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Non-discrimination

Austria

2023

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Justice
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EUROPEAN COMMISSION

Directorate-General for Justice and Consumers

Directorate D — Equality and Union citizenship

Unit D.1 Non-Discrimination: LGBTIQ, Age Horizontal Matters

Unit D.2 Non- Discrimination: Anti-Racism and Roma Coordination

European Commission

B-1049 Brussels

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 2022 – 1 January 2023

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Luxembourg: Publications Office of the European Union, 2023

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PDF ISBN 978-92-68-01424-0 ISSN 2599-9176 doi: 10.2838/233655 DS-BB-23-001-EN-N



Universiteit Utrecht

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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 actively attracting younger male 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 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.

Regarding the grounds of race and ethnicity (in Austria, these terms are legally 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 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.

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.

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.

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 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 Court⁷ 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 legal standard of protection against discrimination on the ground of disability is considerably higher than the minimum requirements of Directive 2000/78/EC. From 2012, 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 a new National Disability Action Plan 2022-2030, which was approved on 6 July 2022. 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 disabilities⁸ 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.⁹

In 2022, dialogue with NGOs about anti-discrimination issues remained stagnant.

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): 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

⁷ Constitutional Court, Decision No. G 258-259/2017-9, 4 December 2017.

⁸ This comprises intellectual as well as psycho-social disabilities.

⁹ Federal Disability Equality Act (*Behindertengleichstellungsgesetz*), 2005, § 13.

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. Since 2021, 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 relatively 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, with the notable exception of teachers at public compulsory schools, teachers at certain agricultural schools and educators at certain hostels for agricultural students. 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 chambers¹⁰ of agricultural workers and employers. 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.

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.¹¹ In implementing the CRPD, the Federation and the provinces established mechanisms for monitoring the implementation.

The most important pieces of legislation transposing and implementing the EU anti-discrimination directives are at a federal level: the Equal Treatment Act, the Federal-Equal Treatment Act and the Act on the Equal Treatment Commission and the National Equality Body, and for the ground of disability, the Act on the Employment of Persons with Disabilities and the Federal Disability Equality Act. All provinces have enacted respective legislation within their own competence and all of them have expanded the protection against discrimination beyond the minimum requirements set out in the directives.

3. Main principles and definitions

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

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

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.

¹⁰ Chambers are public law entities established by statute and involving compulsory membership of all workers/employers in the respective field.

¹¹ By Constitutional Law, BGBl Nr 59/1964, of 6 April 1964.

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 some other Member States. The resources for the federal equality bodies are limited.

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 Diskriminierungsopfern), for all grounds, while the possibilities for *actio popularis* are limited to the disability ground.

One relieving factor for victims of discrimination is the shift in the burden of proof provision, which allows them to gain 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 Court¹² 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.

¹² Supreme Court, Decision No. 90BA49/16w, 29 September 2016.

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 (Bundeskanzleramt), is divided into three senates, dealing with:

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

The functions of the chairpersons, who are part of the respective senates, are undertaken by federal civil servants. The other members of the commission perform their functions on an unsalaried basis. The 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.

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

During 2022, the national equality body (Ombud for Equal Treatment) has continued to improve its visibility (website, case of the month, public events, etc.), and it has used its mandate to publish expert opinions on draft legal bills and expanded the information about different forms, grounds and legal handling of discrimination on its website.¹³

In February 2022, an incident in Lower Austria triggered public debate¹⁴ about the necessity of levelling up the protection against discrimination for all grounds on federal level. A private provider of accommodation had advertised his services with the addition that homosexuals were not welcome ('Why we are an anti-homo house') and the house rules stated that 'homosexuality, paedophilia and gender ideology are philosophies which destroy the mental sanity of those affected'. When the case became public, it quickly became clear that this conduct was not prohibited by any law, as the protection against discrimination in the provision of services did not cover sexual orientation. There were no legal consequences, however, and no new attempts were made to close this gap in protection against discrimination.

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,

¹³ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/Themen.html> (Ger).

¹⁴ See media reports at: <https://www.noen.at/krems/aggsbach-markt-anti-homo-haus-wirbel-um-unterkunft-aggsbach-homosexualitaet-kritik-tourismus-print-312370885>; and reaction to it: <https://www.klagsverband.at/archives/18219>.

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.

INTRODUCTION

The national legal system

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*): 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. 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, 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. 14/2019¹⁵ 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 alone¹⁶ with the notable exception of teachers at public compulsory schools, and teachers at certain agricultural schools and educators at certain hostels for agricultural students. 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 chambers¹⁷ of agricultural workers and employers. 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.

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.¹⁸ In implementing the UNCPRD, the Federation and the provinces established mechanisms for monitoring the implementation.

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

¹⁶ See Federal-Constitutional Law, Article 21.

¹⁷ Chambers are public law entities established by statute and involving compulsory membership of all workers/employers in the respective field.

¹⁸ By Constitutional Law, BGBl Nr 59/1964, of 6 April 1964.

List of main legislation transposing and implementing the directives

Official title of the law: Equal Treatment Act¹⁹

Abbreviation: ETA/ GIBG

Date of adoption: 26 June 2004

Entry into force: 1 July 2004

Latest relevant amendment: BGBl I No. 16/2020

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20003395>

Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation
Civil/administrative/criminal law: Mainly civil law with a few administrative penal provisions

Material scope: Most important law, private employment, access to goods or services, education, principal legislation for provinces

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

Official title of the law: Federal-Equal Treatment Act²⁰

Abbreviation: F-ETA/ B-GIBG

Date of adoption: 23 June 2004

Entry into force: 1 July 2004

Latest relevant amendment: BGBl I No. 205/2022

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008858>

Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation
Civil/administrative law

Material scope: Public (Federal) employment

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

Official title of the law: Federal Agricultural Labour Act²¹

Abbreviation: FALA/ LAG

Date of adoption: 25 March 2021

Entry into force: 1 July 2021

Latest relevant amendment: BGBl I No. 167/2022

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011524>

Grounds covered: gender, ethnic affiliation, religion, belief, age, and sexual orientation
Civil/administrative law

Material scope: employment of agricultural and forestry workers, provincial equal treatment offices

Principal content: prohibition of direct and indirect discrimination, harassment, victimisation, abrogation of provincial agricultural labour relations acts

¹⁹ Bundesgesetz über die Gleichbehandlung, BGBl I No. 66/2004, last amended by BGBl I No. 16/2020.

²⁰ Bundesgesetz über die Gleichbehandlung im Bereich des Bundes, BGBl I No. 66/2004, last amended by BGBl I No. 205/2022.

²¹ Bundesgesetz über das Arbeitsrecht in der Land- und Forstwirtschaft, BGBl I No. 78/2021, last amended by BGBl I No. 167/2022.

Official title of the law: Act on the Equal Treatment Commission and the National Equality Body²²

Abbreviation: GBK/GAW-G

Date of adoption: 23 June 2004

Entry into force: 1 July 2004

Latest relevant amendment: BGBl I No. 107/2013

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008466>

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

Official title of the law: Act on the Employment of Persons with Disabilities²³

Abbreviation: BEinstG

Date of adoption: 10 August 2005

Entry into force: 11 August 2005

Latest relevant amendment: BGBl I No. 185/2022

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008253>

Grounds covered: disability

Civil law

Material scope: Employment, public/private

Principal content: Prohibition of discrimination in the workplace, special protection

Official title of the law: Federal Disability Equality Act²⁴

Abbreviation: BGStG

Date of adoption: 10 August 2005

Entry into force: 11 August 2005

Latest relevant amendment: BGBl I No. 32/2018

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004228>

Grounds covered: disability

Civil law

Material scope: goods and services

Principal content: accessibility, protection against discrimination beyond employment

Official title of the law: Federal Disability Act²⁵

Abbreviation: BBG

Date of adoption: 10 August 2005

Entry into force: 1 January 2006

Latest relevant amendment: BGBl I No. 185/2022

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008713>

Grounds covered: disability

Administrative law

²² Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, BGBl I No. 66/2004, last amended by BGBl I No. 107/2013.

