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Country report

Non-discrimination

Austria

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including summary



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Country report

Non-discrimination

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

Austria

Dieter Schindlauer

Reporting period 1 January 2021 – 31 December 2021

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EXECUTIVE SUMMARY

1. Introduction

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

From the beginning of the 1990s, the situation and perception of 'foreigners' started to change. The political rise of the Freedom Party (FPÖ) started to dominate the political discourse and changed the political culture.

The FPÖ was in coalition government with the centre-right Austrian People's Party (ÖVP) from the end of 2017 until May 2019. Early elections on 29 September 2019 brought a steep decrease in votes for the Freedom Party (from 26 % to 16 %). On 7 January 2020, a new coalition government was formed between the People's Party and the Green Party, which is still in place despite some political turmoil and the election of a new federal chancellor in 2021.

The public discourse on immigration and integration has been dominated by the populist FPÖ, which has openly communicated ideas of 'natural' dominance by 'true-born' Austrians and open hostility towards immigrants of the Islamic faith. This tendency has been severely increased by the so-called 'refugee crisis', which brought a peak influx of refugees in 2015; fewer refugees arrived in 2016 and 2017, and the numbers are further decreasing. Austria is among the three European countries that have received the highest rate of refugee arrivals.

Regarding the grounds of race and ethnicity (in Austria, these terms are generally subsumed under 'ethnic affiliation'), the courts recognised relatively quickly that discriminatory reference to 'foreignness' is clearly covered by legal protection.¹ Migrants, mainly refugees, are still the main target of right-wing hatred and suffer a lot from discrimination in all fields. Legislation and jurisprudence have shown that the anti-discrimination regulations do work in practice and offer wide legal protection for migrants. Although the Government's programme envisaged the development of a national action plan against racism and discrimination,² such a plan does not exist.

Although Austria is a predominantly Catholic country,³ other religious communities have been accepted for many years. Only in the past decade has this general situation of tolerance been shifting, especially with regard to the Muslim community, which is facing an increasingly heightened atmosphere of hostility. After a period of longstanding acceptance and legal standing as a recognised religious community since 1912, the Islamic faith community is now constantly confronted with hostile agitation. In 2021, a new criminal provision was introduced to the Criminal Code,⁴ which now specifically targets 'religiously motivated extremist organisations'. The provision was heavily criticised by

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

² See also UN Human Rights Council, A/HRC/47/12, report of the working group on the Universal Periodic Review/Austria, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/084/50/PDF/G2108450.pdf?OpenElement>; para 10.

³ Estimated distribution of Austrian population regarding religious affiliation (latest figures are for 2016): 74 % Christian (64.2 % Catholics), 17 % non-religious, 8 % Muslim and 2 % other religions. See Goujon, A. et al. (2017), *Religious Denominations in Vienna & Austria: Baseline Study for 2016 – Scenarios until 2046*, Vienna Institute of Demography (Working Papers 09/2017).

⁴ See: Criminal Code, BGBl I Nr 159/2021, in force since 1 September 2021, § 247b.

some civil society organisations⁵ and researchers⁶ for constituting 'symbolic criminal policy' and putting the Muslim community under general suspicion.

Although public antisemitism remains a taboo, research finds that it still exists to a high degree in the population. The pandemic continued throughout 2021, and in numerous public gatherings and protests, antisemitic undertones or references appeared. A popular framing was to equate the anti-vaccination movement with the victims of the Shoah with the slogan, "We are the new Jews!"⁷

There are 14 different faith communities legally recognised by Austria – the latest being the Alevi faith community, which has been legally recognised only since 2010.

The situation of the LGBTQI communities in Austria is mixed. On the one hand, during the past two decades, the community has attained a high level of visibility and acceptance through public events such as the Pride Parade (*Regenbogenparade*) as well as in the media. The main public discourse is still focusing on homosexuality, while issues of questioning the duality of sex/gender (intersex/queerness/questioning) are slowly gaining momentum. On the other hand, Austria remains a very conservative, predominantly Catholic country where homophobic statements by politicians and high-ranking church officials are still quite common. After legally recognising partnerships for same-sex couples in 2010, in December 2017 the Constitutional Court⁸ opened both legal possibilities – marriage and registered partnership – to both different-sex and same-sex partners. The judgment took effect from 2019. So far, all attempts to 'level up' the legal protection against discrimination on all grounds at federal level have failed again and again due to Catholic fears regarding LGBTQI persons. This is at least one strong reason why the scope of protection against discrimination has not been extended beyond employment for all grounds at federal level, despite the fact that all nine provinces have provided this extension of protection in their (limited) legal capacity.

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

The political will to counteract discrimination on the ground of disability appears to be relatively high. The legal standard of protection against discrimination on this ground is considerably higher than the minimum requirements of Directive 2000/78/EC. In 2012, many provinces and the Federation set up institutions such as monitoring boards in order to implement the UN Convention on the Rights of Persons with Disabilities (UNCRPD). These included federal and provincial monitoring mechanisms for the rights of persons with disabilities (*Monitoringausschuss*) and the National Disability Action Plan 2012-2020 (prolonged by Government decree until the end of 2021). Concerning the broad scope of protection against discrimination outside employment, Austria seems to be rather advanced. There have been important cases on the subject so far. Nevertheless, persons with disabilities still face a much higher unemployment rate, and those with mental disabilities⁹ in particular experience a high degree of exclusion. In addition, it is so far only in the field of disability that *actio popularis* for some stakeholders is possible.¹⁰

In 2021, dialogue with NGOs about anti-discrimination issues remained stagnant.

⁵ See, for example, Amnesty International Austria: https://www.amnesty.at/media/8087/amnesty_oesterreich_stellungnahme_bundesgesetze_anti-terrorismus-massnahmen_jan-2021.pdf; (GER).

⁶ See: Arno Pilgram, opinion shared during public consultation process: https://www.parlament.gv.at/PAKT/VHG/XXVII/SNME/SNME_36452/index.shtml.

⁷ See, for example, Valerie Krb in Kurier; NS-Vergleich auf Corona-Demos: 'Sie spucken den Opfern ins Gesicht', <https://kurier.at/politik/inland/ns-vergleiche-auf-corona-demos-sie-spucken-den-opfern-ins-gesicht/401828758>.

⁸ Constitutional Court, Decision No. G 258-259/2017-9, 4 December 2017.

⁹ This comprises intellectual as well as psycho-social disabilities.

¹⁰ Federal Disability Equality Act (*Behindertengleichstellungsgesetz*), 2005, § 13.

2. Main legislation

The Republic of Austria is a federal state. According to the Austrian Constitution, legal powers are exercised either by the Federation (*Bund*) or the provinces (*Länder*). Under the Constitution, neither the Federation nor the provinces have the exclusive power to regulate anti-discrimination. This has led to a very scattered legal framework, with more than 30 provincial pieces of legislation and five main acts at the federal level.

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

The most important federal acts implementing the directives are:

Equal Treatment Act (*Gleichbehandlungsgesetz*)

The Equal Treatment Act covers the private sector and protects against discrimination in employment on the following grounds: gender, ethnic affiliation (*ethnische Zugehörigkeit*), religion or belief, sexual orientation and age. Protection against discrimination on the ground of ethnic affiliation also extends to social protection, including social security and health care, social advantages, education and access to and supply of goods and services that are available to the public, including housing.

Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*)

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

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

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

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

The Act *inter alia* protects against discrimination on the ground of disability in employment and occupation in the public (federal) and private sector and includes the concept of reasonable accommodation. It also contains a compulsory quota regarding the employment of persons with disabilities.

Federal Disability Equality Act (*Behindertengleichstellungsgesetz*)

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

Federal Agricultural Labour Act 2021 (*Landarbeitsgesetz*)

The Act uses the federal competence to regulate the rights of agricultural and forestry workers and thereby outlaws discrimination at the federal level, while the provinces have to implement the legislation. It covers the employment scope covered by

Directive 2000/78/EC for agricultural and forestry workers for all protected grounds (including ethnic affiliation). It was introduced recently, in 2021.

Provincial level protection most importantly concerns (provincial) public employment. All the provinces expand their protection to all grounds covering not only the employment sphere but also access to and supply of goods and services, housing, social security and benefits and health, and they thereby exceed the minimum requirements of the directives. Contracts between private persons are, in general, not covered by this protection as they are regulated by federal law and not within the legislative powers of the provinces.

3. Main principles and definitions

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

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

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

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

All grounds mentioned in the directives are covered, but the scope of protection differs between the grounds. The implementation applies to both the public and private sectors. While protection in the field of employment is covered for all grounds, only the grounds of disability and ethnic affiliation are protected beyond employment through federal legislation (which also regulates all contracting between private actors), while all nine provinces went beyond the minimum protection within their legislative powers by protecting all grounds in all fields covered by Directive 2000/43/EC.

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

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

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

4. Material scope

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

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

5. Enforcing the law

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

NGOs are not sufficiently integrated into the system and many do not receive sufficient funding for tasks related to the enforcement of the anti-discrimination legislation.

Neither the National Equality Body nor the Equal Treatment Commission are responsible for disability cases, but there is a compulsory conciliation process before the Federal Social Minister's Service, which is a useful tool to mediate cases and come to agreements that would not be possible to enforce before a court (e.g. apologies, or actual removal of barriers) as in court proceedings, essentially only financial compensation can be claimed.

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

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

The sanctions in principle comprise compensation for material and immaterial damages. Injunctions are therefore not available. It is a very difficult task for the courts to decide on the immaterial damages in an effective and dissuasive but still proportionate way, given the lack of legal tradition in this respect. In order for compensation to function as a dissuasive sanction, the existing practice of awarding only very low amounts of compensation for immaterial damage will have to be adjusted by the courts. With regard to harassment, the law has fixed a minimum level of compensation (EUR 1 000). It is interesting to note that the legislator has seen a need to continuously raise the minimum amount of compensation, from EUR 400 to EUR 720 and then to EUR 1 000. Obviously, the practice of courts in sticking strictly to the minimum has created this need to avoid ridiculously low outcomes in proceedings with regard to compensation for immaterial damages. An important decision by the Supreme Court¹¹ has given rise to expectations that there will be guidance for the courts directing them to assess the amount of compensation in discrimination cases in a way that is more in line with the directives. However, courts are still very cautious in awarding compensation beyond the minimum amount.

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

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

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

6. Equality bodies

Equal Treatment Commission

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

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

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

¹¹ Supreme Court, Decision No. 90BA49/16w, 29 September 2016.

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

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

National Equality Body (Anwaltschaft für Gleichbehandlungsfragen, Gleichbehandlungsanwaltschaft)

The National Equality Body, which has been set up at the Federal Chancellery, is structured in three separate parts with three separate Ombuds under one umbrella, in a similar way to the Equal Treatment Commission's senates. Among those three elements, the Office of the Ombud for Equal Employment Opportunities, which already existed before the 2000 directives came into force, remains responsible for ensuring the equal treatment of women and men in the workplace. The two other Ombuds for Equal Treatment have been created to implement the 2000 anti-discrimination directives and are responsible respectively for dealing with discrimination on the basis of race, ethnic origin, religion, age and sexual orientation in relation to employment and discrimination based on ethnic affiliation outside the working environment. The National Equality Body is responsible for counselling and supporting victims of discrimination. To fulfil these functions, the Ombuds can hold consultation hours and consultation days in the whole federal territory. Most importantly, they can conduct independent inquiries and surveys and publish independent reports and recommendations concerning all questions related to discrimination. The body has (almost) no role before the courts, and practice shows that it quite often manages to arbitrate between the conflicting parties so that they reach an agreement. This function is not explicitly mentioned in the legislation, but it is often used successfully. As it is still understaffed, the body has so far not made full use of its powers to conduct independent inquiries and surveys and publish independent reports; only very few of these exist so far.

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

For the ground of disability, a separate structure has been set up. The Ombud for Persons with Disabilities (Behindertenanwalt) is responsible for the provision of advice and support to persons with disabilities. The Ombud can conduct surveys on the situation of persons with disabilities and give and publish statements and opinions on this issue and can initiate an *actio popularis* in its own name, but there is no quasi-judicial body established for the ground of disability.

7. Key issues

The province of Carinthia took a very useful legislative step in 2021 by re-codifying its provincial anti-discrimination legislation in a consolidated new Equal Treatment Act. This is a positive reaction to widespread criticism from anti-discrimination experts and

international monitoring bodies (e.g. the European Commission against Racism and Intolerance—ECRI—established by the Council of Europe) that the legal landscape covering protection against discrimination is extremely fragmented among too many different legal acts.

During 2021, the national equality body (Ombud for Equal Treatment) has significantly stepped up its visibility (website, case of the month, public events, etc.), and it has used its mandate to issue eight independent expert opinions on different legal developments and published these on its website.¹²

The CJEU's decision C-94/20 of 10 June 2021¹³ was perceived by civil society organisations as a setback for protection against discrimination for migrants and asylum seekers, as the Court reiterated its main requirement, expressed in its *Jyske Finans*¹⁴ decision, stating that indirect discrimination requires 'that it is particularly persons of a given ethnic origin who are at a disadvantage because of the measure at issue.'¹⁵ The judgment thereby shows the limits of protection by Directive 2000/43/EC in a situation where the main racist public discourse is often not focused on one particular ethnic group but directed against 'foreigners' as an undefined group of 'others'. When the battle against discrimination is perceived as a fight against continued and re-enforced privilege by the dominant group, these limitations are considerable.

2021 saw a continuation of heated public debate on hatred on the internet, with mainly racist, homophobic and sexist content being discussed. A quite comprehensive bundle of legislative measures ('hatred on the internet package')¹⁶ was enacted and took effect from January 2021. It contains new and refined sanctions and remedies and concentrates largely on ensuring comparatively easy access to redress in cases of online hatred and bullying.

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

However, it would seem that obligatory attempts to settle individual disability discrimination cases through facilitated reconciliation processes (*Schlichtungsverfahren*) continue to be a success story. The reconciliation process is used quite frequently, sometimes including a formal mediation process, and the agreements reached often reflect a learning experience and therefore a deeper understanding of discrimination among the parties involved.

¹² See: <https://www.gleichbehandlungsanwaltschaft.gv.at/Gleichstellungspolitik/Stellungnahmen.html> (Ger).

¹³ Court of Justice of the European Union (CJEU), Case C-94/20, *Land Oberösterreich v. KV*, 10 June 2021; <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13526953>.

¹⁴ CJEU, Case C-668/15, *Jyske Finans v. Ligebehandlingsnævnet*, 6 April 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CA0668&from=EN>.

¹⁵ CJEU, Case C-668/15, *Jyske Finans v. Ligebehandlingsnævnet*, 6 April 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CA0668&from=EN>, para 55.

¹⁶ Federal Law on Measures to Fight against Hatred on the Internet (*Bundesgesetz, mit dem Maßnahmen zur Bekämpfung von Hass im Netz getroffen werden*) (*Hass-im-Netz-Bekämpfungs-Gesetz – HiNBG*), BGBl. I 148/2020, 23 December 2020.

INTRODUCTION

The national legal system

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

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

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

Labour law legislation falls under the competency of the Federation (Article 10(1)(11) of the Federal Constitutional Law). In the area of labour law on agricultural workers, the legislative powers are divided between the Federation and the provinces: legislation of principles by the Federation and implementing legislation by the provinces (Article 12 of the B-VG). There has been a change in the competency as a result of BGBl. I No. 14/2019¹⁷ which took effect in 2021: the new figure 9 of Article 11 of the Federal Constitution gives the Federation the competency to legislate on agricultural and forestry workers' rights (which includes protection against discrimination), while the provinces have to implement the legislation. A new 2021 Federal Labour Relations Act is based on this competence.

