REPORT ON MEASURES TO COMBAT DISCRIMINATION

Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT

Austria

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

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INTRODUCTION

0.1 The national legal system

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

The Republic of Austria is a **federal state**. According to the Austrian Constitution, first enacted in 1920, legal powers are exercised either by the Bund (Federation) or the Länder (federal states or provinces, namely: *Burgenland, Kärnten, Oberösterreich, Niederösterreich, Salzburg, Steiermark, Tirol, Vorarlberg, and Wien*). Legislative powers are divided between the federal parliament called Nationalrat (acting together with the Bundesrat) and federal state parliaments called Landtage.

Legislative powers are - in principle - clearly defined by the Constitution: matters due to be regulated by the Nationalrat (federal parliament) are explicitly listed in the Constitution. With regard to these matters, provincial parliaments do not have legislative power. Matters not (explicitly) designated by the Constitution as federal matters belong to the jurisdiction of the Landtage (provincial parliaments).

Under the Constitution, **neither the Federation nor the states have the exclusive power to regulate "anti-discrimination"**. The Federation may — and has done so in 1997 regarding disability — introduce a new clause to the (constitutional) catalogue of human rights prohibiting discrimination. Amending the Federal Constitution is strictly a federal matter. The Federation may also implement the anti-discrimination clause if and insofar as implementation is linked to matters coming within the legislative powers of the Federation (such as labour law, public transport law, civil law).

Labour law legislation falls into the competency of the Federation (Art. 10 par. 1 lit. 11 Federal Constitutional Law [*Bundes-Verfassungsgesetz*], *B-VG*). Just in the area of labour law of agricultural workers and the labour protection of agricultural workers and agricultural salaried employees the legislative powers are divided between the federation and the states: legislation of principles by the federation and implementing legislation by the states (Art. 12 *B-VG*).

Legislation in respect of employees (civil servants) of the nine states and of local authorities (regional public employment) rests exclusively with those federal states alone (Art. 21 *B-VG*); with the notable exceptions of teachers at public compulsory schools (Art. 14 par. 2 *B-VG*) and of teachers at certain agricultural schools and educators at certain agricultural students' hostels (Art. 14a par. 2 lit. e and Art. 14 a par. 3 lit. b *B-VG*).

Legislative power regarding self-employment, education/training and workers/employers/occupational organisations is divided between the federal states and the Federation; the states hold legislative power, for instance, in areas such as *kindergartens* and juvenile educational institutions, hospitals, nursing homes, ambulance services, funeral-services, fire-brigades and chambers[1] of agricultural workers/employers (Art. 10 – 15 *B-VG*).

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

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

0.2 State of implementation

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

- **Timeline**: Austria has not taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability and therefore not met the timeline for implementation.
- **Levels of implementation within the federal structure**: Up to now there is only implementing legislation on the federal level and in four provinces (Länder). *Burgenland, Oberösterreich, Salzburg, Tirol*, and *Vorarlberg* have not yet enforced implementing legislation. In Oberösterreich and Vorarlberg and Tyrol preparatory work has been done and draft versions assessed. Nevertheless there is still no implementation.
- **Disability:** The provincial legislation in Kärnten[2] (not yet in force), Steiermark[3], Niederösterreich[4] and Wien[5] are also dealing with discrimination on the basis of disability, while at the federal level legislation protection against discrimination on the ground of disability is still not in place.
- **Burden of proof:** The new (federal) Equal Treatment Act lowers the burden of proof for the plaintiff but in a way that is different from the way stated in the directives. The burden of proof does not completely switch over to the respondent, when the plaintiff established facts from which it may be presumed that there has been direct or indirect discrimination. The law states that the respondent has to prove that "it is likely that a different motive – documented by facts established by the respondent - was the crucial factor in the case or that there has been a legal ground of justification". So the respondent is obliged to prove the likelihood of established facts". In my view this does not constitute a clear shift of the burden of proof the way the directive demands, - even though the burden of proof is lowered. The four provincial pieces of legislation state a shift of the burden of proof that is in line with the directives.
- **Harassment:** The legislation is falling short in implementing the Directives as the prohibition of harassment is restricted to the (successful) violation of dignity and the creation of a certain environment and unsuccessful conduct with (only) the purpose of violating dignity and creating the specific environment is not covered.
- **Independent bodies:** The "independent bodies" are not fully independent. For independent structures without a minister's responsibility a norm at constitutional rank is needed under Austrian law. The attempt to provide for a constitutional safeguard of