²³ Behinderteneinstellungsgesetz, BGBl I No. 82/2005, last amended by BGBl I No. 185/2022.

²⁴ Bundesgesetz über die Gleichstellung von Menschen mit Behinderungen, BGBl I No. 82/2005, last amended by BGBl I No. 32/2018.

²⁵ Bundesgesetz über die Beratung, Betreuung und besondere Hilfe für behinderte Menschen, BGBl I No. 82/2005, last amended by BGBl I No. 185/2022.

Material scope: Establishing Ombud for Persons with Disabilities and Monitoring Board Disability and providing specific aid to persons with disability
Principal content: Specialised bodies

Official title of the law: Styrian Equal Treatment Act ²⁶

Abbreviation: Stmk-GIBG

Date of adoption: 28 October 2004

Entry into force: 1 November 2004

Latest relevant amendment: LGBl No. 104/2017

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrStmk&Gesetzesnummer=20000467>

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

Civil/administrative law

Material scope: Public (provincial) employment

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

Official title of the law: Styrian Disability Act ²⁷

Abbreviation: StBHG

Date of adoption: 28 October 2004

Entry into force: 1 November 2004

Latest relevant amendment: LGBl No. 117/2021

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrStmk&Gesetzesnummer=20000434>

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

Official title of the law: Viennese Anti-Discrimination Act ²⁸

Abbreviation: Wr-ADG

Date of adoption: 8 September 2004

Entry into force: 9 September 2004

Latest relevant amendment: LGBl No. 39/2018

Web

link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrW&Gesetzesnummer=20000171>

Grounds covered: Grounds covered: ethnic affiliation, religion, belief, disability, age, sexual orientation, sexual identity, gender, pregnancy, parenthood

Civil and administrative Law

Material scope: anti-discrimination beyond employment

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

²⁶ (Stmk) Gesetz vom 6. Juli 2004, mit dem ein Gesetz über die Gleichbehandlung im Bereich des Landes, der Gemeinden und Gemeindeverbände erlassen wird, LGBl No. 66/2004, last amended by LGBl No. 104/2017.

²⁷ (Stmk) Gesetz über Hilfeleistungen für Menschen mit Behinderung, LGBl No. 26/2004, last amended by LGBl No. 117/2021.

²⁸ (W) Gesetz zur Bekämpfung von Diskriminierung, LGBl No. 35/2004, last amended by LGBl No. 39/2018.

Official title of the law: Viennese Public Officers Act ²⁹

Abbreviation: Wr-BedG

Date of adoption: 11 December 2017

Entry into force: 1 January 2018

Latest relevant amendment: LGBl No. 61/2022

Web

link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrW&Gesetzesnummer=20000547>

Grounds covered: Grounds covered: race, ethnic origin, religion, belief, disability, age, sexual orientation, sexual identity, gender, civil status, parenthood

Civil and administrative Law

Material scope: Public (provincial) employment

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

Official title of the law: Lower Austrian Equal Treatment Act ³⁰

Abbreviation: NÖ-GBG

Date of adoption: 17 April 2004

Entry into force: 18 September 2004

Latest relevant amendment: LGBl No. 98/2022

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrNO&Gesetzesnummer=20000466>

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

Civil and administrative Law

Material scope: Public (provincial) employment

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

Official title of the law: Lower Austrian Anti-Discrimination Act ³¹

Abbreviation: NÖADG

Date of adoption: 13 March 2017

Entry into force: 14 March 2017

Latest relevant amendment: LGBl No. 76/2018

Web

link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrNO&Gesetzesnummer=20001157>

Grounds covered: Grounds covered: gender, ethnic affiliation, religion, 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

Official title of the law: Carinthian Equal Treatment Act ³²

Abbreviation: K-GIBG

Date of adoption: 23 September 2021

Entry into force: 1 January 22

Latest relevant amendment: -

²⁹ (W) Wiener Bedienstetengesetz, LGBl No. 33/2017, last amended by LGBl No. 61/2022.

³⁰ (NÖ) NÖ Gleichbehandlungsgesetz, LGBl No. 65/2004, last amended by LGBl No. 61/2022.

³¹ (NÖ) NÖ Antidiskriminierungsgesetz 2017, LGBl No. 24/2017, last amended by LGBl No. 76/2018.

³² (K) Gesetz über die Gleichbehandlung von Frauen und Männern und das Verbot der Diskriminierung, LGBl No. 70/2021

Web link: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrK&Gesetzesnummer=20000387 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
Official title of the law: Upper Austrian Anti-Discrimination Act ³³ Abbreviation: OÖ-ADG Date of adoption: 6 May 2005 Entry into force: 1 June 2005 Latest relevant amendment: LGBl No. 64/2021 Web link: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrNO&Gesetzesnummer=20001157 Grounds covered: Grounds covered: gender, ethnic affiliation, religion, 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
Official title of the law: Salzburg Equal Treatment Act ³⁴ Abbreviation: S-GIBG Date of adoption: 31 March 2006 Entry into force: 1 May 2006 Latest relevant amendment: LGBl No. 56/2021 Web link: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrSbg&Gesetzesnummer=20000441 Grounds covered: Grounds covered: gender, ethnic affiliation, religion, 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
Official title of the law: Tyrolian Equal Treatment Act ³⁵ Abbreviation: T-GIBG Date of adoption: 11 January 2005 Entry into force: 12 January 2005 Latest relevant amendment: LGBl No. 39/2022 Web link: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrT&Gesetzesnummer=10000244

³³ (OÖ) Landesgesetz über das Verbot der Diskriminierung auf Grund der ethnischen Zugehörigkeit, der Religion, der Weltanschauung, einer Behinderung, des Alters, des Geschlechts oder der sexuellen Orientierung LGBl No. 50/2005, last amended by LGBl No. 64/2021.

³⁴ (Slb) Gesetz über die Gleichbehandlung im Bereich des Landes, der Gemeinden und Gemeindeverbände, LGBl No. 31/2006, last amended by LGBl No. 56/2021.

³⁵ (T) Gesetz über die Gleichbehandlung im Landesdienst, LGBl No. 1/2005, last amended by LGBl No. 39/2022.

Grounds covered: Grounds covered: gender, ethnic affiliation, religion, belief, disability, age, sexual orientation Civil and administrative Law 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
Official title of the law: Tyrolian Anti-Discrimination Act ³⁶ Abbreviation: T-ADG Date of adoption: 31 March 2005 Entry into force: 1 April 2005 Latest relevant amendment: LGBl No. 138/2019 Web link: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrT&Gesetzesnummer=20000317 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
Official title of the law: Tyrolian Equal Treatment Act for Municipalities ³⁷ Abbreviation: T-GGIBG Date of adoption: 11 January 2005 Entry into force: 12 January 2005 Latest relevant amendment: LGBl No. 144/2018 Web link: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrT&Gesetzesnummer=20000001 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 T Equal Treatment Act)
Official title of the law: Vorarlbergian Anti-Discrimination Act ³⁸ Abbreviation: V-ADG Date of adoption: 19 May 2005 Entry into force: 1 June 2005 Latest relevant amendment: LGBl No. 72/2022 Web link: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrVbg&Gesetzesnummer=20000085 Grounds covered: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation Civil and administrative Law

³⁶ (T) Gesetz über das Verbot von Diskriminierungen, LGBl No. 25/2005, last amended by LGBl No. 138/2019.

³⁷ (T) Gesetz über die Gleichbehandlung im Dienst der Gemeinden und der Gemeindeverbände, LGBl No. 2/2005, last amended by LGBl No. 144/2018.

³⁸ (V) Gesetz über das Verbot der Diskriminierung, LGBl No. 17/2005, last amended by LGBl No. 72/2022.