Legislation in respect of employees (civil servants) of the nine provinces and of local authorities rests exclusively with those provinces alone (Article 21 of the B-VG), with the notable exception of teachers at public compulsory schools (Article 14(2) of the B-VG), and teachers at certain agricultural schools and educators at certain hostels for agricultural students (Article 14a(2)(e) and Article 14a(3)(b) of the B-VG). Legislative powers regarding self-employment, education and training and workers/employers/occupational organisations are divided between the provinces and the Federation; the provinces hold legislative power, for instance, in areas such as social benefits; kindergartens and juvenile educational institutions; hospitals; nursing homes; ambulance services; funeral services; fire brigades; and chambers¹⁸ of agricultural workers and employers (Articles 10 to 15 of the B-VG). Provinces are very important providers of rented housing, including social housing. The Province of Vienna, for example, is by far the biggest landlord in the country.

¹⁷ Amendment to the Federal-Constitutional Law, BGBl. I No. 14/2019 of 15 January 2019.

¹⁸ Chambers are public law entities established by statute and involving compulsory membership of all workers/employers in the respective field.

In principle, international human rights treaties have to be incorporated into national law in order to come into effect. The ECHR forms an integral part of the Austrian Constitution.¹⁹ In implementing the UNCRPD, the Federation and the provinces established mechanisms for monitoring the implementation.

List of main legislation transposing and implementing the directives

The federal legal framework basically consists of:

- Equal Treatment Act²⁰ (*Gleichbehandlungsgesetz*); Abbreviation: ETA/GIBG, adopted 26 June 2004, in force since 1 July 2004. Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation. Most important law, covering private employment (on all protected grounds), access to goods or services (on ethnic affiliation only) defining principle legislation for provinces.
- Federal²¹-Equal Treatment Act²² (*Bundes-Gleichbehandlungsgesetz*); Abbreviation: F-ETA/B-GIBG, adopted 23 June 2004, in force since 1 July 2004. Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation. Covers federal public employment.
- Act on the Equal Treatment Commission and the National Equality Body²³ (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*); Abbreviation: GBK/GAW-G, adopted 23 June 2004, in force since 1 July 2004. Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation. Covers the establishment of and rules of procedure for national equality bodies.
- Act on the Employment of Persons with Disabilities²⁴ (*Behinderteneinstellungsgesetz*); Abbreviation: BEinstG, adopted 10 August 2005, in force since 11 August 2005. Grounds covered: disability. Covers public and private employment of persons with disabilities.
- Federal Disability Equality Act²⁵ (*Behindertengleichstellungsgesetz*); Abbreviation: BGStG, adopted 10 August 2005, in force since 11 August 2005. Grounds covered: disability. Covers access to goods and services for persons with disabilities.
- Federal Disability Act²⁶ (*Bundesbehindertengesetz*); Abbreviation: BEinstG, adopted 10 August 2005, in force since 1 January 2006. Grounds covered: disability. Established the Ombud for Persons with Disabilities.
- Federal Agricultural Labour Act 2021²⁷ (*Landarbeitsgesetz*); Abbreviation: LAG; adopted 30 March 2021, in force since 30 June 2021, Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation; covers the employment rights of agricultural and forestry workers. Under this Act, the Federation now regulates non-discrimination in relation to agricultural and forestry workers at a federal level for the first time; the Act sets aside the previously existing respective regulations in all nine provinces (see more in Chapter 12.1 below)

List of most important provincial acts:

- Styrian Equal Treatment Act (*Steiermärkisches Gleichbehandlungsgesetz*), Landesgesetzblatt (LGBI) 66/2004, last amended by LGBI 104/2017;
- Styrian Disability Act (*Steiermärkisches Behindertengesetz*), LGBI 26/2004, last amended by LGBI 113/2020;

¹⁹ By Constitutional Law, BGBl Nr 59/1964, of 6 April 1964.

²⁰ BGBl I 66/2004, last amended by BGBl I 40/2017.

²¹ Nb: it is easy to confuse the Equal Treatment Act and the Federal Equal Treatment Act, especially as they are both federal laws.

²² BGBl I 65/2004, last amended by BGBl I 58/2019.

²³ BGBl I 66/2004, last amended by BGBl I 107/2013.

²⁴ BGBl 22/1970, last amended by BGBl I 32/2018.

²⁵ BGBl I 82/2005, last amended by BGBl I 32/2018.

²⁶ BGBl 283/1990, last amended by BGBl I 100/2018.

²⁷ BGBl I 78/2021.

- Viennese Anti-Discrimination Act (*Wiener Antidiskriminierungsgesetz*), LGBl für Wien 35/2004, last amended by LGBl 39/2018;
- Viennese Service Order (*Wiener Dienstordnung*), LGBl 42/2006, last amended by LGBl 40/2021;
- Viennese Contracted Officers Act (*Wiener Bedienstetengesetz*), LGBl 33/2017, last amended by LGBl 40/2021;
- Lower Austrian Equal Treatment Act (*Niederösterreichisches Gleichbehandlungsgesetz*), LGBl 69/1997, last amended by LGBl 34/2020;
- Lower Austrian Anti-Discrimination Act 2017 (*Niederösterreichisches Antidiskriminierungsgesetz*), LGBl 24/2017, last amended by 76/2018;
- Carinthian Anti-Discrimination Act (*Kärntner Antidiskriminierungsgesetz*), LGBl 63/2004, last amended by 29/2020; - no longer in force from 01.01.2022
- Carinthian Equal Treatment Act (*Kärntner Landes-Gleichbehandlungsgesetz*), LGBl 70/2021 – in force from 01.01.2022
- Upper Austrian Anti-Discrimination Act, (*ÖO Antidiskriminierungsgesetz*), LGBl 50/2005, last amended by LGBl 64/2021;
- Salzburgian Equal Treatment Act (*Salzburger Gleichbehandlungsgesetz*), LGBl 31/2006, last amended by LGBl 38/2020;
- Tyrolian Equal Treatment Act (*Tiroler Landes-Gleichbehandlungsgesetz*), LGBl 1/2005, last amended by LGBl 138/2019;
- Tyrolian Anti-Discrimination Act (*Tiroler Anti-Diskriminierungsgesetz*) LGBl 25/2005, last amended by LGBl 138/2019;
- Tyrolian Equal Treatment Act for Municipalities (*Tiroler Gemeinde-Gleichbehandlungsgesetz*), LGBl 2/2005, last amended by LGBl 144/2018;
- Tyrolian Provincial Teachers Employment Act (*Tiroler Landeslehrer-Diensthöheitsgesetz*), LGBl 74/1998, last amended by LGBl 138/2019;
- Vorarlbergian Anti-Discrimination Act (*Vorarlberger Antidiskriminierungsgesetz*), LGBl 17/2005 last amended by LGBl 44/2021;
- Burgenlandian Anti-Discrimination Act (*Burgenländisches Antidiskriminierungsgesetz*), LGBl 84/2005, last amended by LGBl 83/2020;

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

General clauses establishing equality before the law:

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

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

This list is merely demonstrative, as the general clause in Article 7 of the B-VG stipulates a full equal treatment obligation and has been interpreted as such by the Constitutional Court. All other forms and grounds of discrimination are in principle covered if they are a legally accepted or essential part of EU law (such as discrimination on the basis of sexual orientation for example, which has led to decisions by the Constitutional Court to lift the bans on adoption²⁸ and IVF for same-sex couples).²⁹

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

Specific constitutional provisions:

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

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

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

These provisions cannot be enforced against private actors, although they can be enforced against the state.

²⁸ See Constitutional Court, Decision No. G119/2014, 11 December 2014.

²⁹ See Constitutional Court, Decision No. G16/2013, 10 December 2013.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing and implementing the two EU anti-discrimination directives (as listed in the Introduction):

Federal level:

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

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

Provincial level:

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

Carinthia: gender (explicitly including pregnancy and maternity), ethnic affiliation, religion or belief, disability, age, sexual orientation.

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

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

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

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

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

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

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

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

Racial origin

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

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

Ethnic origin

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

In an early case, the Viennese Independent Administrative Senate decided³⁰ that a placement company (*Arbeitsvermittler*) was guilty of placing a discriminatory job advertisement looking for an unskilled kitchen assistant while demanding that candidates have 'excellent proficiency in German' and EU citizenship. The Senate found that both requirements were racially discriminatory (not stating whether directly or indirectly) and set the administrative fine to EUR 100.

Another landmark case was ruled on by the Viennese Civil Regional Court.³¹ In this case, the Court, acting as a court of appeal, ruled in the case of a woman of Tunisian origin who had been physically kicked out of a fashion store in Vienna with the words 'we do not sell to foreigners'. The Court held that this constituted discrimination and harassment on the ground of ethnic affiliation and awarded EUR 800 (as opposed to EUR 400 in the first instance) in compensation for immaterial damages. It stated that it was irrelevant whether the claimant was in fact a foreigner or an Austrian citizen of Tunisian origin.

The Supreme Court,³² in its decision of July 2013, reasoned that referring to an employee's 'foreignness' in a harassing way constitutes harassment on the basis of ethnic affiliation. It stated that the requirement for harassing activity to be linked to a 'protected characteristic' may not be interpreted too narrowly. It also stated that the connection to a characteristic of 'ethnic affiliation' does not depend on the existence of any real differences; the attribution by the harasser is enough. Therefore, discrimination against a person because he or she is perceived as a 'migrant' is, in principle, covered by the definition of 'ethnic affiliation'. Another Viennese case³³ dealt with discrimination on the grounds of 'visible migration background' (*erkennbarer Migrationshintergrund*), and the court clearly stated that this was covered by 'ethnic affiliation'.

The CJEU's decision C-94/20 of 10 June 2021³⁴ clarified, however, that Directive 2000/43/EC does not protect against a difference in treatment that is based on nationality/third country citizenship and the requirement of specific (official) language skills in the provision of financial housing assistance through a province.

In summary, it can be stated that the case law provides for a broad protection against discrimination on this ground. Even elements such as first language, appearance and national origin as well as 'migrant background' are clearly covered by 'ethnic affiliation'.

³⁰ Viennese Independent Administrative Senate (UVS Wien), Decision No. 06/42/318/2008, 11 March 2008.

³¹ Viennese Civil Regional Court, *Hayet B. v. Ferdinand S.*, Decision Nos. 35R68/07w and 35R104/07i, 30 March 2007.

³² Supreme Court, Decision No. 90bA40/13t, 24 July 2013.

³³ Viennese Civil Regional Court, Decision No. 36 R 292/15f, 10 December 2015.

³⁴ CJEU, Case C-94/20, *Land Oberösterreich v. KV*, 10 June 2021, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13526953>.

National minorities

Protection of recognised national minorities (*Volksgruppen*: Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma)³⁵ is provided for 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 Federal National Minorities Act of 1976 (*Volksgruppengesetz*).³⁶

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

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

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

b) Religion or belief

The Austrian legal framework does not contain a legal definition of religion or belief. The explanatory notes of the amended Equal Treatment Act state:³⁷

‘Also the terms “religion or 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. Brockhaus³⁸ defines Religion formally as a system to address in its dogma, practice and social manifestations the last questions of human society and individual life and to find answers to these. According to the respective basic philosophy of salvation and in relation to the respective “experience of mischief” every religion has got its own goal of salvation and its way to salvation. This exists in close relation to the “unavailability” which is perceived as a personal (god, gods) and impersonal (rules, cognition, knowledge) transcendence. Also the wearing of religious symbols and clothes is covered by the scope of protection, as the membership to a specific religion can be assumed by these or these are perceived as an expression of a certain religion. It constitutes an infringement of the prohibition of discrimination, if the employer acknowledges the wishes of a specific group while

³⁵ In December 1993, Austrian Roma and Sinti were recognised as an ethnic minority (autochthonous Roma), but there is an undefined number of immigrant Roma, mostly from the former Yugoslavia.

³⁶ Federal National Minorities Act (*Bundesgesetz über die Rechtsstellung von Volksgruppen in Österreich*), 5 August 1976.

³⁷ Parliamentary materials, No. 307 of appendices XXII GP, 26 November 2003, available at: https://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00307/fname_010536.pdf.

³⁸ Brockhaus (1996-1999), *Die Enzyklopädie, Zwanzigste (20), überarbeitete und aktualisierte Auflage*, Leipzig/Mannheim.

not acknowledging those of another group.³⁹ 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.’

The Supreme Court⁴⁰ has clarified that different treatment based on religious clothing (the headscarf) can constitute direct discrimination on the ground of religion. The Court stated that the discrimination in that case was direct, as distinct religious clothing is not a neutral criterion with regard to religion. The application of the definition, therefore, clearly takes into account both *forum internum* as well as *forum externum* in the sense of the CJEU’s judgment in *Achbita* (C-157/15).

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

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

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

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

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

c) Disability

Several fields of law include lengthy definitions of the term ‘disability’.

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

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

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

³⁹ This in no way relates to any duty for reasonable accommodation but clarifies that no faith might be treated more favourably than another.

⁴⁰ Supreme Court, Decision No. 9ObA117/15v, 25 May 2016.

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

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

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

While these definitions (given the specific context of the respective areas of application) are considerably broader than the European Court of Justice (ECJ) judgment in the *Chacón Navas*⁴¹ case (C-13/05), they do not directly reflect the CJEU’s decision in *Ring and Skouboe Werge*⁴². The regulations still place a focus on the ‘impairment’ itself and deduce ‘disability’ from that, while the CJEU’s judgment in *Ring and Skouboe Werge*, following the spirit of the UNCRPD, puts more emphasis on barriers. Nevertheless, the author of this report presumes that the courts could easily apply the existing definitions completely in line with CJEU case law as those definitions do not in any way block this possibility. However, so far, no case law explicitly confirms this assumption.

d) Age

Although there is no legal definition of age, case law has shown that this definition is not complicated – it is understood as referring to the lifetime spent.⁴³ Age is a protected ground if people are discriminated against on the basis of the fact that they are perceived as too young or too old in certain circumstances without justification.

e) Sexual orientation

Sexual orientation is commonly understood (by courts as well as claimants) as referring to heterosexuality, homosexuality and bisexuality only.⁴⁴ Case law does not raise questions of definition in this regard.

Transsexual (transgender) identity is seen as being covered by gender or more explicitly by the term ‘sexual identity or gender identity’ in some provinces⁴⁵. This report does not cover the sex/gender ground.

2.1.2 Multiple discrimination

In Austria, multiple discrimination is prohibited by law.

⁴¹ CJEU, Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA*, 11 July 2006.

⁴² CJEU, Joined Cases C-335/11 and C-337/11, *Jette Ring and Lone Skouboe Werge v. Dansk Arbejdsgiverforening*, 11 April 2013.

⁴³ See, for example: Supreme Court, Decision 9ObA106/15a, 18 August 2016, in which the Court found discrimination on the ground of age in case of termination of contract at the point where an employee had reached the pensionable age.

⁴⁴ See, for example, Constitutional Court, Decision No. G16/2013 ua, 10 December 2013, in which the ban on access to IVF for homosexual couples was found to be unconstitutional/discriminatory on the basis of sex and sexual orientation.

⁴⁵ See: Viennese Anti-Discrimination Act, § 2/1 where the protected grounds listed include the terms ‘gender identity and sex’ (*Geschlechtsidentität und Geschlecht*), or the Styrian Equal Treatment Act, listing ‘(...) sexual orientation and identity’ in its § 1.

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

The law does provide some specific rules on how to deal with cases of multiple discrimination. § 19a of the Federal Equal Treatment Act; §§ 12(13), 26(13), and 51(10) of the Equal Treatment Act; and § 142(10) of the Federal Agricultural Labour Act state:

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

The explanatory notes state that these regulations clarify that cases of discrimination based on multiple grounds need to be assessed taking an overall view, and that the claims cannot be separated or aggregated by grounds. This means that the assessment does not just add the grounds in a strictly arithmetic manner (e.g. discrimination based on two grounds doubles the amount due) but treats every act of discrimination individually when assessing the impact of multiple discrimination while giving the courts wide powers of discretion with regard to how to take it into account.

