law Gazette Nr. 2/2005 [Tiroler Gemeinde-Gleichbehandlungsgesetz, LGBl. 2/2005] | January 12th 2005 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Administrative Law, Civil Law | Public employment in municipalities | prohibition of direct and indirect discrimination, harassment, victimisation, (same as ETA) |
| Tyrolian Agricultural Labour Relations Act, Provincial Law Gazette Nr. 27/2000 as amended by Nr. 61/2005, last amended by Nr- 75/2007 [Tiroler Landarbeitsordnung Tiroler LGBl Nr. 27/2000 idF 61/2005 zuletzt geändert durch 75/2007 | Amended version July 27th 2005 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Civil and administrative Law | Employment of agricultural and forestry workers | prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution |

| | | | | | |
|---|---|---|---|---|---|
| Tirolian Provincial Teachers Employment Act , Provincial Law Gazette Nr. 74/1998, last amended by Nr. 82/2005 [Tiroler Landeslehrer-Diensthoheitsgesetz LGBl.. 74/1998, zuletzt geändert durch LGBl. 82/2005] | Amended version December 1st 2005 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Administrative Law | Employment of provincial teachers | provincial specialised institution for teachers (Equal Treatment Commission) |
| Vorarlbergian Anti-Discrimination Act, Provincial law Gazette Nr. 17/2005 [Vorarlberger Antidiskriminierungsgesetz, LGBl. 17/2005] | June 1st 2005 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Civil and administrative Law | Public (provincial) employment, goods & services, education, social protection, health | prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised office |
| Burgenlandian Anti-Discrimination Act, Provincial Law Gazette Nr. 84/2005 [Burgenländisches Antidiskriminierungsgesetz, LGBl.. 84/2005] | October 6th 2005 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Civil and administrative Law | Public (provincial) employment, goods & services, education, social protection, health | prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised office |
| Burgenlandian Agricultural LabourRelations Act, Provincial Law Gazette Nr. 37/1977, last amended by Nr. 39/2006 [Burgenländische Landarbeitsordnung LGBl.. 37/1977, zuletzt geändert durch LGBl. 39/2006] | Amended version August4th 2006 | gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation | Civil and administrative Law | Employment of agricultural and forestry workers | prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution |

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Name of country: **Austria** Date: 01-02-06

| Instrument | Signed (yes/no) | Ratified (yes/no) | 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) | yes | yes | no | yes | yes |
| Protocol 12, ECHR | yes | no | | | |
| Revised European Social Charter | yes | no | | Ratified collective complaints protocol? no | no |
| International Covenant on Civil and Political Rights | yes | yes | no | | no |
| International Convention on Economic, Social and Cultural Rights | yes | yes | no | | no |
| Convention on the Elimination of All Forms of Racial Discrimination | yes | yes | no | yes | no |
| Convention on the Elimination of Discrimination Against Women | yes | yes | no | | no |
| ILO Convention No. 111 on Discrimination | yes | yes | no | | No |

| | | | | | |
|---|---|---|---|---|---|
| Convention on the Rights of the Child | yes | yes | no | | no |
| Convention on the Rights of Persons with Disabilities | yes | no | no | no | no |