Material scope: Public (provincial) employment, goods & services, education, social protection, health
Principal content: prohibition of direct and indirect discrimination, harassment, victimisation; provincial specialised institution

Official title of the law: Burgenlandian Anti-Discrimination Act³⁹

Abbreviation: B-ADG

Date of adoption: 5 October 2005

Entry into force: 6 October 2005

Latest relevant amendment: LGBl No. 27/2022

Web link:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrBgld&Gesetzesnummer=20000359>

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

³⁹ (B) Gesetz über das Verbot der Diskriminierung auf Grund der ethnischen Zugehörigkeit, der Religion, der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Orientierung, LGBl No. 84/2005, last amended by LGBl No. 27/2022.

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 adoption⁴⁰ and IVF for same-sex couples).⁴¹

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.

⁴⁰ See Constitutional Court, Decision No. G119/2014, 11 December 2014.

⁴¹ See Constitutional Court, Decision No. G16/2013, 10 December 2013.

2 THE DEFINITION OF DISCRIMINATION

2.1 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 decided⁴² 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.⁴³ 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,⁴⁴ 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 case⁴⁵ dealt with discrimination on the grounds of 'visible migration background' (*erkennbarer Migrationshintergrund*), and the court clearly stated that this was covered by 'ethnic affiliation'.

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

⁴³ Viennese Civil Regional Court, *Hayet B. v. Ferdinand S*, Decision Nos. 35R68/07w and 35R104/07i, 30 March 2007.

⁴⁴ Supreme Court, Decision No. 9ObA40/13t, 24 July 2013.

⁴⁵ Viennese Civil Regional Court, Decision No. 36 R 292/15f, 10 December 2015.

The CJEU's decision C-94/20 of 10 June 2021⁴⁶ 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'.

National minorities

Protection of recognised national minorities (*Volksgruppen*: Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma)⁴⁷ 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*).⁴⁸

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:⁴⁹

'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. Brockhaus⁵⁰ defines Religion formally as a system to address in its dogma, practice and social

⁴⁶ 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>.

⁴⁷ 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.

⁴⁸ Federal National Minorities Act (*Bundesgesetz über die Rechtsstellung von Volksgruppen in Österreich*), 5 August 1976.

⁴⁹ 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.

⁵⁰ Brockhaus (1996-1999), *Die Enzyklopädie, Zwanzigste (20), überarbeitete und aktualisierte Auflage*, Leipzig/Mannheim.

manifestations the last questions of human society and individual life and to find answers to these. According to the respective basic philosophy of salvation and in relation to the respective “experience of mischief” every religion has got its own goal of salvation and its way to salvation. This exists in close relation to the “unavailability” which is perceived as a personal (god, gods) and impersonal (rules, cognition, knowledge) transcendence. Also the wearing of religious symbols and clothes is covered by the scope of protection, as the membership to a specific religion can be assumed by these or these are perceived as an expression of a certain religion. It constitutes an infringement of the prohibition of discrimination, if the employer acknowledges the wishes of a specific group while not acknowledging those of another group.⁵¹ 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 Court⁵² 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. In 2022, the Supreme Court clarified in a judgment⁵³ that membership of a political party as such is not enough to be regarded as ‘belief’.

⁵¹ This in no way relates to any duty for reasonable accommodation but clarifies that no faith might be treated more favourably than another.

⁵² Supreme Court, Decision No. 9ObA117/15v, 25 May 2016.

⁵³ Supreme Court, Decision No. 9ObA59/22z, 25 October 2022; see details in Chapter 12.2

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:

'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*⁵⁴ case (C-13/05), they do not directly reflect the CJEU's decision in *Ring and Skouboe Werge*⁵⁵. 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.⁵⁶ 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.

⁵⁴ CJEU, Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA*, 11 July 2006.

⁵⁵ CJEU, Joined Cases C-335/11 and C-337/11, *Jette Ring and Lone Skouboe Werge v. Dansk Arbejdsgiverforening*, 11 April 2013.

⁵⁶ See, for example: Supreme Court, Decision 90bA106/15a, 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.

e) Sexual orientation

Sexual orientation is commonly understood (by courts as well as claimants) as referring to heterosexuality, homosexuality and bisexuality only.⁵⁷ 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 provinces⁵⁸. This report does not cover the sex/gender ground.

2.2 Multiple and intersectional discrimination

In Austria, multiple discrimination is not explicitly prohibited by law.

In Austria, intersectional discrimination is not explicitly prohibited by law.

The Austrian legislation does not contain a provision explicitly prohibiting multiple discrimination and does not mention intersectional 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, the following case law deals with multiple and/or intersectional discrimination:

There is not a lot of case law in Austria that deals explicitly with multiple discrimination, and no case law on intersectional 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

⁵⁷ 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.

⁵⁸ 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.

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.

2.3 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.'

As a result, the prohibition of direct discrimination (most importantly in §§ 17(1), 18, 31(1), 36 of the Equal Treatment Act) is deemed to include the concept of discrimination by assumption, as it explores the perception of the discriminator rather than the characteristics of the discriminated.

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. In a judgment⁵⁹ on the disability ground, the Supreme Court further stated clearly, 'The protection against discrimination is also applicable when the employer is wrong about the actual existence of the protected characteristic. Mistakes cannot justify the infringement of the principle of equal treatment. The protection against discrimination is in fact to be granted, irrespective of whether the characteristic on which the discrimination is based on, actually applies or is just assumed.'

§ 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.⁶⁰

b) Discrimination by association

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

⁵⁹ Supreme Court, Decision 9ObA107/15y, 26 November 2015.

⁶⁰ 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.

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.

In the first (and so far, only) court case involving discrimination by association,⁶¹ 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.

2.4 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;
- §§ 134, 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 directives⁶² (genuine and determining occupational requirement, positive measures, exceptions regarding age). See:

- §§ 20, 22, 34 of the Equal Treatment Act;

⁶¹ Viennese Civil Regional Court, Decision No. 36 R 292/15f, 10 December 2015.

⁶² See for example: High Provincial Court Linz (OLG Linz), Decision Nr. 12Ra63/16w, 21 September 2016; ECLI:AT:OLG0459:2016:RL0000175.

- §§ 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.

2.5 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

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

- §§ 17(1), 18, 31(1) of the Equal Treatment Act;
- § 13 of the Federal-Equal Treatment Act;
- § 7b(1) of the Act on the Employment of 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 problematic⁶³.

2.5.1 Statistical evidence

Section 2.5.1 has not been updated for 2022. Regarding the legal framework and practice, please see Country report Non-discrimination Austria 2022, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, reporting period 1.1.2021 – 1.1.2022.

2.6 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;
- §§ 134, 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.

⁶³ See exemplar on the disability ground: Viennese Provincial Court on Civil Matters, Decision Nr. 36 R 75/22d, 15 June 2022.

A judgment by the High Provincial Court of Innsbruck⁶⁴ 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.

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 2020,⁶⁵ 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.

2.7 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;
- §§ 134, 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

⁶⁴ 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.

⁶⁵ Supreme Court, Decision No. 90bA66/20a, 29 September 2020.

Criminal Code) but this requires very intense and dangerous behaviour and is therefore much narrower than instructions to discriminate in the civil anti-discrimination legislation.

In Austria, instructions explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Austria, the instructor and the discriminator are liable.

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

2.8 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 (in § 8) 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 heavy burden on the employer is to be judged.⁶⁶ This was already the case before the directives were transposed into national law, which is why the term 'heavy burden' is used instead of the latterly introduced concept of 'disproportionate burden'.

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 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. This position might require adaptation following the CJEU judgment in Case C-485/20, *XX v. HR Rail SA*, of 10 February 2022, in which the CJEU found that there was an obligation for redeployment to a suitable job unless this would impose a disproportionate burden on the employer. It must be noted that even before the directives came into effect, there was already a general legal duty⁶⁷ on employers to find new job positions for persons with disabilities ('privileged persons with disabilities') and not to dismiss them if that did not constitute a heavy burden on the employer, even if the dismissal was not on grounds of disability.

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.⁶⁸

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

⁶⁶ Administrative High Court, Decision No. 99/11/0246, 14 December 1999. NB: this judgment preceded the relevant EU directives coming into force.