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

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

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

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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

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

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

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

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

§ 3 of the Styrian Equal Treatment Act is quite inconsistent in its wording as it prohibits direct discrimination against a person 'on grounds of his/her gender, his/her ethnic affiliation, his/her religion or the faith, a disability, age or sexual orientation'. One could interpret the use of possessive pronouns here as a differentiation regarding the grounds of gender, ethnicity and religion on the one hand, and the other grounds on the other hand. It is surely the case that the legislator did not intend to provide for such differentiation, but the wording might lead to the interpretation that discrimination based on assumed criteria might not be protected in respect of certain grounds.⁴⁶

b) Discrimination by association

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

Discrimination by association is explicitly covered in:

- Equal Treatment Act (§§ 5(4), 6(4), 19(4), 21(4), 32(4), 35(3), 44(4), 46(4), 47(4));
- Federal Equal Treatment Act (§§ 4a(5) and 13a(4));
- Act on the Employment of Persons with Disabilities (§ 7b(5));
- Federal Disability Equality Act (§ 4(2));
- Federal Agricultural Labour Act (§ 135(4)).

In all those paragraphs, the norm reads:

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

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

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

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

⁴⁶ E.g. if a person of Iraqi origin is refused entry into a Government canteen with the words 'No Turks in here!', the defendant could argue that the basis of the denial was not the claimant's ethnic affiliation as he is not Turkish. The problem here is mainly that it is one principle/assumption of legal interpretation that the lawmakers do not use different wording for no reason.

In the first (and so far, only) court case involving discrimination by association,⁴⁷ regarding access to a club in the company of 'migrants', the courts of two instances had no problem whatsoever with detecting this form of discrimination and applied the law accordingly.

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

a) Prohibition and definition of direct discrimination

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

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

- §§ 17(1), 18, 31(1), 36 of the Equal Treatment Act;
- § 13 of the Federal Equal Treatment Act;
- § 7b(1) of the Act on the Employment of Persons with Disabilities;
- § 4(1) of the Federal Disability Equality Act;
- § 135(1) of the Federal Agricultural Labour Act.

b) Justification for direct discrimination

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

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

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

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

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

a) Prohibition and definition of indirect discrimination

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

⁴⁷ Viennese Civil Regional Court, Decision No. 36 R 292/15f, 10 December 2015.

- §§ 17(1), 18, 31(1) of the Equal Treatment Act;
- § 13 of the Federal-Equal Treatment Act;
- § 7b(1) of the Act on the Employment of Persons with Disabilities;
- § 4(1) of the Federal Disability Equality Act;
- § 135(2) of the Federal Agricultural Labour Act.

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

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

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

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

b) Justification test for indirect discrimination

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

2.3.1 Statistical evidence

a) Legal framework

The Austrian Act on Data Protection⁴⁸ (*Datenschutzgesetz*) underwent massive changes in 2018 due to the entry into force of the General Data Protection Regulation (GDPR). In particular, Article 9 of the GDPR has overruled the previous definitions of ‘sensitive data’.

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

In Austria, statistical evidence may be admitted under national law in order to establish indirect discrimination (as for all other kinds of claims).

b) Practice

In Austria, in general, statistical evidence is not used in practice in order to establish indirect discrimination in cases on the grounds of ethnic affiliation, religion or belief, sexual orientation or disability.

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

⁴⁸ Act on Data Protection (*Datenschutzgesetz*), BGBl I 165/1999, last amended by BGBl I 24/2018.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

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

Harassment is prohibited in the following norms:

- §§ 17(1), 18, 31(1) of the Equal Treatment Act;
- § 13 of the Federal Equal Treatment Act;
- § 7b(1) of the Act on the Employment of Persons with Disabilities;
- § 4(1) of the Federal Disability Equality Act;
- § 138(1) of the Federal Agricultural Labour Act.

Harassment is defined in the following norms:

- §§ 21(1), 21(2), 35(1) of the Equal Treatment Act;
- § 16 of the Federal Equal Treatment Act;
- § 7d of the Act on the Employment of Persons with Disabilities;
- § 5(4) of the Federal Disability Equality Act;
- § 138(2) of the Federal Agricultural Labour Act.

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

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

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

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

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

A judgment by the High Provincial Court of Innsbruck⁴⁹ clarified that a single incident can have the effect of creating an intimidating, hostile or humiliating environment for the person affected, in a case of a waiter who had been harassed by his direct supervisor with the words 'I am going to throw the scrambled eggs on your head, you ugly N. [*insulting expression withheld*]!'. The Court thereby overruled the court of first instance that had found the single incident not conducive to the creation of a hostile environment according to the meaning of the law.

⁴⁹ High Provincial Court of Innsbruck (Oberlandesgericht Innsbruck), Decision No. 15Ra 13/17z, 1 March 2017, available (in German) at: https://www.klagsverband.at/dev/wp-content/uploads/2017/04/OLG-Innsbruck-15Ra13_17z-anonymisiert.pdf.

b) Scope of liability for harassment

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

Generally, employers or service providers can be held liable for the actions of employees according to the general norms in civil law in cases where a contractual relationship already exists between the service provider and the client. For cases of an employment relationship, § 21 of the Equal Treatment Act states in subparagraph (1), figure 2 that it is deemed a form of discrimination if the employer culpably neglects to produce relief in cases of harassment through third persons (including co-workers and clients). The individual harasser or discriminator can be held liable in any case. The employer is always liable for discriminatory decisions by superiors that affect their subordinates. The claimant can choose which one to sue. Usually, the employer is sued and then has the possibility to claim damages from the direct harasser in a separate claim. There is no rule or general practice for sharing liability. In a decision dating from 2020,⁵⁰ the Supreme Court advanced its clear view that the exact formal position of the harasser is not important for the liability of the employer. It is enough that the harasser actually fulfils certain functions for the employer and has the mandate and consent of the employer to do so.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

- §§ 17(1), 18, 31(1) of the Equal Treatment Act;
- § 13 of the Federal-Equal Treatment Act;
- § 7b(1) of the Act on the Employment of Persons with Disabilities;
- § 4(1) of the Federal Disability Equality Act;
- § 135(3) of the Federal Agricultural Labour Act.

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

- §§ 21(3), 32(3) of the Equal Treatment Act;
- § 13a(3) of the Federal-Equal Treatment Act;
- § 7c(8) of the Act on the Employment of Persons with Disabilities;
- § 5(5)(1) of the Federal Disability Equality Act;
- § 138(3) of the Federal Agricultural Labour Act.

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

In Austria, instructions explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Austria, the instructor and the discriminator are liable.

⁵⁰ Supreme Court, Decision No. 90bA66/20a, 29 September 2020.

In general, employers or service providers can be held liable for the actions of employees according to the general norms in civil law in cases where a contractual relationship already exists between the service provider and the client. For cases of an employment relationship, § 21 of the Equal Treatment Act states in subparagraph (1), figure 2 that it is deemed a form of discrimination if the employer culpably neglects to produce relief in cases of harassment through third persons (including co-workers and clients). The individual direct harasser or discriminator (employee or third person) can be held liable in any case. The employer is always liable for discriminatory decisions by superiors that affect their subordinates. Instruction to discriminate is a separate act of discrimination (§ 19/3 of the Equal Treatment Act) and is not dependent on the actual act of discrimination following this instruction.

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

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

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

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

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

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

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

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

- b) Case law

Allowances and grants available under the Act on the Employment of Persons with Disabilities are to be taken into account when the ‘reasonableness’ of adjustments regarding a potentially undue burden on the employer is to be judged.⁵¹ This was already the case before the directives were transposed into national law.

The duty of reasonable accommodation does not contain an (absolute) obligation to reassign the employee to another job or change the main duties or job description. The main case law is: Supreme Court Decision No. 9ObA165/13z of 29 April 2014, in which the

⁵¹ Administrative High Court, Decision No. 99/11/0246, 14 December 1999.

Court dealt with the dismissal of a care worker who had lost her mobility. The claimant argued that she would still be able to do different jobs (secretariat or administrative tasks) within the employer's enterprise. The Court quoted the respective CJEU case law and recitals 16 and 17 of Directive 2000/78/EC, and clearly concluded that the main point of consideration is the actual job – the one for which the person has been contracted. This is the nucleus of any efforts regarding reasonable accommodation, and the ability to do that particular job determines the question of the right to termination of the employment without breaching the equal treatment obligations. The Court found that there is no obligation to redeploy the person to another post or to create a new post just to maintain the person with a disability in employment.⁵²

In addition, if dismissal seems necessary to prevent the company's bankruptcy or other grave disturbances, the employee's interests are usually outweighed by the interests of the employer.⁵³

c) Definition of disability and non-discrimination protection

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

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

In Austria, failure to meet the duty of reasonable accommodation in employment for persons with disabilities is recognised as a form of discrimination.

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

Courts cannot order actual measures regarding reasonable accommodation – only financial compensation can be requested for the failure to meet this duty. This corresponds to the general decision of Austrian lawmakers in respect of all discrimination claims outside an existing work relationship⁵⁴ to allow only financial compensation but no restitution *in natura* and no further sanctions to be allotted. The idea behind that is to not force someone to conclude a contract with anyone by law (apart from existing duties to contract, such as for monopolists, etc.). The shift of the burden of proof is applied to reasonable accommodation as it is to indirect discrimination (§ 7p of the Act on the Employment of Persons with Disabilities and § 12 of the Federal Disability Equality Act).

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

'(4) It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers⁵⁵ would be illegal or would pose an unreasonable and disproportionate burden on the employer.

⁵² Note: This position might need some adaptations after the CJEU judgment in Case C-485/20, *XX v. HR Rail SA*, of 10 February 2022 (after the cut-off date), in which the CJEU saw an obligation to redeployment to a suitable job unless this imposes a disproportionate burden to the employer.

⁵³ E.g. Administrative High Court, Decision No. 89/09/0147, 22 February 1990, Decision No. 2000/11/0096, 11 June 2000, and Decision No. 97/08/0469, 4 October 2001.

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

⁵⁵ The term 'barriers' is not defined or specified in law; it nevertheless seems that the legislator wants it to be interpreted in a broad sense, to include physical and technological barriers and procedures that may act as a deterrent.

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

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

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

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

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

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

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

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

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

'Indirect discrimination shall be taken to occur where apparently neutral provisions, criteria or practices or characteristics of constructed areas [*Merkmale gestalteter Lebensbereiche*]⁵⁶ would put persons with disabilities at a particular disadvantage compared with other persons, unless that provisions, criteria or practices or characteristics of constructed areas is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.' (§ 5(2) of the Federal Disability Equality Act).

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

⁵⁶ This rather obscure wording obviously tries to be as broad as possible, including physical barriers and technical equipment.

- (1) It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers⁵⁷ would be illegal or would pose a disproportionate burden on the provider of goods or services. When testing whether a burden is disproportionate, the following has to be taken into account in particular:
- the necessary effort to eliminate the conditions constituting the disadvantage;
 - the economic capacity of the person denying the discrimination;
 - public financial assistance available for the necessary improvements;
 - the time span between the coming into force of this Act and the alleged discrimination;
 - the effect of the disadvantage in regard to the general interests of the persons protected by this act;
 - concerning access to housing: the need of the person for the particular accommodation. This need has to be demonstrated by the person claiming access.
- (2) In case the removal of conditions which constitute the disadvantage turns out to be a disproportionate burden in this sense it shall still be deemed discrimination if the provider failed to improve the situation of the affected person at least in a considerable way in order to reach the best possible approximation to equal treatment.
- (3) When assessing whether certain circumstances constitute indirect discrimination it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent it has been complied with.
- (4) Premises or other facilities, means of transport, technical equipment, information systems or other dedicated spheres of life shall be deemed accessible [*barrierefrei*] if they can be accessed and used by persons with disabilities in a customary way, unassisted and without extra difficulty.'

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

When assessing the practical interpretation of the scope of protection, the outcome of some confidentially concluded dispute resolution processes seem to show that the Federation accepts this wide scope of protection, while one case⁵⁸ shows the practical limitations of it. In this case, the Court basically stated that moving a newly introduced public office (here, 'service for citizens') into a historic building that was not accessible to a wheelchair user did not constitute discrimination and did not trigger the duty to provide reasonable accommodation, to the extent that accessibility was safeguarded as 'the law only applies to newly built barriers.'

There have been few important cases on the subject so far. One case concerned a bakery in Vienna, where a newly built stair at the entrance was found to constitute discrimination.⁵⁹ The second case concerned the production of a DVD by the Austrian

⁵⁷ The term 'barriers' is not defined or specified in law; it nevertheless seems that the legislator wants it to be interpreted in a broad sense, to include physical and technological barriers and procedures that may act as a deterrent.

⁵⁸ Viennese Civil Regional Court, *M.L. v. The Republic of Austria*, Decision No. 36 R96/12b, 5 December 2012.

⁵⁹ Josefstadt District Court, Decision No. 4C 707/11 z-14, 14 November 2011.

Broadcasting Corporation (ORF) without subtitles.⁶⁰ Here, the Court found that there was discrimination against deaf customers. Both cases were brought by individual claimants.

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

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

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

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

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

A recent judgment by the Supreme Court,⁶¹ though, might indicate at least some level of protection against unreasonable redeployment that creates conflict with religious needs. The Court stated that an employer's duty to care for employees included a duty to consider whether it was possible and appropriate to deploy the employee in a position where, without additional organisational burden or disadvantages for other employees, working without conflict with specific religious needs was possible.

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

⁶¹ Supreme Court, Case 9ObA59/20i of 14 September 2021.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Austria, there are no residence⁶² or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

Persons with irregular residential status are entitled to the protection of the directives.

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

a) Protection against discrimination

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

The main provisions can be found in:

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

Two provincial legislations explicitly protect legal persons,⁶³ if the discrimination is directed against its members, partners or organs on one of the protected grounds in connection with their activities for the legal person. It is unclear whether a general formula⁶⁴ used in all other provincial pieces of legislation only clarifies the liability of legal persons for discriminatory acts or also extends to their protection.

b) Liability for discrimination

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

The main provisions on liability can be found in:

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

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

⁶² Immigration laws and alien employment laws still bar immigrants without the respective permissions from employment. Legal permission to work in Austria will therefore regularly be a genuine and determining occupational requirement.

⁶³ Burgenlandian Anti-Discrimination Act (LGBI 84/2005, last amended by LGBI 82/2016), § 24(3); Upper Austrian Anti-Discrimination Act (LGBI 50/2005, last amended by LGBI 51/2017), § 1(2).

⁶⁴ 'This prohibition of discrimination applies to other natural or legal persons in as far as their activities are regulated by provincial legislation.' E.g. Salzburgian Equal Treatment Act (LGBI 31/2006, last amended by LGBI 54/2017), § 28(1).

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

a) Protection against discrimination

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

- §§ 16-18, 21, 23(1), 25, 27, 30, 31, 35, 36, 39 of the Equal Treatment Act (private sector);
- §§ 13, 16 of the Federal Equal Treatment Act (public sector);
- §§ 7f-7i of the Act on the Employment of Persons with Disabilities;
- §§ 2(1), 4, 8 of the Federal Disability Equality Act (public sector);
- §§ 2(2), 4 of the Federal Disability Equality Act (private sector);
- Section 15 (§§ 133-150) of the Federal Agricultural Labour Act.

b) Liability for discrimination

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

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

3.2 Material scope

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

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

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

The national anti-discrimination legislation very clearly and explicitly covers these areas. The protection regarding self-employment was even broadened and adapted to the requirement set out in Directive 2010/41/EU (regarding equal treatment between men and women in regard to self-employment) for all grounds covered. Migrants are equally covered by all legal acts prohibiting discrimination in all areas protected by the directives.

The main provisions can be found here:

- §§ 16, 17 of the Equal Treatment Act (private sector);
- § 13 of the Federal-Equal Treatment Act (public sector);
- § 7b of the Act on the Employment of Persons with Disabilities;
- § 134(2) of the Federal Agricultural Labour Act.

All these provisions state that in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employment, discrimination is prohibited. This is not further interpreted or defined.

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

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

For the private sector, this is covered by the Equal Treatment Act (§ 17(1)(6)). For the public sector employment, it is covered by the Federal Equal Treatment Act (§ 13(1)(6)); for agricultural workers by § 134(2) of the Federal Agricultural Labour Act; and by respective provincial acts for public employment in provinces and municipalities. For the ground of disability, both sectors are covered by the Act on the Employment of Persons with Disabilities (§ 7b(1)).

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

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

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

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

The Equal Treatment Act provides for protection against discrimination in relation to:

measures for vocational training, advanced vocational training and retraining (§ 17), and access to vocational guidance, vocational training, advanced vocational training and retraining beyond a working relationship (§ 18). The Federal Agricultural Labour Act refers to this scope in § 134(2)/4.

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

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

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

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

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

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

At the federal level, § 31(3) of the Equal Treatment Act restricts the protection to discrimination on the ground of ethnic affiliation. Attempts to broaden the personal scope have found no majority in Parliament so far. § 31(3)(1) quotes the directive literally without giving a clear interpretation of the terms used and without clearly defining the addressees of the regulations. The protection on the ground of disability in the Federal Disability Equality Act is formulated so broadly that it seems clear that social protection is included, although judicial interpretation is needed to be absolutely sure. Migrants are equally protected by the anti-discrimination legislation. There are on-going discussions on cutting social benefits for migrants and refugees, but they are more concentrated in the field of social advantages (see below).

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

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

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

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

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

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

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

In Austria, the lack of definition of social advantages initially did not raise problems. Initial problems with the interpretation seemed to have been solved since a judgment⁶⁵ on 'commuters' aid' in Lower Austria dealt intensively with the interpretation and stated clearly that the protection has to be interpreted in a broad sense – no matter how the advantage is officially named or whether there is an enforceable entitlement to it. The court found

⁶⁵ Provincial Court St. Pölten (Landesgericht St. Pölten), Decision No. 21 R 16/13f-13, 31 January 2013.

that there was discrimination on the basis of ethnic affiliation because the nationality of the claimant⁶⁶ was the only reason for rejection.⁶⁷

Some further restrictions have been implemented since: in particular, the province of Upper Austria has repeatedly enforced legislation that makes access to certain social contributions (especially 'housing assistance') dependent on residency status and German language skills.⁶⁸

The CJEU's decision C-94/20 of 10 June 2021⁶⁹ has changed the view on this matter, reiterating that indirect discrimination requires 'that it is particularly persons of a given ethnic origin who are at a disadvantage because of the measure at issue.'⁷⁰ While the judgment leaves open some possible protection for long-term residents according to Directive 2003/109/EC, it clearly limits the protection by Directive 2000/43/EC against indirect discrimination when the different treatment applies to all non-(EU)citizens.

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

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

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

The protection of teachers and university students against discrimination is regulated in §§ 40-42 of the Federal Equal Treatment Act.

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

With regard to practice relating to Muslim students, the Initiative für ein diskriminierungsfreies Bildungswesen,⁷¹ in its 2020 report, reported 186 cases of discrimination in education, 15 % of which involved incidents categorised as 'Islamophobic'. Most cases reported were related to discrimination on the basis of religion and/or ethnicity.

⁶⁶ The claimant qualified as a long-term resident under Directive 2003/109/EC.

⁶⁷ There have been further judgments along these lines, especially concerning Tyrol – see District Court Innsbruck, Decision No. 26C263/13y-11, 7 January 2014.

⁶⁸ See Upper Austria, Provincial Court Linz, Decision No. 14R201/18d, 9 November 2018.

⁶⁹ CJEU, Case C-94/20, *Land Oberösterreich v. KV*, 10 June 2021, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13526953>.

⁷⁰ CJEU, Case C-94/20, *Land Oberösterreich v. KV*, 10 June 2021, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13526953>, para 55.

⁷¹ Initiative für ein diskriminierungsfreies Bildungswesen (2020), *Discrimination in the Austrian Education System – 2020 Report (Diskriminierung im österreichischen Bildungswesen – Bericht 2019)*, available at: http://diskriminierungsfrei.at/wp-content/uploads/2021/06/IDB_Jahresbericht2020.pdf.

A specific issue surfaced in schools in which cooking is part of the compulsory curriculum. The Ministry of Education has prepared an information sheet for parents⁷² explaining that in these schools, there is no way to avoid tasting (*abschmecken*) food including pork and alcoholic beverages. The pupils are allowed to spit out the items after tasting, but they cannot refuse to taste. Parents have to sign a form to express their consent if they want their children to be accepted into these schools. The issue is so far legally unsolved, with regard to whether this knock-out requirement is justifiable in respect of the principle of non-discrimination on the basis of religion (as these are public state-run schools). There have been no judicial proceedings on this matter yet, and the concept of reasonable accommodation has not been discussed in this respect.

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

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

There is no general protection against textbooks or teaching materials that reproduce stereotypes or use discriminatory language. Only individuals could claim that the use of such materials amounts to discrimination or harassment. Such materials have not yet been challenged in court, though research⁷³ shows that many schoolbooks actually reinforce stereotypes and present a heteronormative, exoticist and racist picture of the world.

In addition, the general approach to education for pupils with disabilities gives rise to concern. The concluding observations of the CRPD, which were issued in September 2013,⁷⁴ expressed great concern 'that progress towards inclusive education in Austria appears to have stagnated' and 'that the number of children in special schools is on the increase and that insufficient effort has been made to support the inclusive education of children with disabilities' (CRPD concluding observations, paragraph 40). Although by law the parents are the ones who make the decision on whether their child attends a special school or an integrated school, in practice the opinions of experts are very often decisive, and they often recommend special schooling.

The National Action Plan regarding disability⁷⁵ was enacted by the Council of Ministers on 24 July 2012 and was extended to 2021 by the Council of Ministers. The plan contains *inter alia* a clear commitment to the further development of 'inclusive schooling' instead of segregated 'special schooling'.

a) Trends and patterns regarding Roma pupils

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

⁷² Bundesministerium für Bildung, Wissenschaft und Forschung (2012), *Formular: besondere Aufnahmeinformation für Schulen für wirtschaftliche Berufe und Tourismusschulen*.

⁷³ See, for example, Markom, C., Weinhäupl, H. (2007), *Die anderen im Schulbuch*, Vienna.

⁷⁴ Committee on the Rights of Persons with Disabilities (CRPD) (2013), *Concluding observations on the initial report of Austria*, available at: http://www.ohchr.org/Documents/HRBodies/CRPD/10thSession/CRPD-C-AUT-CO-1_en.doc.

⁷⁵ Ministry of Social Affairs (2012), *National Action Plan on Disability 2012-2020*, available at: <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=225>.

Segregation in schools is not a topic touched on intensively in public or scientific discourse in Austria. The European Commission against Racism and Intolerance (ECRI)⁷⁶ found in its report on Austria that the disadvantaged position of the Roma, for the most part non-autochthonous Roma, in education at all levels plays a central role in excluding them from most other areas of public life.

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

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

Research from 2006 indicated that 50 % of the Roma pupils in Oberwart, where Austria's Roma born between 1975 and 1985 are concentrated, faced severe problems with school education during their first year in primary school. However, around 40 % of (then) younger Roma children (born after 1985) were doing well pursuing upper secondary education, with one (born in 1980) even pursuing higher education.⁷⁷ Most adult Roma suffer from serious education deficits. Education policy towards the Roma concentrates on youth, whereas there are very few attempts to remedy the education deficits of adult Roma.

Later research⁷⁸ has shown a positive trend for younger Roma to be involved in higher education and successful educational careers, although the overall level of education is still below average.

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

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

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

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

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

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

⁷⁶ European Commission against Racism and Intolerance (ECRI) (2015), *ECRI report on Austria*, p. 29, available at: <https://www.coe.int/t/dqhl/monitoring/ecri/Country-by-country/Austria/AUT-CbC-V-2015-034-ENG.pdf>.

⁷⁷ See, for this section, European Monitoring Centre on Racism and Xenophobia (EUMC) (2006), *Roma and Travellers in Public Education*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/179-roma_report.pdf.

⁷⁸ Luciak, M., (2014), *ROMBAS Studienbericht Zur Bildungssituation von Roma und Sinti in Österreich*, Initiative Minderheiten, available at: <https://docplayer.org/28641502-Studienbericht-rombas.html>.

With regard to disability, the protection can be found in § 2(2), in connection with § 4 of the Disability Equality Act. The private as well as the public sector are bound by these norms. This includes accessibility to goods and services in a rather broad sense, as shown by case law in which it has been found that a new stair at the entrance of a bakery⁷⁹ as well as missing subtitles from a DVD⁸⁰ can constitute discrimination on the ground of disability. Both cases have been brought to court by affected individuals claiming their rights to access to goods and services and the duty to provide reasonable accommodation. The implementation of the Disability Equality Act requires individual to claim their rights and does not safeguard general accessibility.

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

a) Distinction between goods and services available publicly or privately

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

Case law has clarified the meaning of 'available to the public'.⁸¹

The court established:

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

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

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

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

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

'justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Especially, it is not deemed discrimination if the provision of housing constitutes a specially close or intimate relationship of the parties or their relatives.'⁸²

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

⁷⁹ Josefstadt District Court, Decision No. 4C 707/11 z-14, 14 November 2011.

⁸⁰ Viennese Commercial Court, *L. CLAIMANT. v. ORF*, Decision No. 60R93/10x, 8 September 2011.

⁸¹ Viennese Commercial Court, Decision No. 1R 129/10g, 19 January 2011.

⁸² This is a regulation on the prohibition of discriminatory advertisements, where the offer is available to the public.

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

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

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

Migrants are not treated differently under anti-discrimination legislation and benefit equally from anti-discrimination law enforcement as nationals. There have been some political approaches to restrict access to municipal social housing to persons who speak German at an advanced level.⁸³

To give a few examples, the city of Wels tried to tie access to public housing to the requirement for a certain degree of mastery of the German language. These ideas (by FPÖ mayors) have been found to be illegal and were not put into practice until December 2017, when Upper Austria introduced severe restrictions on provincial subsidies for housing⁸⁴ (*Wohnbauförderung, Wohnbeihilfe*). The law requires migrants to have been residing legally for more than five years in Austria; to have been employed for at least 54 months within the past five years; and to show proof of their ability to speak German in order to qualify as a beneficiary of these subsidies. NGOs have brought several cases to court in support of people affected by this rule and have described the practice as racist and discriminatory. The second-instance court has found in favour of the claimant in one decision.⁸⁵ It remains unclear whether, technically, this matter falls under housing or under social benefits, as it links both aspects.

The CJEU's decision C-94/20 of 10 June 2021,⁸⁶ on the above-mentioned matter of the Upper Austrian housing benefit, clarified that Directive 2000/43/EC was not applicable in this case. The CJEU reiterated that indirect discrimination requires 'that it is particularly persons of a given ethnic origin who are at a disadvantage because of the measure at issue.'⁸⁷ While the judgment leaves open some possible protection for long-term residents according to Directive 2003/109/EC, it limits the protection by Directive 2000/43/EC against indirect discrimination when the different treatment applies to all non-(EU)citizens.

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

⁸³ Website of FPÖ provincial functionary Haimuchner (2015), 'German as Key for Housing', available at: <https://www.fpoe-ooe.at>.

⁸⁴ See Upper Austrian Act on Housing Support Subsidies (*OÖ Wohnbauförderungsgesetz*), (LGBl 6/1993, last amended by LGBl 98/2017), § 6(9).

⁸⁵ See Upper Austria, Provincial Court Linz, Decision No. 14R201/18d, 9 November 2018.

⁸⁶ CJEU, Case C-94/20, *Land Oberösterreich v. KV*, 10 June 2021, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13526953>.

⁸⁷ CJEU, Case C-94/20, *Land Oberösterreich v. KV*, 10 June 2021, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13526953>, para 55.

a) Trends and patterns regarding housing segregation for Roma

In Austria, there is discrimination against the Roma in many ways, including in access to housing, but there is no traceable segregation issue. Roma settlements do exist in Austria, especially in Burgenland, although they might not be legitimately referred to as 'segregated' as there is no tangible legal or state pressure with regard to segregated housing.

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

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

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

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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 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 Persons with Disabilities; § 13b(1) of the Federal Equal Treatment Act; and § 136(2) Federal Agricultural Labour Act all use the same wording.

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

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

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

This exception is transposed mainly by § 20(2) of the Equal Treatment Act and § 136/2 of the Federal Agricultural Labour Act, which states:

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

The law does not explicitly mention that this exception should not justify discrimination on another ground. Still, the provision could be interpreted as such in line with the directive as using this exception to justify discrimination on any other ground would clearly breach Directive EC 2000/78

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

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

The Catholic Church is a very influential employer in rural areas in particular and an important provider of hospitals and educational institutions.

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)

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

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

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

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

Moreover, even before the 2008 amendment, the case law⁸⁸ was clear in stating that the assertion that 'we do not sell to foreigners' constituted direct discrimination on the ground of race, and is thus not covered by the nationality exception.

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

Given the formulation of the nationality exception (after the 2008 amendment), every distinction on grounds of citizenship that is not founded on a legal basis will in principle be seen as discrimination on the ground of ethnic affiliation.

Discrimination on the basis of being or looking like 'a migrant' is also clearly prohibited.⁸⁹ In its judgment⁹⁰ on the discriminatory general exclusion of non-nationals from 'commuters' aid' in Lower Austria, the court had no problem in applying the prohibition of discrimination on ethnic grounds to that case.

It seems to the author of this report that Austrian courts generally use an interpretation of ethnic discrimination that does not scrutinise the 'particular ethnic origin' of the person

⁸⁸ Viennese Civil Regional Court, *Hayet B. v. Ferdinand S.*, Decision Nos. 35R68/07w and 35R104/07i, 30 March 2007.

⁸⁹ Viennese Civil Regional Court, Decision No. 36 R 292/15f, 10 December 2015.

⁹⁰ Lower Austria, Provincial Court St. Pölten, Decision No. 21 R 16/13f-13, 31 January 2013.

affected, as the CJEU did in its *Jyske Finans* judgment⁹¹ and reinforced in 2021 in its judgment in *Oberösterreich v. KV*,⁹² but instead takes a broader view of the term 'on grounds of ethnic affiliation'. This case law might, in the light of the CJEU rulings, develop into a stricter differentiation between differentiations with a legal basis (like housing benefits regulated by provincial legislation) and those without (like the requirement for Austrian citizenship for a job without a legal basis).

In general, the focus of the Austrian decisions so far lies more on the perception of the discriminators: if the actions are driven by the view that a person is to be treated differently based on a perceived 'otherness' that contains ethnic elements, courts find that there has been ethnic discrimination. It remains uncertain, however, how a case in which there was reference solely to a person's place of birth would be judged.

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

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

However § 7c(3) of the Act on the Employment of Persons with Disabilities contains a general clause on 'genuine occupational requirements'. The test for such 'genuine occupational requirements' can comprise questions of health and safety, as clarified by the explanatory notes to the Equal Treatment Act:⁹³

'The exception also comprises the areas of health and safety. This comprises especially those protective provisions regulating a duty to wear uniforms or helmets for reasons of safety.' This exception is therefore not restricted to the ground of disability as permitted by the directive but is valid for all the grounds dealt with by the Equal Treatment Act, although it always has to withstand the test of being a 'genuine occupational requirement'.