⁶⁷ See Act on the Employment of Persons with Disabilities, § 8

⁶⁸ 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.

existing work relationship⁶⁹ 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 barriers⁷⁰ would be illegal or would pose a disproportionate burden on the employer.

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

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

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

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

⁶⁹ 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.

⁷⁰ 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.

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*]⁷¹ 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:

- ‘(1) It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers⁷² 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

⁷¹ This rather obscure wording obviously tries to be as broad as possible, including physical barriers and technical equipment.

⁷² 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.

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 case⁷³ 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.⁷⁴ The second case concerned the production of a DVD by the Austrian Broadcasting Corporation (ORF) without subtitles.⁷⁵ 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

Section 2.8.f is not updated for 2022. Please see Country report Non-discrimination Czechia 2022 Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, - Reporting period 1.1.2021 – 1.1.2022.

⁷³ Viennese Civil Regional Court, *M.L. v. The Republic of Austria*, Decision No. 36 R96/12b, 5 December 2012.

⁷⁴ Josefstadt District Court, Decision No. 4C 707/11 z-14, 14 November 2011.

⁷⁵ Viennese Commercial Court (Handelsgericht Wien), *L.H. v. ORF*, Decision No. 60R93/10x, 8 September 2011.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Austria, there are no residence⁷⁶ 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,⁷⁷ 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 formula⁷⁸ 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. Private and public sector including public bodies (Article 3(1))

⁷⁶ 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.

⁷⁷ 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).

⁷⁸ '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);
- §§ 7a(1), 7b, 7d of the Act on the Employment of Persons with Disabilities (private sector)
- §§ 7a(2), 7b, 7d of the Act on the Employment of Persons with Disabilities (public sector);
- §§ 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);
- §§ 7e -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. Gender identity, gender expression and sex characteristics are not mentioned in the legislation.

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. Gender identity, gender expression and sex characteristics are not mentioned in the legislation.

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. The protection covers the grounds stated in the directive, while gender identity, gender expression and sex characteristics are not mentioned in the legislation.

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. Gender identity, gender expression and sex characteristics are not mentioned in the legislation.

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. Gender identity, gender expression and sex characteristics are not mentioned in the legislation.

§ 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. Gender identity, gender expression and sex characteristics are not mentioned in the legislation.

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 judgment⁷⁹ 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 that there was discrimination on the basis of ethnic affiliation because the nationality of the claimant⁸⁰ was the only reason for rejection.⁸¹

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.⁸²

The CJEU's decision C-94/20 of 10 June 2021⁸³ 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.'⁸⁴ 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. Gender identity, gender expression and sex characteristics are not mentioned in the legislation. This provision 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

⁷⁹ Provincial Court St. Pölten (Landesgericht St. Pölten), Decision No. 21 R 16/13f-13, 31 January 2013.

⁸⁰ The claimant qualified as a long-term resident under Directive 2003/109/EC.

⁸¹ There have been further judgments along these lines, especially concerning Tyrol – see District Court Innsbruck, Decision No. 26C263/13y-11, 7 January 2014.

⁸² See Upper Austria, Provincial Court Linz, Decision No. 14R201/18d, 9 November 2018.

⁸³ 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>.

⁸⁴ 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.

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,⁸⁵ 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.

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 parents⁸⁶ 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 research⁸⁷ 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 2013,⁸⁸ 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.

⁸⁵ 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.

⁸⁶ Bundesministerium für Bildung, Wissenschaft und Forschung (2012), *Formular: besondere Aufnahmeinformation für Schulen für wirtschaftliche Berufe und Tourismusschulen*.

⁸⁷ See, for example, Markom, C., Weinhäupl, H. (2007), *Die anderen im Schulbuch*, Vienna.

⁸⁸ 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.

The National Action Plan regarding disability⁸⁹ 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.

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)⁹⁰ 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.⁹¹ 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 research⁹² 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)

⁸⁹ Ministry of Social Affairs (2012), *National Action Plan on Disability 2012-2020*, available at: <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=225>.

⁹⁰ European Commission against Racism and Intolerance (ECRI) (2015), *ECRI report on Austria*, p. 29, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Austria/AUT-CbC-V-2015-034-ENG.pdf>.

⁹¹ 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.

⁹² Luciak, M., (2014), *ROMBAS Studienbericht Zur Bildungssituation von Roma und Sinti in Österreich*, Initiative Minderheiten, available at: <https://docplayer.org/28641502-Studienbericht-rombas.html>.

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). Gender identity, gender expression or sex characteristics are not mentioned in the legislation.

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 bakery⁹³ as well as missing subtitles from a DVD⁹⁴ 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'.⁹⁵

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. Gender identity, gender expression and sex characteristics are not mentioned in the legislation.

⁹³ Josefstadt District Court, Decision No. 4C 707/11 z-14, 14 November 2011.

⁹⁴ Viennese Commercial Court, *L. CLAIMANT. v. ORF*, Decision No. 60R93/10x, 8 September 2011.

⁹⁵ Viennese Commercial Court, Decision No. 1R 129/10g, 19 January 2011.

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

'justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Especially, it is not deemed discrimination if the provision of housing constitutes a specially close or intimate relationship of the parties or their relatives.'⁹⁶

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/EC with regard to ethnic affiliation as it introduces an additional justification even for direct discrimination on that ground.

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

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

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

Migrants are not treated differently under anti-discrimination legislation and benefit equally from anti-discrimination law enforcement as nationals. There have been some political approaches to restrict access to municipal social housing to persons who speak German at an advanced level.⁹⁷

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 housing⁹⁸ (*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.⁹⁹ 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 2021,¹⁰⁰ 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

⁹⁶ This is a regulation on the prohibition of discriminatory advertisements, where the offer is available to the public.

⁹⁷ Website of FPÖ provincial functionary Haimuchner (2015), 'German as Key for Housing', available at: <https://www.fpoee-ooe.at>.

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

⁹⁹ See Upper Austria, Provincial Court Linz, Decision No. 14R201/18d, 9 November 2018.

¹⁰⁰ 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>.

issue.¹⁰¹ 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.

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.

¹⁰¹ 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.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4 Directive 2000/43, Article 4(1) Directive 2000/78)

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(1) 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 second part of Article 4.2 of the Directive is not reflected in Austrian law.

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 law¹⁰² 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.¹⁰³

¹⁰² Viennese Civil Regional Court, *Hayet B. v. Ferdinand S.*, Decision Nos. 35R68/07w and 35R104/07i, 30 March 2007.

¹⁰³ Viennese Civil Regional Court, Decision No. 36 R 292/15f, 10 December 2015.

In its judgment¹⁰⁴ 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 affected, as the CJEU did in its *Jyske Finans* judgment¹⁰⁵ and reinforced in 2021 in its judgment in *Oberösterreich v. KV*,¹⁰⁶ 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 different treatment 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 at work (Article 7(2) Directive 2000/78)

In Austria, there are no exceptions in relation to disability and health and safety at work, 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:¹⁰⁷

'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

¹⁰⁴ Lower Austria, Provincial Court St. Pölten, Decision No. 21 R 16/13f-13, 31 January 2013.

¹⁰⁵ CJEU, Case C-668/15, *Jyske Finans v Ligebehandlingsnævnet*, 6 April 2017.

¹⁰⁶ 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>.

¹⁰⁷ Parliamentary materials, No. 307 of appendices XXII GP, 26 November 2003, p. 16.

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

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

As we can see from the case law,¹⁰⁸ 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 Court¹⁰⁹ has clearly stated that 'dismissal does not necessarily constitute discrimination but can be justified even if age is a decisive factor.'

¹⁰⁸ See, for example, Supreme Court, Decision No. 60b246/10k, 18 July 2011.

¹⁰⁹ Supreme Court, *R.K. V. Österreichischer Rundfunk*, Decision No. 9ObA113/12a, 25 June 2013. In this judgment, the Court quoted the CJEU cases *Palacios de la Villa*, *Fuchs/Köhler* and *Prigge* to underline that an

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.

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 connected with age.

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.