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

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

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

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

'(3) A different treatment does not constitute discrimination if

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

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

⁹¹ CJEU, Case C-668/15, *Jyske Finans v Ligebehandlingsnævnet*, 6 April 2017.

⁹² CJEU, Case C-94/20, *Land Oberösterreich v. KV*, 10 June 2021, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13526953>.

⁹³ Parliamentary materials, No. 307 of appendices XXII GP, 26 November 2003, p. 16.

- the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
 - the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
 - the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
- (5) The fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'

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

As we can see from the case law,⁹⁴ so far courts tend to be very strict in sticking to a narrow interpretation of these exceptions.

b) Justification of direct discrimination on the ground of age

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

The test, according to §§ 13b(3) of the Federal Equal Treatment Act and §§ 20(3) of the Equal Treatment Act, requires:

direct discrimination to be

- objective and appropriate;
- justified by a legitimate aim, especially in the fields of employment policy, labour market and vocational training;
- and the means of achieving that aim to be appropriate and necessary.

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

The Supreme Court⁹⁵ has clearly stated that 'dismissal does not necessarily constitute discrimination but can be justified even if age is a decisive factor.'

⁹⁴ See, for example, Supreme Court, Decision No. 60b246/10k, 18 July 2011.

⁹⁵ Supreme Court, *R.K. v. Österreichischer Rundfunk*, Decision No. 9ObA113/12a, 25 June 2013. In this judgment, the Court quotes the CJEU cases *Palacios de la Villa*, *Fuchs/Köhler* and *Prigge* to underline that an employer, when they are economically forced to lay off staff, shall try to cause the least social hardship and can therefore use the argument that somebody who is already entitled to a pension is socially more secure than another person, although that argument is connected with age.

c) Permitted differences of treatment based on age

In Austria, national law does not permit differences of treatment based on age for activities within the material scope of Directive 2000/78, but there are exceptions to this rule.

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

‘(3) A different treatment does not constitute discrimination if

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

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

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

d) Fixing of ages for admission to occupational pension schemes

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

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

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

4.6.2 Special conditions for younger or older workers

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

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

4.6.3 Minimum and maximum age requirements

In Austria, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training.

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

This serves as a basis for some collective agreements that introduce, or rather maintain, maximum ages in respect of access to employment in some fields – for example, for pilots. All of those might nevertheless be challenged in court as the restrictions have to be interpreted narrowly.

4.6.4 Retirement

a) State pension age

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

An individual can collect a pension and still work.

The general retirement (pensionable) age (i.e. the age at which individuals may begin to collect their pension) is currently 65 years for male and 60 years for female workers in the private sector; for civil servants it is set at 61.5 years for both sexes. These periods will be harmonised gradually from 2024 to 2033 when the general pensionable age will be 65 years.⁹⁶

In general, individuals who have attained the necessary number of months of paying into the pension scheme⁹⁷ can collect a pension and still work.

b) Occupational pension schemes

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

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

An individual can collect a pension and still work.

c) State-imposed mandatory retirement ages

In Austria, there is no state-imposed mandatory retirement age in the private sector. In the case of older people who are unemployed, special regulations force them to switch to the pension system. A worker aged 62 (as a minimum) who has lost or is losing his or her job can stay unemployed for one more year. After that, if he or she has not found a new job, he or she is obliged to switch to the pension system.

For public employment, though, an automatic shift into the pension stage is anticipated.⁹⁸

⁹⁶ Law Accompanying the Budget (*Budgetbegleitgesetz*) (BGBl I 71/2003), *Federal Law Gazette*, 71/2003, 20 August 2003.

⁹⁷ The rules for taking into account periods of apprenticeship, work or studies before the age of 18 for grading and pension scheme have been subject to a series of preliminary judgments by the CJEU: judgment of 18 June 2009, *Hütter*, C-88/08; judgment of 16 January 2014, *Pohl*, C-429/12; judgment of 21 January 2015, *Felber*, C-529/13; judgment of 28 January 2015, *ÖBB Personenverkehr*, C-417/13.

⁹⁸ Civil Servants Duty Act (*Beamten Dienstrechtsgesetz*) BGBl Nr. 333/1979 as amended by BGBl I Nr. 71/2003, § 13/1.

Civil servants are automatically transferred into the pension when they reach the age of 65 years – employment can be extended only for one year, renewable up to a maximum of five years, if there is 'an important operational reason' for such a measure.

d) Retirement ages imposed by employers

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

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

e) Employment rights applicable to all workers irrespective of age

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

f) Compliance of national law with CJEU case law

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

In its Decision No. 9ObA13/16a of 26 January 2017, the Supreme Court clarified that the fact that an employee has reached the pensionable age and is entitled to a pension does, nevertheless, have an impact on the assessment of whether a dismissal is 'socially unfair'. It stated: 'Reaching the pensionable age and entitlement to pension does not preclude the protection against unfair dismissal in general, while the fact that the lawmaker tolerates reductions of income that are regularly the effect of retirement as well as the foreseeability of the time of pension demand a strict scrutiny in weighing the affected interests.'

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

Seniority as such is not a protected element in the Austrian labour law. Generally, in Austria, age might be taken into account when applying a special provision declaring 'socially unfair' (*sozialwidrig*) dismissals illegitimate. This provision is to be found in § 105(3), figure 2 of the Labour Constitution Law (*Arbeitsverfassungsgesetz*),⁹⁹ which states:

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

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

⁹⁹ Labour Constitution Law (*Arbeitsverfassungsgesetz*), 15 January 1974 (BGBl 22/1974, last amended by BGBl I 71/2013).

(...) in case the works council [*Betriebsrat*] entered an objection against a dismissal according to heading b), the dismissal is deemed socially unfair when a comparison of social aspects shows a bigger social hardship for the affected worker than for other workers of the same company and the same field of occupation, whose work to do is possible and desired by the dismissed worker. In cases of older workers, the test of social unfairness and the comparison of social aspects must take into consideration facts of longstanding staff-membership (seniority) and the complications on the basis of higher age he or she has to face in trying to reintegrate into the labour process. (...) Circumstances under heading a) based on the higher age of a worker who has been employed in the company for long years can only be used to justify the dismissal in case a further employment of the dismissed would massively negatively affect the companies' interests.'

b) Age taken into account for redundancy compensation

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

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

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

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

4.8 Any other exceptions

In Austria, national law provides for one other exception to the prohibition of discrimination (on any ground covered by this report), consisting of the problematic regulation on 'discrimination-free advertising of housing' (§ 36 of the Equal Treatment Act).

Such regulation allows for a justification of direct discrimination on the ground of ethnic affiliation (see above, Section 2.2.b)

There are no further exceptions to the prohibition of discrimination (on any ground) provided in national law.

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

a) Scope for positive action measures

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

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

The main legislation can be found in:

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

b) Quotas in employment for persons with disabilities

In Austria, national law provides for a quota for the employment of persons with disabilities.

100. Under § 1(1) of the Act on the Employment of Persons with Disabilities, all employers who employ 25 employees or more are obliged to employ at least one person with disabilities for each group of 25 employees (the ratio of this quota, therefore, being 1:25).¹⁰⁰ For certain economic sectors, the Minister for Social Affairs may, by regulation, increase the relevant ratio from 1:25 to up to 1:40; (§ 1(2) of the Act on the Employment of Persons with Disabilities). The Minister has so far not made use of this possibility.

This obligation is widely not complied with, but the law itself provides the option of a lump-sum compensation payment¹⁰¹ in the event that an employer does not fulfil the quota. The payment is constructed not as a fine but as a legal way to compensate for non-compliance. The amounts paid in compensation go towards the so-called *Ausgleichstaxfonds*,¹⁰² which is used for a variety of disability-related measures.

¹⁰⁰ For certain economic sectors, the Minister for Social Affairs may, by regulation, increase the relevant ratio from 1:25 to up to 1:40; § 1(2) of the Act on the Employment of Persons with Disabilities.

¹⁰¹ Figures for 2021: per month/ special post not filled: EUR 276; for companies with 100 or more employees per month/special post not filled: EUR 388; for companies with 400 or more employees per month/special post not filled: EUR 411.

¹⁰² The name of the mechanism can be translated as 'compensatory fund'.

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

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

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

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

Administrative penal law is only a remedy against discriminatory advertisements.

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

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

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

b) Barriers and other deterrents faced by litigants seeking redress

In general, there is a strong reluctance to take legal action in cases of discrimination, as there is a psychological barrier to accepting that one has become a victim of discrimination. In addition, it is not helpful that there have been no cases against victimisation in the courts so far, as many people fear that standing up against discrimination will negatively affect their future prospects and prosperity¹⁰³.

The legal situation regarding discrimination is very complicated and the laws are not intelligible for people without a legal education. Even in cases in which it is not compulsory to be represented by a lawyer, it therefore seems necessary for people to have access to legal aid. The powers of the National Equality Body are restricted to providing help in the procedure before the Equal Treatment Commission, but the body has no legal standing before the courts on behalf of victims of discrimination. One great obstacle is the absence of an established framework of case law – especially regarding the amount of compensation

¹⁰³ Regarding the issue of underreporting of discriminatory incidents, see, for example: European Union Agency for Fundamental Rights, 'Equality in the EU 20 years on from the initial implementation of the Equality Directives', FRA Opinion 1/2021, p. 50 onwards.

for non-pecuniary damages. As the costs of civil law procedures are related to the amount in dispute,¹⁰⁴ this is a crucial question and it bears a lot of risks.

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

c) Number of discrimination cases brought to justice

In Austria, statistics on the number of cases relating to discrimination that are brought to justice are not available.

d) Registration of national court decisions on discrimination cases

In Austria, court decisions on discrimination are not registered as such by the national courts.

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

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

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

In Austria, trade unions and the Chamber of Labour are in principle entitled to act on behalf of workers in employment-related cases¹⁰⁵ – but there is no special provision on anti-discrimination matters. The general rules of civil procedure apply.

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

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

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

At provincial level, the Viennese Anti-Discrimination Act (§ 4(2)); the Lower Austrian Anti-Discrimination Act (§ 18(3)); the Upper Austrian Anti-Discrimination Act (§ 8(3)); the

¹⁰⁴ The amount in dispute has to be defined by the claimant and serves as a basis for further costs such as court fees and advocates' fees. Another costly procedural item could be a requirement for experts.

¹⁰⁵ See: Act on Labour and Social Courts (*Arbeits- und Sozialgerichtsgesetz*), BGBl Nr. 104/1985, § 40(1)(2).

Salzburgian Equal Treatment Act (§ 29(4)); and the Styrian Equal Treatment Act (§ 33(3)) state that the claimant can use the help of any legitimate non-profit organisation to be represented in all forms of legal proceedings under these acts, as long as the organisation's aims include the safeguarding of the adherence to the two EU non-discrimination directives.

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

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

According to the Equal Treatment Act, third-party intervention is expressly allowed for one specific NGO, the Litigation Association of NGOs Against Discrimination in the courts (§ 62 of the Equal Treatment Act). As this NGO is an umbrella organisation of more than 60 member organisations and is very much open to potential members, there have been no problems with this choice so far. Access to third-party intervention is not monopolised by this NGO, as others (including trade unions) can intervene as well if they can prove their legal interest in a particular case.

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

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

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

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

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

In penal administrative proceedings, there is no legal standing for interest groups (indeed, there is no legal standing even for the victim of discrimination themselves) at all. In some cases, involving discriminatory advertising, the National Equality Body has a legal standing and can oppose the abatement of the proceedings.¹⁰⁶

The Carinthian Equal Treatment Act (§ 39); the Burgenlandian Anti-Discrimination Act (§ 32); the Tyrolean Anti-Discrimination Act (§ 12), and the Vorarlbergian Anti-Discrimination Act (§ 7(4)) give the right to intervene (*Nebenintervention*) to associations whose statutes state their interest in adherence to the prohibition of discrimination.

¹⁰⁶ See Equal Treatment Act (*Gleichbehandlungsgesetz*), 2004, § 24(3), which states: 'In cases which were induced by the Office for Equal Treatment, the Office has a legal standing in the administrative penal proceeding. The office has the right to appeal against penal decisions.'

c) *Actio popularis*

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

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

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

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

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

The relevant provision reads as follows:

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

'In case the legal duties and restrictions set out by this law are infringed, and thereby, the general interests of the persons protected by this regulation are significantly and sustainably negatively affected, the Austrian National Council of Persons with Disabilities, the Litigation Association of NGOs Against Discrimination and the Ombud for Persons with Disabilities can bring a lawsuit for a declaratory judgment and – regarding big capital corporations¹⁰⁷ – also for injunction and removal of the discrimination on the ground of disability.'

d) Class action

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

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

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

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

The respective regulations can be found in:

1. §§ 26(12), 38(3) of the Equal Treatment Act;
2. § 20a of the Federal Equal Treatment Act;
3. § 7p of the Act on the Employment of Persons with Disabilities;
4. § 12 of the Federal Disability Equality Act;
5. § 142(9) of the Federal Agricultural Labour Act.

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

The Act on the Employment of Persons with Disabilities, the Federal Disability Equality Act and the Federal Agricultural Labour Act all use the same wording.

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

Nevertheless, in its important Decision No. 9ObA177/07f of 9 July 2008, the Supreme Court ruled that this regulation must be interpreted as being in line with the relevant directive – meaning that: 'In the case that the establishment of facts allowing the assumption of discriminatory infringement is successful – it is for the respondent to prove that he or she did not discriminate.'¹⁰⁸

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

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

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

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

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

¹⁰⁸ Supreme Court, Decision Nr. 9ObA177/07f, 9 July 2008.

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

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

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

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

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

There are still no court cases on the matter.

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

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

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

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

In a case of discriminatory termination of employment, a victim can challenge the termination or take the option to accept the termination and claim pecuniary and non-pecuniary damages.¹⁰⁹

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

¹⁰⁹ Equal Treatment Act, 2004, § 26(7).

case law,¹¹⁰ this restriction¹¹¹ might be questionable. As a Member State has to choose a sanction or remedy that is effective, proportionate and dissuasive, a symbolic compensation that does certainly not deter financially powerful employers or undo the personal harm suffered as a result of discrimination is surely problematic if it is the only possible legal remedy for the claimant. A maximum amount of EUR 500 can only be considered purely nominal compensation, while it must be taken into account that general Austrian civil and labour law does not provide for similar non-pecuniary damage claims.

The mere concept of punitive damages is unknown in the Austrian legal tradition, while from a dogmatic point of view the minimum non-pecuniary damages in cases of harassment (EUR 1 000 minimum compensation) can be seen as being of a punitive nature. At the very least, they contain a punitive element as the court does not have to appraise the value of the concrete damage in the event that only the minimum is claimed. Due to the low amount of this minimum, this is a mainly academic or dogmatic issue.

In the event that the discrimination proves decisive in non-employment, the Equal Treatment Act sets out the minimum compensation of two months' salary.¹¹² In court, the claimant can demand only financial compensation, and not to be employed.

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

The Equal Treatment Act establishes a (in principle) very effective sanction for companies that do not observe the prohibition of discrimination: exclusion from public funding granted by the Federation¹¹³ but it does not extend the exclusion to public procurement, which would render the effectiveness of this sanction perfect.¹¹⁴ It is, nevertheless, quite unclear in practice how these provisions are surveyed and how the sanction is triggered.

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

b) Compensation – maximum and average amounts

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

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

In 2016, for the first time, the Supreme Court, while rejecting extraordinary revision in a gender discrimination case in the employment field, came up with a general guideline on

¹¹⁰ Judgment of 22 April 1997, *Nils Draehmpaehl v. Urania Immobilienservice OHG*, C-180/95, ECR I-2195, paras. 25 and 29.