4.6.3 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.¹¹⁰

In general, individuals who have attained the necessary number of months of paying into the pension scheme¹¹¹ 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.¹¹²

¹¹⁰ Law Accompanying the Budget (*Budgetbegleitgesetz*) (BGBl I 71/2003), *Federal Law Gazette*, 71/2003, 20 August 2003.

¹¹¹ 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.

¹¹² 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.'

4.6.4 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' (*sozialwidrige*) dismissals illegitimate. This provision is to be found in § 105(3), figure 2 of the Labour Constitution Law (*Arbeitsverfassungsgesetz*),¹¹³ 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

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

¹¹³ 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 Further exceptions necessary in a democratic society: 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.

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).¹¹⁴ 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 payment¹¹⁵ 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*,¹¹⁶ which is used for a variety of disability-related measures.

¹¹⁴ 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.

¹¹⁵ Figures for 2022: 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.

¹¹⁶ 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 prosperity¹¹⁷.

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

¹¹⁷ 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,¹¹⁸ 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 cases¹¹⁹ – 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

¹¹⁸ 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.

¹¹⁹ 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.¹²⁰

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.

¹²⁰ 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 corporations¹²¹ – 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.

¹²¹ 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.'¹²²

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

¹²² 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.¹²³

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

¹²³ Equal Treatment Act, 2004, § 26(7).

case law,¹²⁴ this restriction¹²⁵ 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.¹²⁶ 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 Federation¹²⁷ but it does not extend the exclusion to public procurement, which would render the effectiveness of this sanction perfect.¹²⁸ 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

¹²⁴ Judgment of 22 April 1997, *Nils Draehmpaehl v. Urania Immobilienservice OHG*, C-180/95, ECR I-2195, paras. 25 and 29.

¹²⁵ Judgment of 10 April 1984, *Von Colson and Karmann v. Land Nordrhein-Westfalen*, C-14/83, ECR 1891, paras. 23 and 24.

¹²⁶ Equal Treatment Act, 2004, § 26(1).

¹²⁷ Equal Treatment Act, 2004, §§ 14, 26, 37.

¹²⁸ 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.¹²⁹ 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.¹³⁰

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 shown 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. According to the general rules of awarding procedural cost in civil law matters, these uncertainties have a strong impact on the actual outcome of a case. To provide an example from 2022: the claimant in a case¹³¹ on the ground of disability won the case (discrimination established), but she had sued for EUR 1 000 (immaterial damages) and was awarded only EUR 500 by the court. The court of first instance wrongly divided the cost of the procedure (every party to bear their own cost) because the claimant only won 50 % of her claim. When claiming immaterial damages, the legal principle is that when the claimant wins 50 % or more of the amount claimed, the costs have to be borne by the respondent. The claimant appealed the decision, lost on the merits (EUR 500 was found to be appropriate), won on the cost of the first instance procedure (EUR 64) so, in the end, she had to pay EUR 367.08 of costs to the respondent for the appeal procedure and bear her own costs. This example might explain very clearly that with the current system, the sanctions are not at all dissuasive to the discriminators but rather keep those discriminated against from seeking legal redress. It also explains why most of the claimants in cases of harassment sue for only the minimum compensation established by law.

¹²⁹ Supreme Court, Decision No. 90bA49/16w, 29 September 2016.

¹³⁰ '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. 90bA49/16w, 29 September 2016).

¹³¹ Viennese Commercial Court, Decision Nr. 1R 50/22g, 25 May 2022, case of accessible hotel rooms only available for a higher category of rooms with higher rates; see details of the case in Section 12.2

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:¹³² '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.

¹³² Supreme Court, Decision No. 9ObA49/16w, 29 September 2016.

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

7.1 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 Commission¹³³ and the National Equality Body.¹³⁴ 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 Commission¹³⁵ (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.¹³⁶

The NEB is quite visible and well known throughout the national territory and puts substantial efforts into visibility (website, media outreach, participation in public discussion and organisation of events like exhibitions), while the ETC is not very visible, and the respective efforts are marginal. Both bodies are accessible on an equal basis for all without costs and provide reasonable accommodation where necessary to persons with disabilities.

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 other¹³⁷ 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.¹³⁸ 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.

¹³³ Available at: <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungs-kommissionen/gleichbehandlungskommission.html>.

¹³⁴ Available at: <https://www.gleichbehandlungsanwaltschaft.gv.at/gleichbehandlungsrecht-in-osterreich>.

¹³⁵ See: <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungs-kommissionen/bundes-gleichbehandlungskommission.html>.

¹³⁶ Available at: <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungs-kommissionen/bundes-gleichbehandlungskommission.html>.

¹³⁷ Although there are annual meetings of the provincial bodies.

¹³⁸ Viennese Anti-Discrimination Act (*Wiener Antidiskriminierungsgesetz*), 2004, § 7(3).

Styria has set up a range of bodies for equal treatment, including the Styrian Equal Treatment Commission; the Commissioner for Equal Treatment;¹³⁹ 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 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.¹⁴⁰ 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 Office¹⁴¹ (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 Treatment¹⁴² (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

¹³⁹ In addition to a separate commissioner for the City of Graz.

¹⁴⁰ Styrian Equal Treatment Act (*Steiermärkisches Gleichbehandlungsgesetz*), § 44.

¹⁴¹ Carinthian Anti-Discrimination Act (*Kärntner Antidiskriminierungsgesetz*), §§ 32, 33.

¹⁴² Lower Austrian Equal Treatment Act (*Niederösterreichisches Gleichbehandlungsgesetz*), §§ 11, 12.

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.

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.

7.2 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 2022, the body has been quite visible, using its website, social media 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 a big 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. Nevertheless, the visibility of the National Equality Body has clearly been increasing over the past two years, and in 2022 the institution adopted an internal communication strategy with a focus on active communication and improved media relations.

7.3 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.

7.4 Status of the designated bodies – general independence and resources

a) Status of the bodies

- Separate or other legal status or personality

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.

- Selection of governing bodies

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 only¹⁴³ (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 appoints the heads of the senates of the ETC and the Ombuds of the NEB.

- Sources of funding

The Federal Chancellor 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.

- Powers to recruit and manage staff

The power to contract staff for the NEB lies with the Federal Chancellery – the work contract is with the Chancellery, while the selection of candidates and the management of the staff

¹⁴³ Act on the Equal Treatment Commission and the National Equality Body (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*), 2004, §§ 2(1)-(4).

lies with the head of the NEB. 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.

For the ETC, the recruitment of the Commissioners is with the seconding institutions, while the administrative staff is contracted by the Federal Chancellery.

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).

- Accountability (to whom and how it is exercised)

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 to the National Council every two years about the implementation of the Equal Treatment Act. In practice, both bodies report to the Federal Chancellor and these are submitted to the Parliament unchanged. In this regard, both bodies are accountable to the Federal Chancellery.

b) 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 Act¹⁴⁴ 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.¹⁴⁵ 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.

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,¹⁴⁶ 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 and refers to the EU Commission recommendation 2018 on standards for equality bodies and the developments on European level¹⁴⁷.

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.

¹⁴⁴ Amendment by *Federal Law Gazette* I 2/2008, 4 January 2008.

¹⁴⁵ The functional independence of the Federal Equal Treatment Commission is regulated in the Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*), 2004, § 24(5).

¹⁴⁶ See latest report: National Equality Body (2020), *Equal Treatment Report for the Private Sector 2018-19 2020 and 2021* (*Gleichbehandlungs-bericht für die Privatwirtschaft 2018/2020 und 2019/2021*), available at: <https://www.gleichbehandlungsanwaltschaft.gv.at/publikationen-und-links/taetigkeitsberichte.html>, p. 128 onwards.

¹⁴⁷ National Equality Body (2020), *Equal Treatment Report for the Private Sector 2018-19 2020 and 2021* (*Gleichbehandlungs-bericht für die Privatwirtschaft 2018/2020 und 2019/2021*), available at: <https://www.gleichbehandlungsanwaltschaft.gv.at/publikationen-und-links/taetigkeitsberichte.html>, pp. 19.