¹¹¹ Judgment of 10 April 1984, *Von Colson and Karmann v. Land Nordrhein-Westfalen*, C-14/83, ECR 1891, paras. 23 and 24.

¹¹² Equal Treatment Act, 2004, § 26(1).

¹¹³ Equal Treatment Act, 2004, §§ 14, 26, 37.

¹¹⁴ See European Commission (2001), *Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*, COM (2001)0566 final, Brussels, 28 November 2001, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2001:333:TOC>.

how to assess the immaterial damages in discrimination cases.¹¹⁵ The language is still quite vague, but it states that the compensation has to go beyond the mere compensation of 'loss of pleasure or amenities of life' in compensation for physical injury or pain and suffering.¹¹⁶

c) Assessment of the sanctions

From an overall assessment, the effectiveness of the existing sanctions seems to be rather limited. The main issue here is that the only instrument used as a sanction is basically compensation for material and immaterial damages. While in most of the cases brought to courts so far, material damage has not played a major role, the Austrian legal system does not otherwise contain an elaborate legal tradition regarding immaterial damages. Basically, the idea of using compensation for damages in a directive, punitive and thereby dissuasive way is so far very unfamiliar, if not bizarre, to judges. The legislator has repeatedly seen the need to raise the minimum amount of compensation for harassment (from the original amount of EUR 400 to EUR 1 000 since 2004) as practice showed that many courts in fact used the figure given in the legislation as a reference point for their decision-making even in cases of discrimination not linked with harassment. In most cases, courts treated the minimum amount as a maximum amount.

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

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

The case law reflects the uncertainties mentioned above that the claimants face regarding the amount of compensation. To illustrate this,¹¹⁷ see two decisions issued by the same court – the Viennese Commercial Court (Handelsgericht Wien) – in more or less identical cases with highly contradictory outcomes concerning the assessment of the amounts awarded in compensation.

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

Issue: A dark-skinned man had been not admitted into a restaurant to celebrate someone's birthday, while his partner and her colleagues (all white) had been admitted without any problem. The court of first instance found that there had been discrimination and awarded the amount of EUR 1 000 that the claimant had demanded in compensation.

¹¹⁵ Supreme Court, Decision No. 9ObA49/16w, 29 September 2016.

¹¹⁶ 'In general, when assessing compensation for discrimination suffered, it is especially necessary to take into account the length and the gravity of the disturbance. When determining this compensatory amount it will be necessary to take into account the psycho-physical situation of the victim, his or her emotional world [*Gefühlswelt*], his or her sensitiveness, the limits of variability of his/her psyche [*Schwankungsbreite seiner Psyche*] and to consider that the compensation is not just balancing the loss of the pleasures or amenities of life but shall also remedy the feeling of having been hurt and, thereby, rebuild the disturbed balance of his/her personality.' (Supreme Court, Decision No. 9ObA49/16w, 29 September 2016).

¹¹⁷ Although the detailed description of the cases might appear more descriptive than analytic, it is a rather effective way of demonstrating the main challenges faced by courts and their unsystematic approach to the legislation, which creates a major obstacle to its use. The cases described are now very old, but the general uncertainty and inconsistency has not changed much over the past few years.

Main argument when assessing the amount of compensation: 'In view of the intended preventive effect of the compensation for immaterial damages by the Equal Treatment Act (...) the amount of compensation cannot be compared to the compensation for pain and suffering [*Schmerzensgeld*] according to § 1325 of the ABGB (General Civil Law Code) – a conclusion which can already be drawn by the existence of a legally fixed minimum amount of compensation – a figure completely unknown otherwise to the concept of compensation. In so far as the respondent wants to deduce any inappropriateness from a comparison with customary amounts of compensation for pain and suffering, he cannot convince the court.' Result: Compensation of EUR 1 000 upheld. All procedural costs have to be paid by the respondent.

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

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

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

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

Result: Compensation reduced from EUR 1 500 to EUR 250, which at the same time means that the claimant (the victim) has to fully pay the cost of the whole proceeding¹¹⁸ – in this case, the costs of the respondent alone, which had to be paid by the claimant in addition to her own costs, amounted to EUR 925.61. As a result, the victim of discrimination suffered a financial loss of a minimum of EUR 675.61.

In 2016, the Supreme Court took the opportunity to issue some initial guidelines for courts on how to assess the amount for compensation in discrimination cases:¹¹⁹ 'In general, when assessing compensation for discrimination suffered, it is especially necessary to take into account the length and the gravity of the disturbance. When determining this compensatory amount it will be necessary to take into account the psycho-physical situation of the victim, his or her emotional world [*Gefühlswelt*], his or her sensitiveness, the limits of variability of his/her psyche [*Schwankungsbreite seiner Psyche*] and to consider that the compensation is not just balancing the loss of the pleasures or amenities of life but shall also remedy the feeling of having been hurt and, thereby, rebuild the disturbed balance of his/her personality.' This guidance clearly goes beyond mere compensation for pain and suffering.

¹¹⁸ Under the general Civil Procedure Code, the burden of procedural costs shifts entirely to the claimant if the amount awarded by the court is lower than half the amount of his or her claim.

¹¹⁹ Supreme Court, Decision No. 9ObA49/16w, 29 September 2016.

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

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

At the federal level, the Act on the Equal Treatment Commission and the National Equality Body establishes an Equal Treatment Commission¹²⁰ and the National Equality Body.¹²¹ In transposing Article 13 of the Racial Equality Directive, Austria extended the functions of the existing quasi-judicial Equal Treatment Commission (then for gender issues only) and created a separate Federal Equal Treatment Commission¹²² (dealing with cases of federal employees only). The then existing Ombud for Equal Employment Opportunities (gender) was transformed into the new National Equality Body consisting of three specialised Ombuds dealing with their respective fields (gender and employment, employment other grounds, other grounds outside employment). In short, the two existing institutions previously dealing with gender discrimination in the workplace only were given extended mandates to deal with discrimination on the ground of gender and on all other grounds mentioned in Article 19 of the Treaty on the Functioning of the European Union (TFEU) except disability. Disability is addressed with a completely separate set of laws and institutions – none of which claims to be a fully-fledged equality body.

In 2005, the additional Ombuds necessary for the new version of the National Equality Body were appointed and took office in the Federal Chancellery. In late April 2005, two new senates within the Equal Treatment Commission started operating. The findings of the Commission on general issues and cases are published in an anonymous and condensed form online.¹²³

At the provincial level, provinces are obliged to set up specialised bodies to promote equal treatment in their own field of competence as some important areas of law and administration are not covered by federal legislation. The provincial bodies are therefore not linked to each other¹²⁴ and share no responsibilities with the federal structures. As is apparent from the impressive list of different bodies, it might not always be easy for victims of discrimination to find out where to turn to.

In Vienna, an Office for the Fight against Discrimination (Stelle zur Bekämpfung von Diskriminierungen) was set up. The position was set up independently by provincial constitutional law.¹²⁵ The duties are not very broad – it is mainly a counselling service with a vague responsibility for mediating conflict as well as writing reports and studies. These tasks were given to an existing independent body of the Vienna Province, the Commissioner for the Safety of Employees (Bedienstetenschutzbeauftragter) – a position that had nothing to do with issues of discrimination previously but was responsible for safety issues concerning the employees of the City of Vienna.

Styria has set up a range of bodies for equal treatment, including the Styrian Equal Treatment Commission; the Commissioner for Equal Treatment;¹²⁶ and Contact Persons. The Commission's main task is to give statements in individual cases of alleged discrimination (in connection with employment by the province) and to comment on specific legal drafts. The Commissioner(s) for Equal Treatment are mainly counselling

¹²⁰ Available at: <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungs-kommissionen/gleichbehandlungskommission.html>.

¹²¹ Available at: <https://www.gleichbehandlungsanwaltschaft.gv.at/gleichbehandlungsrecht-in-osterreich>.

¹²² <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungs-kommissionen/bundes-gleichbehandlungskommission.html>.

¹²³ Available at: <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungs-kommissionen/bundes-gleichbehandlungskommission.html>.

¹²⁴ Although there are annual meetings of the provincial bodies.

¹²⁵ Viennese Anti-Discrimination Act (*Wiener Antidiskriminierungsgesetz*), 2004, § 7(3).

¹²⁶ In addition to a separate commissioner for the City of Graz.

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.¹²⁷ Since May 2012, the Styrian Government and the City of Graz have also funded a general Anti-Discrimination Office, which offers individual counselling to everybody and issues statements and expert opinions.

Carinthia has set up an Anti-Discrimination Office¹²⁸ (Antidiskriminierungsstelle) in the section for civil law within the Office of the Provincial Government. This office is entitled to support (counsel) victims of discrimination and to issue recommendations as well as to conduct independent surveys on discrimination. This body is not independent.

Lower Austria has set up a Lower Austrian Commission for Equal Treatment¹²⁹ (Niederösterreichische Gleichbehandlungskommission) whose main tasks are to give recommendations in individual cases of alleged discrimination (in connection with employment by the province) and to comment on specific legal drafts. The chairperson of the Commission is also the Lower Austrian Commissioner for Equal Treatment (Niederösterreichische/r Gleichbehandlungsbeauftragte/r) and heads the Anti-Discrimination Office. This Commissioner is mainly a counselling body with powers to initiate proceedings. The Office can conduct surveys and issue reports. Lastly, Co-ordinators for Equal Treatment and Promotion of Women are established in all major municipalities and offices of the provincial government. Their task is mainly to counsel individual civil servants and notify grievances to the Commissioner. The members of the Commission and the Commissioner are independent in fulfilling their functions; this is safeguarded by a provincial constitutional provision.

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

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

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

¹²⁷ Styrian Equal Treatment Act (*Steiermärkisches Gleichbehandlungsgesetz*), § 44.

¹²⁸ Carinthian Anti-Discrimination Act (*Kärntner Antidiskriminierungsgesetz*), §§ 32, 33.

¹²⁹ Lower Austrian Equal Treatment Act (*Niederösterreichisches Gleichbehandlungsgesetz*), §§ 11, 12.

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

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

b) Political, economic and social context of the designated bodies

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

There have been no dramatic increases or cutbacks in budget for the equality bodies in recent years. The staff of the National Equality Body has been gradually expanding in recent years to a level that is still not regarded as sufficient by the body itself, but which has been a relieving improvement. In 2021, the body has been more visible than it had previously been, with a newly designed website and public events.

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

c) Institutional architecture

In Austria, the designated bodies do not form parts of a body with multiple mandates.

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

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

d) Status of the designated bodies – general independence

i) Status of the bodies

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

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

The functions of the chairpersons, who head the three senates, are held by federal civil servants appointed by the respective federal minister. The chair of Senate I has a coordinating function among the senates, but the three chairs are in principle equal as the highest officials of the ETC. The members of the Commission perform their functions on an unsalaried voluntary basis; this means that they simply receive the salaries from their delegating institutions, which are ministries and social partners only¹³⁰ (Ministries: Labour and Social Affairs, Federal Chancellery, Justice, Economics; Social Partners: Chamber of Commerce, Chamber of Labour, Austrian Industry Association, Trade Union Federation). Although the members can act independently as members of the Commission, the image is that the Commission consists of persons sent by institutions to represent those institutions' attitudes and political opinions rather than give their individual expertise. The law does not contain any requirements regarding their knowledge or expertise regarding discrimination. The only requirements are that they have to be delegated by the listed institutions and that a minimum quota of 50 % members of the Commission shall be women.

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

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

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

Although detailed information about the budgets of all specialised bodies is not readily available, the National Equality Body seems to be the body where the discrepancy between resources and tasks is most obvious. Only few persons are employed to fulfil all the duties of the body related to all protected areas and all grounds except disability. In its latest report,¹³¹ the NEB complains clearly about the lack of adequate resources, especially for litigation, awareness raising, data processing and challenges presented by the adoption of Directive 2014/45/EU.

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

¹³⁰ Act on the Equal Treatment Commission and the National Equality Body (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*), 2004, §§ 2(1)-(4).

¹³¹ See latest report: National Equality Body (2020), *Equal Treatment Report for the Private Sector 2018-19* (*Gleichbehandlungs-bericht für die Privatwirtschaft 2018 und 2019*), available at: <https://www.gleichbehandlungsanwaltschaft.gv.at/publikationen-und-links/taetigkeitsberichte.html>, p. 128 onwards.

to the National Council every two years about the implementation of the Equal Treatment Act.

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

ii) Independence of the bodies

Both national bodies have functional independence, fully legally safeguarded since 2008, when a new Article 20(2) of the Federal Constitutional Act¹³² allowed the setting up of independent institutions. The independence clauses are enshrined in § 3(3) of the GBK-GAW-G for the NEB and in §§ 10(1a)-(1b) of the GBK-GAW-G for the ETC.¹³³ Functional independence means that nobody can interfere with what they do in their positions. In terms of organisation and budget, however, they are fully dependent on the Federal Chancellery.

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

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

e) Grounds covered by the designated bodies

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

Given the history of both bodies as the original specialist bodies with responsibility for acting against discrimination on the ground of gender in the workplace, there might still be some bias towards putting more effort into the gender ground than other areas. Aside from a visible inclination towards the gender ground, the institution has built up expertise on all grounds.

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

¹³² Amendment by *Federal Law Gazette* I 2/2008, 4 January 2008.

¹³³ The functional independence of the Federal Equal Treatment Commission is regulated in the Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*), 2004, § 24(5).

- f) Competences of the designated bodies – and their independent exercise
 - i) Independent assistance to victims

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

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

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

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

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

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

- ii) Independent surveys and reports

The National Equality Body has the competence to conduct independent surveys and publish independent reports. It can conduct independent inquiries and surveys and publish independent reports¹³⁴ and recommendations concerning all questions related to discrimination. Practice so far has shown that the Ombuds receive quite a respectable number of requests and complaints but do not have enough time (resources) for all other parts of their mandate. Reports are scarce, although some broad information material¹³⁵ has been provided online; in 2021, eight independent opinions¹³⁶ on legal drafts have been published.

The Equal Treatment Commission sporadically publishes expert opinions on legal interpretation of certain aspects of the equal treatment legislation on its website, and it has to publish on its website details of every case in which a respondent does not comply with the duty to report to the Commission in time (§ 13(4), GBK-GAW-G). The latter is a formal obligation only.

¹³⁴ See the NEB's publications at: <https://www.gleichbehandlungsanwaltschaft.gv.at/publikationen-und-links/taetigkeitsberichte.html>.

¹³⁵ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/Themen.html>.

¹³⁶ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/Gleichstellungspolitik/Stellungnahmen.html>.

The report to Parliament¹³⁷ about the work of the NEB and ETC is not independent as it is a report of the Federal Chancellor. In practice, it is obvious that the report is in fact written by the NEB and reaches the Parliament unfiltered, as the assessment of shortcomings is usually bold and direct. In their publications on their own website, the Ombuds of the NEB can also address recent developments.

iii) Recommendations

In Austria, the designated bodies have the competence to issue independent recommendations on discrimination issues. While the NEB has a general mandate to issue recommendations (§ 5(2) of GBK-GAW-G), the ETC issues recommendations in its expert opinions on individual cases or cases of general interest on how to end and remedy specific issues of discrimination. The NEB also publishes expert opinions on issues of particular interests¹³⁸ and its own recommendations.¹³⁹

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

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

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

iv) Other competences

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

In addition, the NEB gets involved in the assessment process for proposed legislation¹⁴⁰ and in awareness-raising activities through workshops¹⁴¹ and events. The Ombuds also offer preventive consultations for employers.

¹³⁷ See, for example, the latest report – National Equality Body (2020), *Equal Treatment Report for the Private Sector 2018-19* (Gleichbehandlungsanwaltschaft für die Privatwirtschaft 2018 und 2019), available at: <https://www.gleichbehandlungsanwaltschaft.gv.at/wir-ueber-uns/taetigkeitsbericht.html>.

¹³⁸ See commissioned expert opinions at: <https://www.gleichbehandlungsanwaltschaft.gv.at/Themen.html>.

¹³⁹ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/Themen.html>.

¹⁴⁰ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/publikationen-und-links/Stellungnahmen.html>.

¹⁴¹ See a list of workshops here: <https://www.gleichbehandlungsanwaltschaft.gv.at/aktuelles-und-services/veranstaltungen.html>.

g) Legal standing of the designated bodies

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

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

Only in the event that the opinion of the NEB diverges from the result of the proceeding before the ETC (§ 5(5) of GBK-GAW-G) or the alleged discriminator does not comply with the recommendations of the ETC in a case brought to the ETC by the NEB (§ 12(5) of GBK-GAW-G), the NEB can bring a case to court for a ruling on principle. The lawsuit requires the consent of the individual affected. According to § 12(6) of the GBK-GAW-G, any resulting decision of a court has to be published on the website of the respective senate of the ETC. To date, no such publication can be found. There is, however, one judgment by the Supreme Court (Decision No. 9ObA44/06w of 9 April 2007) in a case that the NEB lost due to deadlines. In its report for 2014-15,¹⁴² the NEB reports that bringing cases to court is practically almost impossible as the resources are not available and the legal requirements are restrictive (for example, there is no way to go to court if the ETC rightly finds that there has been discrimination in a specific case). The situation has not changed since.

h) Quasi-judicial competences

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

According to the GBK-GAW-G, the ETC has to deliver expert opinions (§ 11) or issue a decision in an individual case (§ 12). The ETC, through its three senates, does so in a quasi-judicial manner using the right to summon involved persons and experts before the senates, which issue their findings in a very court-like language. In decisions on individual cases, when finding that discrimination has occurred, they have to include a recommendation on how to apply the principle of equal treatment and demand an end to the discrimination.

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

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

It is impossible to reliably assess to what extent the decisions of the ETC are respected. Their undisputed benefit lies in the fact that an official body in an official proceeding finds that there has been discrimination and the proceedings are free of charge. For many

¹⁴² National Equality Body (2016), *Equal Treatment Report for the Private Sector 2014-15* (*Gleichbehandlungs-bericht für die Privatwirtschaft 2014 und 2015*), available at: https://www.gleichbehandlungsanwaltschaft.gv.at/dam/jcr:4dc77248-fed3-4c62-86ca-0ae74581c9a2/161125_GAW_Bericht_2015_15.pdf, p. 8.

victims of discrimination, this is an important issue. It seems that in certain cases, the perpetrators really do return from such proceedings having had a learning experience – although all information on this is anonymous and confidential. It is clear, on the other hand, that hardliners or people who just disrespect and ignore the ETC get away without any sanction. The only kind of sanction that the GBK-GAW-G gives the Commission is in § 13, which obliges alleged discriminators to disclose certain information and report to the ETC. If they do not comply with such a request, the Commission has to publish this fact (of non-compliance) on its website.¹⁴³ Not many such announcements can be found there, and it is doubtful that the sanction has a deterrent effect as it is not easy to stumble across these publications by chance due to their non-prominent placement on the website.

There is no quasi-judicial body dealing with cases of discrimination based on disability.

i) Registration by the bodies of complaints and decisions

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

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

The other comprehensive source of information is the biannual report to the Parliament, which comprises two separate parts: one for the ETC and a second one for the NEB. The latest published report is for 2018-19. For the NEB, the data is disaggregated by the internal system of three parts (gender/workplace, other grounds/workplace, gender plus ethnicity/beyond workplace), gender, type of discrimination and geographical distribution throughout the provinces. In total, there were 4 017 requests/inquiries and consultations in 2018 and 2019. Of those reported discrimination cases, 52 % concerned gender, 24 % dealt with ethnic affiliation, 12 % with age, 8 % with religion, 2 % with sexual orientation and 2 % with belief. A total of 78 % of cases were reported from the workplace, while 75 % of cases concerning discrimination on the ground of religion involved anti-Muslim discrimination and 19 % involved antisemitic discrimination.

The Equal Treatment Commission – in the same period¹⁴⁴ – received 242 applications and issued 115 decisions in all three senates. Senate I (gender/workplace) received 135 applications and issued 70 decisions; Senate II (other grounds/workplace) received 73 applications and issued 28 decisions; while Senate III (gender plus ethnicity/beyond workplace) received 34 applications and made a decision in 17 cases. Given its nature as a quasi-judicial body, the ETC does not receive or not record any informal inquiries.

All this information is easily accessible on the internet – however, it is not very up-to-date given the biannual nature of the reports. Nonetheless, the reports are very detailed and allow for an in-depth understanding of the activities of both bodies. It should be reiterated here that neither body deals with cases based on disability.

¹⁴³ See, for example, for Senate III: <https://www.bundeskanzleramt.gv.at/agenda/frauen-und-gleichstellung/gleichbehandlungskommissionen/gleichbehandlungskommission/gbk-senat-iii/weitere-veroeffentlichungen.html>.

¹⁴⁴ See *Federal Equal Treatment Report 2020 (Gleichbehandlungsbericht des Bundes 2020)*, available at: https://www.oeffentlicherdienst.gv.at/fakten/bundespersonal/daten/geschlechter/13_B-GBB_2020_Impressum_Uebersicht_Einleitung.pdf?7or3un.

k) Roma and Travellers

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

8 IMPLEMENTATION ISSUES

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

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

The duty to disseminate information about the issues at stake is not given a high priority by the Federal Government, although there are some activities¹⁴⁵ in this field. Most of the widely visible activities have taken place between 2004 and 2007, directly following the implementation of the EU Directives in national legislation.

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

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

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

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

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

Apart from this formal 'dialogue', the interested NGOs are always invited to comment officially on legal drafts and they do so regularly. The consultations on legal drafts are open to everyone, and comments received are published on the website of the Parliament.¹⁴⁶ There is some bilateral discussion between the ministries and several NGOs.

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

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

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and 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 has been set up to ensure that there are regular meetings specifically concerning issues of discrimination or equal treatment. Generally, social partners have a strong standing in Austrian politics and are involved in most spheres concerning discrimination. However, they do not represent the diversity of the current population.

¹⁴⁵ Some informative brochures were financed by the Government – including guidance in discrimination cases. (e.g. <https://www.gleichbehandlungsanwaltschaft.gv.at/informationmaterial>).

¹⁴⁶ See: parliamentary consultations on legal initiatives: <https://www.parlament.gv.at/PAKT/BEST/GESI/index.shtml>.

d) Addressing the situation of Roma and Travellers

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

Apart from this, the development of a national strategy for Roma integration¹⁴⁷ started in 2011, and the strategy was formulated in 2012. As one visible outcome of this, the Federal Chancellery set up a so-called national contact point for Roma integration in June 2012. This contact point (one person) mainly coordinates governmental activities regarding the Roma strategy and looks after a corresponding 'dialogue platform' which maintains contacts with NGOs. This platform continued its work in 2021 without much visible change.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

None of the bills meant to implement the directives contain provisions on ensuring compliance with the 2000 Directives. Although the general principles of law, *lex specialis derogat legi generali* and *lex posteriori derogat legi priori*, apply to the Austrian legal system, it is still necessary to question and challenge each individual provision before a competent authority or court in order to find out whether it still prevails or is obsolete.¹⁴⁸

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

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

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

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

No general assessment has been made with regard to ensuring that contracts, collective agreements, internal rules of businesses and the rules governing independent occupations, professions, workers' associations and employers' associations comply with the principle of equal treatment.

All questionable rules will therefore have to be assessed and challenged over time. In those areas in which the directives are directly applicable, non-complying rules or parts of contracts or collective contracts have to be disregarded or applied in the light of the Directives, whereas other rules or clauses will have to be formally declared null and void by courts or by the competent administrative authority.

¹⁴⁷ See: https://ec.europa.eu/info/sites/info/files/roma_austria_strategy2_en.pdf.

¹⁴⁸ Primacy of application of European Union law: since the CJEU judgment of 15 July 1964 in *Costa v. ENEL*, Rs 6/64, national law conflicting with European legislation must not be applied; there is also a direct effect between private contractual partners.

9 COORDINATION AT NATIONAL LEVEL

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

The Equal Treatment Act and the Federal Equal Treatment Act are both coordinated and fleshed out by the Federal Ministry of Labour and the Ministry of Social Affairs, Health, Care and Consumer Protection and the Minister of Women, Integration, Family and Youth in the Federal Chancellery.

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

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

There is no national action plan on anti-racism or discrimination. The current Government's plan foresees the creation of such a national action plan, but it has not yet been realised.

There is, nevertheless, the *National Action Plan on Disability 2012-2020*,¹⁴⁹ which was adopted by the Council of Ministers on 24 July 2012 (and extended to the end of 2021). In this paper, protection against discrimination, accessibility and awareness raising are prime topics.

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

A National Strategy against Antisemitism¹⁵⁰ was developed in 2020, and published in early 2021. The strategy contains 38 measures mainly in the areas of awareness raising, combating hate speech, research and security for Jewish institutions and communities and monitoring of antisemitic incidents.

¹⁴⁹ Ministry of Social Affairs (2015), *National Action Plan 2012-2015 – Interim Report*, available at: <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=362>.

¹⁵⁰ See the *Nationale Strategie gegen Antisemitismus (National Strategy against Antisemitism)* document, available at: <https://www.bundestkanzleramt.gv.at/dam/jcr:8bd2975f-0483-4e74-abd9-d66446195d7c/antisemitismusstrategie.pdf>.

10 CURRENT BEST PRACTICES

- Continuous support for the Litigation Association of NGOs Against Discrimination

As a rather unique mechanism, the Litigation Association of NGOs Against Discrimination¹⁵¹ is one of the driving forces in the creation of case law and legal development in Austria. It is an umbrella organisation focusing on strategic litigation¹⁵² and legal knowledge, involving NGOs dealing with all protected grounds, and it is highly effective in its impact. Through long-term agreements on financial support, the Government has in the past acknowledged this importance and safeguarded the organisation's existence. During 2021, support has continued.

- Compulsory reconciliation attempts in cases concerning discrimination on the ground of disability

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

- Mediation approach by National Equality Body

The National Equality Body – the Ombuds for Equal Treatment – stated in its latest biannual report¹⁵³ that in 82 cases, its efforts to support negotiations between the parties involved in discrimination cases were successful, leading to an out-of-court settlement. This seems a comparatively fruitful way to solve cases in a way that is satisfactory to the victims and at least somewhat educational for the discriminators.

¹⁵¹ See the website for the Litigation Association of NGOs Against Discrimination (Klagsverband Mit Recht gegen Diskriminierung) at: <http://www.klagsverband.at/english>.

¹⁵² During the reporting period, there was a strategic focus by some provinces on legally challenging restrictive legislation regarding social advantages.

¹⁵³ See NEB short report: https://www.gleichbehandlungsanwaltschaft.gv.at/dam/jcr:8d428364-81ed-487b-ae8d-a566de90abf6/GAW_Kurzbericht_2018_19_barrierefrei.pdf.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

Federal level:

- No legal means of redress exists for cases similar to the *Feryn* case (ECJ case C-54/07), in which discriminatory statements without a known individual victim were found to be unlawful in the light of the directive. In Austria – without an individual claiming to have suffered damage from such conduct – no one has the legal right to sue or start a proceeding under the equal treatment legislation. Only limited administrative penal sanctions under Article III(1)(3) of the EGVG (Introductory Act on the Administrative Procedural Laws) can be imposed in such cases. The provision protects only race, colour, national or ethnic origin, religion and disability. People who feel offended can only notify the local authorities and expect them to act on their report. They have no procedural right – and are not even informed about the result (or even initiation) of the proceedings.
- Exception for ethos-based employers. The text of § 20(2) of the Equal Treatment Act does not explicitly state that applying the exception regarding faith or religion may not lead to discrimination on the basis of another ground.
- Penalties: a maximum administrative fine of as low as EUR 360, and exclusion of punishment for employers as first-time offenders (warning only) in cases of discriminatory job advertisements and discriminatory housing advertisements. These sanctions are neither effective, dissuasive nor proportionate.
- The regulation on 'discrimination-free advertising of housing' (§ 36 of the Equal Treatment Act) allows for a justification of differentiation regarding ethnicity and gender if this is 'justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Especially, it is not deemed discrimination if the provision of housing constitutes a specially close or intimate relationship of the parties or their relatives'. While this might be in line with Directive 2004/113/EC (Recital 16 and Article 4(5)) in respect of the gender ground and have some legitimate aspects in respect of Article 8 of the ECHR, it constitutes a breach of Directive 2000/43/EC concerning ethnic affiliation as it introduces an additional justification even for direct discrimination on that ground.
- Compensation: limitation to a maximum amount (as low as EUR 500) if the employer proves that the victim would not have been recruited or not promoted anyway. This sanction is not effective, dissuasive and proportionate.

Provincial level:

The implementation of Directive 2004/113/EC has been used to introduce a new possibility to justify direct as well as indirect discrimination regarding access to and provision of goods and services for all grounds. The formula for this was taken from the justification of indirect discrimination ('if justified by a legitimate aim and the means of achieving that aim is appropriate and necessary'). As a result, even direct discrimination can now be justified in that way. § 4(6) of the Vorarlbergian Anti-Discrimination Act¹⁵⁴ and § 2(7) of the Viennese Anti-Discrimination Act¹⁵⁵ are in clear breach of Directive 2000/43/EC, as they allow this kind of justification even for acts of direct discrimination on the basis of ethnic affiliation for the fields outside employment.

¹⁵⁴ Vorarlbergian Anti-Discrimination Act (*Vorarlberger Antidiskriminierungsgesetz*), 2005, § 4(6): 'A difference of treatment on the ground of one of the grounds mentioned in § 3(1) does not constitute discrimination if it is justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary.' (The list in § 3(1) includes ethnic affiliation).

¹⁵⁵ Viennese Anti-Discrimination Act, 2004, § 2(7): 'Furthermore, a difference of treatment on ground of one characteristic mentioned in subparagraph 1 does not constitute discrimination if it is objective and proportionate as well as justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary.' (The list in §2 (1) includes ethnic affiliation).

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

11.2 Other issues of concern

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

Since 2015, provincial legislators have started to create new legislation in the field of social protection and social benefits that tries to reduce the rights of migrants and refugees to these provincial allowances. It is apparent that these policies are following the 'promise' made during many election campaigns by the Freedom Party, which read: 'Our money for our people'. The higher courts regularly found such provisions, or their application, discriminatory and unlawful. In the light of the CJEU decision in *Land Oberösterreich v. KV*¹⁵⁶ on the Upper-Austrian 'housing benefit', it became clear that Directive 2000/43/EC cannot be used to stop these practices, as the CJEU clarified that Directive 2000/43/EC does not protect against a difference in treatment that is based on nationality/third country citizenship and the requirement of specific (official) language skills to be entitled to receive financial housing assistance through a province.

¹⁵⁶ CJEU, Case C-94/20, *Land Oberösterreich v. KV*, 10 June 2021; <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13526953>.

12 LATEST DEVELOPMENTS IN 2021

12.1 Legislative amendments

The most important legislative development in 2021 was the adoption of the new Federal Agricultural Labour Act¹⁵⁷ (*Landarbeitsgesetz*), adopted on 30 March 2021 and in force since 30 June 2021.