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.

c) Resources

- The annual budget of the body/bodies;

The annual budget of the equality bodies is not publicly available.

- The share of the annual budget dedicated to the equality body mandate (if applicable);

Not applicable

- The total number of staff of the body/bodies;

The ETC consist of 21 members of the senate and four additional administrative directors. The NEB lists 38 staff members of which four are on long leave (parental or educational) and four are interns. There is no information, how many of those staff members have full-time or part-time contracts.

- The number of staff dedicated to the equality body mandate (if applicable).

For the ETC, these are the 21 members of the senates.

For the NEB, only 32 staff members are dedicated directly to the mandate, while six have administrative or other duties (communication, monitoring and evaluation, administration)

7.5 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 institutions have 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.

7.6 Competences of the designated bodies – and their independent exercise

a) 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.

Assistance to victims is further provided by other parties, like NGOs, trade unions and the Chamber of Labour.

b) 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 reports¹⁴⁸ 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 material¹⁴⁹ has been provided online; in 2021, eight independent opinions¹⁵⁰ 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

¹⁴⁸ See the NEB's publications at: <https://www.gleichbehandlungsanwaltschaft.gv.at/publikationen-und-links/taetigkeitsberichte.html>.

¹⁴⁹ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/Themen.html>.

¹⁵⁰ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/Gleichstellungspolitik/Stellungnahmen.html>.

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.

The report to Parliament¹⁵¹ 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.

Since 2021, the NEB has been functioning according to its internally defined logic of intervention and impact,¹⁵² which guides the decision making and strategic direction.

c) 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 interests¹⁵³ and its own recommendations.¹⁵⁴

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 a lack of resources.

d) Prevention, promotion and awareness-raising

While the law is silent on the tasks of prevention, promotion and awareness raising, the NEB gets involved in the assessment process for proposed legislation¹⁵⁵ and in awareness-raising activities through workshops¹⁵⁶ and events. The Ombuds also offer preventive consultations for employers and cooperate on a regular basis with civil society

¹⁵¹ See, for example, the latest report – National Equality Body (2022), *Equal Treatment Report for the Private Sector 2020-21* (*Gleichbehandlungs-bericht für die Privatwirtschaft 2020 und 2021*), available at: <https://www.gleichbehandlungsanwaltschaft.gv.at/wir-ueber-uns/taetigkeitsbericht.html>.

¹⁵² See: https://www.gleichbehandlungsanwaltschaft.gv.at/dam/jcr:e2697ad6-aa66-4a69-a0ad-5dcb1a70c7a5/201204_Grafik_Wirkungslogik_A4.pdf.

¹⁵³ See commissioned expert opinions at: <https://www.gleichbehandlungsanwaltschaft.gv.at/Themen.html>.

¹⁵⁴ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/Themen.html>.

¹⁵⁵ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/publikationen-und-links/Stellungnahmen.html>.

¹⁵⁶ See a list of workshops here: <https://www.gleichbehandlungsanwaltschaft.gv.at/aktuelles-und-services/veranstaltungen.html>.

organisations, which generally see the institution as a valuable ally in the fight against discrimination. In 2022 and 2021, in 59 cases, employers actively sought counsel from the NEB for their internal policies and measures against sexual harassment.

e) 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.

7.7 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 on formalities due to deadlines. In its reports since 2016,¹⁵⁷ the NEB has continuously reported 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.

7.8 Dispute resolution

a) Quasi-judicial functions

In Austria, the Equal Treatment Commission is a quasi-judicial institution. The body cannot issue binding enforceable decisions. It can issue non-binding opinions.

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.

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

¹⁵⁷ 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.

i) Power to impose sanctions

The decisions of the ETC 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.

ii) Nature and level of sanctions that can be imposed

not applicable.

iii) Possibility to appeal

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.

iv) Enforcement of binding decisions

not applicable.

v) Implementation of non-binding opinions

It is impossible to reliably assess to what extent the decisions of the ETC are respected. The non-binding opinions are followed up by the Commission, and the results (implementation) reported in the bi-annual reports to the Parliament¹⁵⁸. Very often, the opinions are used by the parties to reach a settlement.

Apart from this the undisputed benefit of the opinions lies in the fact that an official body in an official proceeding finds that there has been discrimination and the proceedings are free of charge. For many victims of discrimination, this is an important issue. It seems that in certain cases, the perpetrators really do return from such proceedings having had a learning experience – although all information on this is anonymous and confidential. It is clear, on the other hand, that hardliners or people who just disrespect and ignore the ETC get away without any sanction. The only kind of sanction that the GBK-GAW-G gives the Commission is in § 13, which obliges alleged discriminators to disclose certain information and report to the ETC. If they do not comply with such a request, the Commission has to publish this fact (of non-compliance) on its website.¹⁵⁹ 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.

¹⁵⁸ See for 2020 and 2021: https://www.bundestkanzleramt.gv.at/dam/jcr:b7c4a189-481e-4a13-b485-f6123673d609/gbb_priv_20_21_T1.pdf.

¹⁵⁹ See, for example, for Senate III: <https://www.bundestkanzleramt.gv.at/agenda/frauen-und-gleichstellung/gleichbehandlungskommissionen/gleichbehandlungskommission/gbk-senat-iii/weitere-veroeffentlichungen.html>.

b) Amicable settlements

The National Equality Body – the Ombuds for Equal Treatment – stated in its biannual report (2018-2019)¹⁶⁰ 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, and in the latest report¹⁶¹ (2020-2021) the NEB reports about 129 cases it was involved in negotiations for settlements, of which 77 % were successful.

7.9 Procedural safeguards

As there are no binding decisions by either of the bodies, no specific procedural safeguards exist in law. The only safeguard when it comes to the investigative powers of the bodies is a general obligation of confidentiality regarding the information collected through investigations. The division of tasks between the two major equality bodies functions as a kind of procedural safeguard. The Equal Treatment Commission fulfils its function in an impartial manner, while the National Equality Body mainly assists victims of discrimination and supports their claims if they are deemed to be justified.

7.10 Data collection by the designated bodies

a) Registration of complaints and decisions

In Austria, the designated 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 ETC¹⁶² and a second one for the NEB¹⁶³.

The latest published report is covering the years 2020 and 2021. At the NEB, a total of 4 962 requests/inquiries and consultations have been registered. A total of 47 % of these concerned the workplace and 17 % were about access to and supply of goods and services, whereas 31 % concerned issues outside the legal scope of the protection against discrimination. Regarding the grounds, 40 % of the cases were on gender, 21 % on ethnicity, 8 % on age, 5 % on religion, 3 % on sexual orientation and 2 % on belief.

¹⁶⁰ See NEB short report: https://www.gleichbehandlungsanwaltschaft.gv.at/dam/jcr:8d428364-81ed-487b-ae8d-a566de90abf6/GAW_Kurzbericht_2018_19_barrierefrei.pdf.

¹⁶¹ See: Bericht der Gleichbehandlungsanwaltschaft 2020/2021, https://www.gleichbehandlungsanwaltschaft.gv.at/dam/jcr:bdf93218-cef8-4a87-96c7-a27958fec406/221201_GAW_Taetigkeitsbericht_2020-21_A4_BF.pdf.

¹⁶² See: Gleichbehandlungsbericht für die Privatwirtschaft 2020/2021; https://www.bundestkanzleramt.gv.at/dam/jcr:3529f523-73a2-47fb-a6eb-550d5002fe7c/gbb_priv_20-21_T2.pdf.

¹⁶³ See latest report: Tätigkeitsbericht der Gleichbehandlungsanwaltschaft 2020/2021: https://www.bundestkanzleramt.gv.at/dam/jcr:3529f523-73a2-47fb-a6eb-550d5002fe7c/gbb_priv_20-21_T2.pdf.