The Act uses the federal competence to regulate the rights of agricultural and forestry workers and thereby tackles discrimination in an aligned manner at the federal level, while the provinces must implement the legislation. It covers the employment scope for agricultural and forestry workers for all grounds covered by Directive 2000/78/EC. Although, the substance of the legislation does not introduce new regulations regarding protection against discrimination, it opens up possibilities for amendments and developments regulated by federal law, without legislative processes in all nine provinces. It further declared the nullification of all the various provincial agricultural labour relations acts. This is a positive development in the direction of unifying the fragmented legal basis that has been criticised from many sides for many years now.

A similar approach at the provincial level has led to the adoption of the new Carinthian Equal Treatment Act,¹⁵⁸ which came into force on 1 January 2022. The new law supersedes the previous Anti-Discrimination Act and codifies all major provincial legal norms against discrimination in one new piece of legislation. Again, on the substance and content, the changes are minor, while the step to make anti-discrimination legislation more accessible and unified is clearly a positive one.

12.2 Case law

Relevant discrimination ground(s): belief

Name of the court: Supreme Court

Date of decision: 25 November 2021

Name of the parties: Withheld

Reference number: 9ObA130/21i

Link: https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20211125_OGH0002_009OBA00130_21I0000_000/JJT_20211125_OGH0002_009OBA00130_21I0000_000.html

Brief summary: An employee claimed to have been dismissed from her job due to her 'belief regarding the coronavirus' and claimed discrimination on the ground of belief. She was convinced that the coronavirus is just as dangerous as an 'ordinary influenza' and was arguing against the wearing of masks. The Court stated clearly that it could not see any reason to subsume these thoughts as 'belief' within the meaning of Directive 2000/43/EC. It stated: 'When the claimant refers to the fact that constitutional law has to be followed, she is right. Her concern about her health is very well comprehensible. All this, though, has nothing to do with faith in the meaning of the law.' Therefore, the claim was not successful.

Relevant discrimination ground(s): Disability

Name of the court: Supreme Court

Date of decision: 24 March 2021

Name of the parties: Withheld

Reference number: 9ObA77/20v

Link: https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20210324_OGH0002_009OBA00077_20V0000_000/JJT_20210324_OGH0002_009OBA00077_20V0000_000.html

Brief summary: An employer had ordered an employee who was claiming rights (i.e. unfair dismissal) from his status as a person with a disability to submit all his medical documents and an expert opinion from the Social Minister's Service, and to undergo a

¹⁵⁷ BGBl I 78/2021.

¹⁵⁸ Carinthian LGBl No.70/2021.

separate examination with a doctor of their choice. The two lower instances declared that these orders were not based in law and did not have to be followed. The Court upheld the ruling and stated that the only legal requirement in this regard is to submit a declaration issued by the competent medical authority (i.e. the Social Minister's Service), stating the estimated duration of the sick leave and the cause thereof. The indication of the cause does not contain any medical details of the diagnosis and there is no obligation to reveal such details to the employer.

Relevant discrimination ground(s): Religion

Name of the court: Supreme Court

Date of decision: 14 September 2021

Name of the parties: Withheld

Reference number: 9ObA59/20i

Link: https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20210914_OGH0002_008OBA00059_20I0000_000/JJT_20210914_OGH0002_008OBA00059_20I0000_000.html

Brief summary: An employee was internally redeployed in a public hospital to another post which included the transport of different items, including food and items containing blood. He refused to sign the redeployment order and pointed out that he was a devout Hindu and did not only live strictly as a vegan, but also must not have any physical contact with meat, fish or eggs, even in closed containers. The employer insisted on the redeployment. The employee did not show up for work and was dismissed. The Court did not decide the case on its merits but sent it back to the lower instance to collect further evidence. It stated that the employer's duty to care for employees includes consideration of whether it is possible and appropriate to deploy the employee in a position where he can, without additional organisational burden or disadvantages for other employees, worked without conflict with his religious needs.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION**Country: Austria****Date: 1 January 2022**

Title of the law: Equal Treatment Act Abbreviation: GIBG Date of adoption: 23.06.2004 Latest relevant amendment: BGBl I No. 107/2013 Entry into force: 01.07.2004 Weblink: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation Mainly civil law with a few administrative penal provisions Material scope: Most important law, private employment, access to goods or services, education, principle legislation for provinces Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
Title of the law: Federal Agricultural Labour Act Abbreviation: LAG Date of adoption: 25.03.2021 Latest relevant amendment: BGBl I No. 78/2021 Entry into force: 01.07.2021 Weblink: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation Material scope: employment of agricultural workers, provincial equal treatment offices Principal content: prohibition of direct and indirect discrimination, harassment, victimisation, abrogation of provincial agricultural labour relations acts
Title of the law: Federal-Equal Treatment Act Abbreviation: B-GIBG Date of adoption: 23.06.2004 Latest relevant amendment: BGBl I No. 58/2019 Entry into force: 01.07.2004 Weblink: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation Administrative and civil law Material scope: Public (Federal) employment Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
Title of the law: Act on the Equal Treatment Commission and the National Equality Body Abbreviation: GBK/GAW-G Date of adoption: 23.06.2004 Latest relevant amendment: BGBl I No. 107/2013 Entry into force: 01.07.2004 Weblink: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation Administrative law Material scope: Creation of specialised bodies Principal content: Creation of specialised bodies and procedures
Title of the law: Act on the Employment of Persons with Disabilities Abbreviation: BEinstG

Date of adoption: 10.08.2005 Latest relevant amendment: BGBl I No. 78/2021 Entry into force: 11.08.2005 Weblink: www.ris.bka.gv.at Grounds covered: disability Civil (labour) law Material scope: Employment, public/private Principal content: Prohibition of discrimination, special protection
Title of the law: Federal Disability Equality Act Abbreviation: BGStG Date of adoption: 10.08.2005 Latest relevant amendment: BGBl I No. 32/2018 Entry into force: 11.08.2005 Web link: www.ris.bka.gv.at Grounds covered: disability Civil law Material scope: Goods and services Principal content: accessibility, protection against discrimination beyond employment
Title of the law: Federal Disability Act Abbreviation: BBG Date of adoption: 10.08.2005 Latest relevant amendment: BGBl I No. 32/2018 Entry into force: 01.01.2006 Web link: www.ris.bka.gv.at Grounds covered: disability Administrative law Material scope: Establishing Ombud for Persons with Disabilities and Monitoring Board Disability Principal content: Specialised bodies
Title of the law: Styrian Equal Treatment Act Abbreviation: Stmk-GIBG Date of adoption: 28.10.2004 Latest relevant amendment: LGBl No. 104/2017 Entry into force: 01.11.2004 Web link: www.ris.bka.gv.at Grounds covered: gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation Civil and administrative law Material scope: Public (provincial) employment Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
Title of the law: Styrian Disability Act Abbreviation: Stmk-BHG Date of adoption: 25.06.2004 Latest relevant amendment: LGBl No. 113/2020 Entry into force: 01.07.2004 Web link: www.ris.bka.gv.at Grounds covered: disability Administrative law Material scope: specialised institution Principal content: Instalment of provincial 'Ombud for persons with disabilities' – general task to work on complaints. Discrimination not expressly mentioned

Title of the law: Styrian Agricultural Labour Organisation Act (Steiermärkisches Landarbeits-Organisationsgesetz) Abbreviation: STLAOG Date of adoption: 19.10.2021 Latest relevant amendment: n.a. Entry into force: 16.12.2021 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion, belief, disability age, and sexual orientation Civil and administrative Law, provincial equal treatment commission Material scope: Employment of agricultural and forestry workers
Title of the law: Viennese Anti-Discrimination Act Abbreviation: Wr-ADG Date of adoption: 08.09.2004 Latest relevant amendment: LGBl No. 39/2018 Entry into force: 09.09.2004 Web link: www.ris.bka.gv.at Grounds covered: race, ethnic origin, religion, belief, age, sexual orientation, sexual identity, gender, pregnancy, maternity
Title of the law: Viennese Service Order Abbreviation: WDO Date of adoption: 22.09.2006 Latest amendments: LGBl No. 40/2021 Entry into force: 09.09.2004 Web link: www.ris.bka.gv.at Grounds covered: race, ethnic origin, religion, belief, disability, age, sexual orientation, sexual identity, gender, pregnancy, maternity Civil and administrative Law Material scope: Public (provincial) employment Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
Title of the law: Viennese Contracted Officers Act Abbreviation: W-BedG Date of adoption: 11.12.2017 Latest relevant amendment: LGBl No. 40/2021 Entry into force: 01.01.2018 Web link: www.ris.bka.gv.at Grounds covered: race, ethnic origin, religion, belief, disability, age, sexual orientation, sexual identity, gender, pregnancy, maternity Civil and administrative Law Material scope: Public (provincial) employment Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
Title of the law: Lower Austrian Equal Treatment Act Abbreviation: NÖ GIBG Date of adoption: 11.07.1997 Latest relevant amendment: LGBl No. 34/2020 Entry into force: 18.09.2004 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Public (provincial) employment

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
Title of the law: Lower Austrian Anti-Discrimination Act Abbreviation: NÖADG Date of adoption: 26.01.2017 Latest relevant amendment: LGBl No. 76/2018 Entry into force: 30.04.2005 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: anti-discrimination beyond employment Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
Title of the law: Lower Austrian Agricultural Labour Organisations Act Abbreviation: NÖ LAOG Date of adoption: 01.07.2021 Latest relevant amendment: LGBl No. 51/2021 Entry into force: 01.07.2021 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Employment of agricultural and forestry workers, provincial equal treatment commission Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
Title of the law: Carinthian Anti-Discrimination Act Abbreviation: K-ADG Date of adoption: 28.12.2004 Date of going out of force: 01.01.2022 – recodification in new equal treatment act Latest relevant amendment: LGBl No. 70/2021 Entry into force: 29.12.2004 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Public (provincial) employment and non-employment scope. Comprehensive Anti-discrimination legislation Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
Title of the law: Carinthian Agricultural Labour Organisation Act Abbreviation: K-LAOG Date of adoption: 22.07.2021 Latest relevant amendment: LGBl No. 63/2021 Entry into force: 10.08.2021 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Employment of agricultural and forestry workers, provincial equal treatment commission

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
Title of the law: Carinthian Equal Treatment Act Abbreviation: K-GIBG Date of adoption: 23.09.2021 Latest relevant amendment: LGBTI No.70/2021 Entry into force: 01.01.2022 Web link: www.ris.bka.gv.at Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation Civil and administrative Law – recodification Material scope: Public (provincial) employment, goods & services, education, social matters (soziales), health Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised office
Title of the law: Upper Austrian Anti-Discrimination Act Abbreviation: OÖ-ADG Date of adoption: 06.05.2005 Latest relevant amendment: LGBTI No. 64/2021 Entry into force: 01.06.2005 Web link: www.ris.bka.gv.at Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Public (provincial) employment, goods & services, education, social matters (soziales), health Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised office
Title of the law: Upper Austrian Agricultural Labour Organisation Act Abbreviation: Oö. LAOG Date of adoption: 17.06.2021 Latest relevant amendment: LGBTI No. 64/2021 Entry into force: 01.07.2021 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Employment of agricultural and forestry workers, provincial equal treatment commission Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
Title of the law: Salzburg Equal Treatment Act Abbreviation: S-GIBG Date of adoption: 31.03.2006 Latest relevant amendment: LGBTI No.38/2020 Entry into force: 01.05.2006 Web link: www.ris.bka.gv.at Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Public (provincial) employment, goods & services, education, social matters (soziales), health

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised office
Title of the law: Salzburgian Agricultural Labour Relations Act Abbreviation: S-LAO Date of adoption: 22.04.2009 Latest relevant amendment: LGBl No. 80/2019 Entry into force: 23.04.2006 – only partly in force since 01.01.2020 Web link: www.ris.bka.gv.at Grounds covered: gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation administrative Law Material scope: mandate of provincial equal treatment commission Principal content: provincial specialised office
Title of the law: Tyrolian Equal Treatment Act Abbreviation: T-GIBG Date of adoption: 11.01.2005 Latest relevant amendment: LGBl No. 138/2019 Entry into force: 12.01.2005 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Public (provincial) employment, Principal content: prohibition of direct and indirect discrimination, harassment, victimisation
Title of the law: Tyrolian Anti-Discrimination Act Abbreviation: T-ADG Date of adoption: 31.03.2005 Latest relevant amendment: LGBl No. 138/2019 Entry into force: 01.04.2005 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: goods & services, education, social matters, health reasonable accommodation for persons with disabilities Principal content: prohibition of direct and indirect discrimination, harassment, provincial specialised office
Title of the law: Tyrolian Equal Treatment Act for Municipalities Abbreviation: T-GGIBG Date of adoption: 11.01.2005 Latest relevant amendment: LGBl No. 144/2018 Entry into force: 12.01.2005 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Public employment in municipalities Principal content: prohibition of direct and indirect discrimination, harassment, victimisation, (same as Equal Treatment Act)
Title of the law: Tyrolian Agricultural Labour Organisation Act Abbreviation: T-LAOG

Date of adoption: 03.02.2021 Latest relevant amendment: LGBT No. 61/2021 Entry into force: 01.01.2022 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation administrative Law Material scope: Employment of agricultural and forestry workers, provincial equal treatment commission Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
Title of the law: Tyrolian Provincial Teachers Employment Act Abbreviation: TLDHG Date of adoption: 01.12.2005 Latest relevant amendment: LGBT No. 138/2019 Entry into force: 01.01.2006 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Administrative Law Material scope: Employment of provincial teachers Principal content: provincial specialised institution for teachers (Equal Treatment Commission)
Title of the law: Vorarlbergian Anti-Discrimination Act Abbreviation: V-ADG Date of adoption: 19.05.2005 Latest relevant amendment: LGBT No. 44/2021 Entry into force: 01.06.2005 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Public (provincial) employment, goods & services, education, social protection, health Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
Title of the law: Vorarlbergian Act on the Organisation and Implementation of Labour Law for Agricultural and Forestry Workers Abbreviation: V-LFOG Date of adoption: 14.04.2021 Latest relevant amendment: LGBT No. 44/2021 Entry into force: 01.07.2021 Web link: www.ris.bka.gv.at Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law Material scope: Public (provincial) employment, goods & services, education, social protection, health Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution
Title of the law: Burgenlandian Anti-Discrimination Act Abbreviation: B-ADG Date of adoption: 05.10.2005

Latest relevant amendment: LGBl No. 83/2020

Entry into force: 06.10.2005

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

Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation

Civil and administrative Law

Material scope: Public (provincial) employment, goods & services, education, social protection, health

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**Country: Austria****Date: 1 January 2022**

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	13.12.1957	03.09.1958	No	Yes	Yes, it is part of the Federal Constitution
Protocol 12, ECHR	04.11.2000	Not ratified, as per 01.01.2020	N/A	N/A	N/A
Revised European Social Charter	07.05.1999	20.05.2011	N/A	Ratified collective complaints protocol? No	N/A
International Covenant on Civil and Political Rights	10.12.1973	10.09.1978	Exclusion of Habsburg-Lorraine family. Different treatment of Austrian nationals and aliens.	Yes	No
Framework Convention for the Protection of National Minorities	01.02.1995	31.03.1998	Limitation to 'national minorities' as defined by Law on Ethnic Groups	N/A	No
International Covenant on Economic, Social and Cultural Rights	10.12.1973	10.09.1978	No	No	No
Convention on the Elimination of All Forms of Racial Discrimination	22.07.1969	09.05.1972	No	Yes	No

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
ILO Convention No. 111 on Discrimination	10.01.1973	10.01.1973	No	N/A	No
Convention on the Rights of the Child	26.08.1990	06.08.1992	No	N/A	No
Convention on the Rights of Persons with Disabilities	30.03.2007	26.09.2008	No	Yes	No

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