Within the ETC, Senate 1 received 116 complaints, 66 opinions were issued, 65 complaints have been withdrawn and in eight cases, the senate found the complaints inadmissible. By the end of 2021, 59 cases were pending. Senate 2 received 52 complaints, 30 opinions were issued, 25 complaints have been withdrawn, and in 2 cases, the senate found the complaints inadmissible. By the end of 2021, 25 cases were pending. Senate 3 received 31 complaints, 10 opinions were issued, 4 complaints have been withdrawn and in nine cases, the senate found the complaints inadmissible. By the end of 2021, 11 cases were pending.

b) Equality data collection

In Austria, the designated bodies do not collect general equality data.

The NEB can access and use data from all available sources or decide to have equality data collected for it by other institutions.

7.11 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 activities¹⁶⁴ 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. The communication activities of the National Equality Body have improved in the recent years and a lot of information (designed in a non-legal language) is available on the website¹⁶⁵. The impact will be monitored, although it has not yet been evaluated.

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.¹⁶⁶ 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.

¹⁶⁴ Some informative brochures were financed by the Government – including guidance in discrimination cases. (e.g. <https://www.gleichbehandlungsanwaltschaft.gv.at/informationmaterial/>).

¹⁶⁵ See: <https://www.gleichbehandlungsanwaltschaft.gv.at/>.

¹⁶⁶ See: parliamentary consultations on legal initiatives: <https://www.parlament.gv.at/PAKT/BEST/GESI/index.shtml>.

- 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.

- 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 integration¹⁶⁷ 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 2022 without much visible change. In 2022, an evaluation¹⁶⁸ of the national strategy was published, which highlights a lot of potential for improvement, especially regarding the implementation and bureaucratic efforts necessary to implement projects funded by the European Union (ESF). These were deemed to exclude all but one Roma self-organisation from participation, as national coordination and aid was found to be inadequate.

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.¹⁶⁹

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).

¹⁶⁷ See: https://ec.europa.eu/info/sites/info/files/roma_austria_strategy2_en.pdf.

¹⁶⁸ See: Sensiro (2022), *Studie zur Evaluierung der nationalen Strategie zur Inklusion der Rom:nja in Österreich* (Evaluation Study of National Strategy for the Inclusion of Roma in Austria), available at: https://www.bundestkanzleramt.gv.at/dam/jcr:cf8b5f65-fe97-49c0-a580-124ed48c6afb/studie_sensiro.pdf.

¹⁶⁹ 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.

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.

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 Economy, and the Ministry of Social Affairs, Health, Care and Consumer Protection and the Minister of Women, Family, Integration and Media 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*).

A National Strategy against Antisemitism¹⁷⁰ 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.

On 6 July 2022, the Council of Ministers adopted the new National Action Plan for Disability 2022-2030.¹⁷¹ The action plan contains eight chapters dealing with policy, equality and non-discrimination, accessibility, education, employment, independent living, health and rehabilitation, and awareness raising and information. The chapter on non-discrimination sets out the following measures:

- Evaluation of the legal framework for equal treatment regarding disability
- Expansion of possibilities for providing a legal claim to the removal of barriers so that courts can order to remove barriers that have been found discriminating (instead of a claim restricted to compensation only as in the current legislation)
- Introduction of a legal minimum amount of compensation for discrimination
- Creation of the possibility to bring claims about discrimination before the Supreme Court irrespective of the generally applicable limitations by the amount in question
- Duty to support the Disability Ombudsman for all federal public organs
- Assessment of options of the introduction of *actio popularis* in the Act on the Employment of Persons with Disabilities
- Increased awareness raising for judges and prosecutors regarding multiple and intersectional discrimination
- Development of proposals to strengthen the protection against multiple discrimination
- Publication of important court decisions in simple language¹⁷²
- Training of officers in charge of the mandatory reconciliation processes
- Financial support to institutions mandated to file *actio popularis*

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

¹⁷⁰ 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>.

¹⁷¹ See National Action Plan for Disability 2022-2030, available at: https://www.bundestkanzleramt.gv.at/dam/jcr:89f8ed09-12e5-4aab-8ad0-d7f82001904d/25_16_bei.pdf.

¹⁷² A version that is accessible to persons with learning difficulties.

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

There is no national strategy or action plan on LGBTQI equality in place. An attempt in 2020 by some MPs to assign the task of developing a national action plan to the Ministry of Women and Integration¹⁷³ remained unsuccessful. It has been adjourned by the Parliament and therefore has not yet produced any results.

In June 2021, the province of Vorarlberg adopted a provincial Action Plan for LGBTQI*¹⁷⁴, which refers to the EU Strategy 2020 – 2025. The Action Plan focuses mainly on awareness raising, access to counselling and the visibility of the community, and is based on an inquiry that included the LGBTQI communities.

¹⁷³ See Parliamentary Materials (GER):

https://www.parlament.gv.at/dokument/XXVII/A/1130/fname_854114.pdf

¹⁷⁴ See Vorarlberg, Aktionsplan für LGBTIQ* (GER):

<https://vorarlberg.at/documents/302033/472097/Brosch%C3%BCre+LGBTIQ-Aktionsplan+2022.pdf/4ff44591-4298-e198-397a-b155b63ba19d?t=1660816391535>.

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 Discrimination¹⁷⁵ 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 litigation¹⁷⁶ 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 report¹⁷⁷ that it had facilitated negotiations in 129 cases, of which 77 % were successful (agreements for the settlement of the dispute were concluded). 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.

- There are no best practices in relation to the use of artificial intelligence to improve the effective implementation of the national legislation transposing the directives.

¹⁷⁵ See the website for the Litigation Association of NGOs Against Discrimination (Klagsverband Mit Recht gegen Diskriminierung) at: <http://www.klagsverband.at/english>.

¹⁷⁶ During the reporting period, there was a strategic focus by some provinces on legally challenging restrictive legislation regarding social advantages.

¹⁷⁷ See NEB report, 2020-2021, p. 43: https://www.gleichbehandlungsanwaltschaft.gv.at/dam/jcr:bdf93218-cef8-4a87-96c7-a27958fec406/221201_GAW_Taetigkeitsbericht_2020-21_A4_BF.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 Act¹⁷⁸ and § 2(7) of the Viennese Anti-Discrimination Act¹⁷⁹ 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.

¹⁷⁸ 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).

¹⁷⁹ 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. The legislation is currently under revision and amendments might address these issues.

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*¹⁸⁰ 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.

The discussion about the use of AI by the public Labour Market Service (Arbeitsmarktservice) to grade the chances of integration for unemployed persons into the labour market has been criticised publicly for its discriminatory potential. A study by the Austrian Academy of Science¹⁸¹ from 2020 indicates that the use of the technology as it stands is 1. not very effective; 2. not targeted enough; 3. has not been examined and elaborated regarding stereotypes, bias, and structural discrimination, which might increase existing inequalities rather than mitigate them.

¹⁸⁰ 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>.

¹⁸¹ See: <https://www.oeaw.ac.at/ita/projekte/der-ams-algorithmus>.

12 LATEST DEVELOPMENTS IN 2022

12.1 Legislative amendments

There have been no relevant legislative changes in anti-discrimination law in 2022, neither at a federal nor provincial level.

On the other hand, 2022 was a year that saw the publication of evaluations of two important sectors of anti-discrimination policy; both were independently conducted and were quite critical. The evaluation of the National Strategy for the Inclusion of Roma in Austria,¹⁸² based mainly on 400 interviews with Roma, clearly concluded that there is a need for improvement in all areas, including participation, empowerment and sustainability of the actions.

The evaluation of the National Action Plan for Disability 2012-2020¹⁸³ was also very critical on issues such as monitoring of the action plan, financing of concrete activities, coordination, involvement of the provinces, lack of capacity building, inter-sectional discrimination, the lack of a right to the removal of barriers (only financial compensation for discrimination), the non-inclusive education system, no mention of self-determined life in the action plan and lack of general awareness. These are not legislative amendments, but the practice of evaluating national policies through independent experts might lead to better decisions in the future, including at the legislative level.

12.2 Case law

Relevant discrimination ground(s): disability

Name of the court: Commercial Court Vienna (as second instance)

Date of decision: 25 May 2022

Name of the parties: Names withheld

Reference number: 1 R 50/22g

ECLI reference: n/a

Link: https://www.klagsverband.at/klav/wp-content/uploads/2022/09/1-R-50-22g_Berufungsurteil_anonymisiert.pdf.

Brief summary:

The claimant was a person with a disability using an electric wheelchair to get around. She booked a hotel room – a standard double room in a hotel – and notified the hotel that the room needed to be accessible for her in her wheelchair. The hotel replied that there were accessible rooms available, but only in a slightly more expensive category. All accessible rooms in the hotel were in this higher category. The claimant cancelled the booking and sued the hotel for discrimination on the ground of disability.

The court found (as did the court of first instance) found direct discrimination on the ground of disability and awarded EUR 500 in compensation for non-material damages.

It should be mentioned that the original claim for compensation was EUR 1 000, and with the confirmation of the lower amount of only EUR 500 by the court of appeal, the victim of discrimination had to pay procedural costs for the respondent of more than EUR 300 and bear her own procedural costs. In summary, therefore, she got the court's confirmation that she had been discriminated against, but the procedure did cost her in stress, effort and financial terms.

¹⁸² Sensiro (2022), *Studie zur Evaluierung der nationalen Strategie zur Inklusion der Rom:nja in Österreich* (Evaluation Study of National Strategy for the Inclusion of Roma in Austria), available at: https://www.bundestkanzleramt.gv.at/dam/jcr:cf8b5f65-fe97-49c0-a580-124ed48c6afb/studie_sensiro.pdf.

¹⁸³ Bundesministerium Soziales, Gesundheit, Pflege und Konsumentenschutz, Evaluierung des Nationalen Aktionsplans Behinderung 2012-2020, available at: <https://www.behindertenarbeit.at/wp-content/uploads/Evaluierung-des-NAP-Behinderung-2012-2020.pdf>.

Relevant discrimination ground(s): disability

Name of the court: Viennese Provincial Court on Civil Matters (as second instance)

Date of decision: 15 June 2022

Name of the parties: Names withheld

Reference number: 36 R 75/22d

ECLI reference: n/a

Link: https://www.klagsverband.at/klav/wp-content/uploads/2022/07/36-R-75-22d_Urteil_anonymisiert_compressed.pdf.

Brief summary:

The claimant was a person with a disability using a wheelchair to get around. He visited a restaurant, but when he needed to use the toilet, it became clear that the restaurant provided no such facility that was accessible to him. He had to leave the restaurant and finally wet his clothes due to the overwhelming pressure. He sued the restaurant for indirect discrimination on the ground of disability.

The Court confirmed the decision of the court of first instance that the claim was justified, that the claimant had been indirectly discriminated on the ground of disability and that the non-material damages of EUR 1 000 awarded were appropriate.

Relevant discrimination ground(s): Ethnic affiliation

Name of the court: Viennese Provincial Court on Civil Matters (as second instance)

Date of decision: 30 August 2022

Name of the parties: *NN v. Wiener Linien GmbH & Co KG*

Reference number: 36R45/22t

ECLI reference: AT: ECLI:AT:LG00003:2022:03600R00045.22T.0830.000

Link:

https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20220830_LG00003_03600R00045_22T0000_000/JJT_20220830_LG00003_03600R00045_22T0000_000.html.

Brief summary:

The Court had to decide on the question whether the tariffs of the respondent (the public transport company of Vienna) were discriminatory on the ground of ethnic affiliation by selling its semester-tickets to students with permanent residency (*Hauptwohnsitz*) in Vienna for EUR 75 while all other students had to pay EUR 150 for the same ticket.

The Court found that this practice constituted indirect discrimination on the ground of ethnic affiliation. The Court reiterated the different approaches to defining the term 'ethnic affiliation' in the Austrian anti-discrimination legislation, and stated: 'when applying this broad definition of ethnic affiliation, in effect also German nationals or Lower Austrians without permanent residence in Vienna can be targets of indirect discrimination on the ground of ethnic affiliation vis-à-vis persons with permanent residence in Vienna.' The claimants stated that using the criterion of permanent residence was particularly prone to result in discrimination against persons with a foreign nationality or different ethnic affiliation; they also used statistical evidence to highlight that 28 % of students in Vienna were non-nationals while 84 % of those who had only a secondary residence (*Nebenwohnsitz*) in Austria were foreign nationals. It remains unclear, however, whether or how this data influenced the position of the Court.

The Court found indirect discrimination on the ground of ethnic affiliation. As a result of the judgment, the respondent consolidated its tariffs for students (at the lower level of EUR 75) and is expected to face claims amounting to up to EUR 4 million in compensation (including EUR 300 for non-material damages for individual claimants). The decision has received quite a lot of public attention for its practical impact, although, in the view of the author of this report, it did not do much to further clarify the definition of 'ethnic affiliation' in the legal context. The Court also mentioned the close relationship of this decision with

the ECJ's judgment of 2012¹⁸⁴ in *European Commission v. Austria*, in which the Court found unjustified unequal treatment infringing the right to freedom of movement resulting from lower transport fares for those students whose parents received the Austrian family allowances. In the author's view, while these two cases have some similarities, the respective legal grounds used to resolve them are very different and not directly comparable.

Relevant discrimination ground(s): belief

Name of the court: Supreme Court

Date of decision: 20 October 2022

Name of the parties: *D. v. Republik Österreich*

Reference number: 9ObA59/22z

ECLI reference: AT:OGH0002:2022:009OBA00059.22Z.1020.000

Link:

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2022_1020_OGH0002_009OBA00059_22Z0000_000&Suchworte=RS0123606+

Brief summary:

The claimant in this case had applied for a job with an Austrian ministry; he was not selected, and claimed discrimination on the ground of belief as he was a member of a political party (opposition party) in which he held several functions. The Supreme Court mainly needed to decide whether and how far membership in a political party can constitute belief in the sense of the equal treatment legislation.

The Court stated that while membership of a church or faith community might be enough to fall under the category of religion in the sense of the law, the same does not automatically apply to membership of a political party and the term 'belief'. The Court stated that mere political opinion on certain political questions or aspects does not constitute 'belief' in the legal sense, but then added quite cryptically, that 'membership of a political party can be a manifestation of belief, if it turns out to be the leading perception of life and the world as a holistic body of meaning which serves to complexly interpret the personal and collective position for the individual understanding of life and is shared by a sufficient number of persons in a suitably firm manner'¹⁸⁵.

The judgment is a bit confusing at first sight. On the one hand, it gives highly complicated (see above) guidance on how to assess whether membership of a political party constitutes belief, while on the other hand, it stresses that the question must be answered with a view to the perception of the potential perpetrator, by highlighting its own case law on assumed discrimination. The underlying problem is the question whether applicants for posts within the public service are protected against discrimination on the ground of political affiliation by subsuming it under belief. The Court does not answer this question clearly, but hints at a way to assess such situations.

¹⁸⁴ CJEU, Case C-75/11, *European Commission v. Republic of Austria*, 4 October 2012, ECLI:EU:C:2012:605.

¹⁸⁵ This is the author's own translation from German. The author is not a professional interpreter, nor a philosopher, so it might be worthwhile to have a look at the original German quote: 'Eine parteipolitische Zugehörigkeit bzw Mitgliedschaft kann aber Ausdruck einer Weltanschauung sein, wenn sie sich als Leitauffassung vom Leben und von der Welt als einem Sinnganzen erweist, die zur komplexen Deutung des persönlichen und gemeinschaftlichen Standorts für das individuelle Lebensverständnis dient und von einer Mehrzahl von Personen hinreichend stabil vertreten wird.'

ANNEX 1: INTERNATIONAL INSTRUMENTS

Country: AUSTRIA

Date: 1 January 2023

Instrument	Date of signature	Date of ratification	Derogation s/ reservation s 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 01.01.2023	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
ILO Convention No. 111 on Discrimination	10.01.1973	10.01.1973	No	N/A	No

Instrument	Date of signature	Date of ratification	Derogation s/ reservation s relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the 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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