[2] Kärntner Antidiskriminierungsgesetz, Kärntner Landesgesetzblatt Nr. 63/2004[Carinthian Anti-discrimination Act, Carinthian Provincial Law Gazette Nr. 63/2004]
[3] (Steiermärkisches) Gesetz vom 6. Juli 2004, mit dem ein Gesetz über die Gleichbehandlung im Bereich des Landes, der Gemeinden und Gemeindeverbände (Landes-Gleichbehandlungsgesetz L-GBG) erlassen und das Landes-Dienstrecht und Besoldungsrecht geändert wird. StMk-LGBl. 66/2004 [Styrian Equal Treatment Act, Styrian Provincial law Gazette 66/2004]
[4] Niederösterreichisches Gleichbehandlungsgesetz NÖ LGBl. 69/1997 idF NÖ LGBl. 65/2004 vom 17.09.2004 [Lower Austrian Equal Treatment Act Lower Austria Law Gazette 69/1997 as amended by 65/2004 on 17/09/2004]
[5] Wiener Antidiskriminierungsnovelle, insb. 18. Novelle zur Dienstordnung 1994, W-LGBl. 36/2004, 10.09.2004 [Viennese Anti-discrimination amendment, 18th amendment to the Service Order 1994, Viennese Provincial law Gazette 36/2004] and Wiener Antidiskriminierungsgesetz LGBl. 35/2004 vom 08.09.2004 [Viennese Anti-discrimination Act, Viennese Provincial Law Gazette 35/2004 of 08/09/2004]

independence for the Equality bodies was blocked in Parliament by the opposition parties. Nevertheless practice will show if there is full de facto independence.

- **NGO legal standing:** Third party intervention is only allowed for one specific NGO ('Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern' [Litigation Association of NGOs Against Discrimination]) in the courts (§. 62 GIBG [ETA]). This association is open for all specialised NGOs to join in but all NGOs not joining the Litigation Association are excluded from any special procedural rights.
- There is no legal standing of NGOs in the courts under the Bundes-Gleichbehandlungsgesetz [Federal-Equal Treatment Act].
- **Dialogue with NGOs and social dialogue:** There is no dialogue with NGOs at all and no standardised social dialogue on antidiscrimination.
- **Compensation**: limitation to a maximum amount (as low as € 500) if the employer proves that the victim would not have been recruited or not promoted anyway; in case of termination no compensation if victim does not return to the (discriminatory) employer. This sanction is not effective, dissuasive and proportionate.
- **Penalties**: maximum administrative fine of as low as € 360, and exclusion of punishment for employers as first-time-offenders (admonition only) in cases of discriminatory job-advertisements. This sanction is not effective, dissuasive and proportionate, either.

0.3 Case-law

Provide a list of any <u>important</u> case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

a. Name of the court
b. Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.
c. Name of the parties
d. Brief summary of the key points of <u>law</u> (no more than several sentences)

There is no relevant case law until now.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

b) Are constitutional anti-discrimination provisions directly applicable?

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

The general principle of equality is enshrined in Art. 2 of the Basic Law of the State 1867 (‘*Staatsgrundgesetz’*, *StGG*) and in Art. 7 of the Federal Constitutional Act 1929 (‘*Bundes-Verfassungsgesetz’*, *B-VG*). Art. 2 *Staatsgrundgesetz* stipulates: ‘All citizens are equal before the law’; Art. 7 *B-VG* also provides that all citizens are equal before the law and adds that

privileges according to birth, sex, social standing, class and religion are excluded and that no one may be disadvantaged on the basis of his disability. The list in the latter sentence is merely a demonstrative one, as the first sentence provides for a full equal treatment obligation. The state is bound by the constitution and the fundamental rights enshrined therein in all its activities, also when it acts as an employer (for both categories of its employees: civil servants and employees with contracts of employment).

It is undisputed that the equal protection clause of the Constitution is legally binding for legislative powers as well as law enforcement agencies.[6] A decision of a law enforcing agency violates the equal protection clause if the decision is based on law violating the equal protection clause, if the agency has interpreted the law in a way that is not in harmony with the equal protection clause, or if the agency otherwise has acted arbitrarily.[7] More importantly, acts of parliament violate the constitutional equal protection clause when differences in treatment or equality of treatment are not based on objective grounds or objective justifications. The constitutional equality clause can not be enforced against private actors as it binds the state.

The Constitutional Court does not use the word "discrimination" when ruling under the equal protection clause of the Austrian Constitution. The Court concentrates on asking whether or not the applicant was placed at a disadvantage, by different or equal treatment, as the case may be. If different or equal treatment is somehow disadvantageous, the Court proceeds scrutinising whether or not the applicant's treatment is objectively justified. Even when acknowledging indirect discrimination in sex discrimination cases in 1993, the Court refrained from using the term "discrimination".

According to the Constitutional Act *BGBl* (Federal Law Gazette) 1964/59, the **European Convention of Human Rights** (ECHR) and its protocols are forming part of the Austrian constitution. *Art. 14 ECHR* therefore is not only binding international law but also Austrian domestic constitutional law.

Besides these general equality-clauses Austrian constitutional law makes some *special provisions* banning discrimination on the basis of race, language or religion (Art. 66 & 67 *Treaty of St. Germain 1919*) and race, colour, descent or national or ethnic origin (Art. I *Federal Constitutional Act for the Implementation of the Convention on the Elimination of all Forms of Racial Discrimination 1973*).

The constitution also includes the commitment of the Republic of Austria to guarantee equal treatment of handicapped and non-handicapped persons in all areas of daily life (Art. 7 par. 1 *B-VG*) and to real equalisation of man and woman (Art. 7 par. 2 *B-VG*).

In addition to those provisions of the federal constitution, some of the constitutions of the nine Austrian states ('*Bundesländer*') contain fundamental rights, among them equality rights.

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

Federal level: gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation, part time employment

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

[7] See, e.g., the formula in *VfSlg.* 14841/1997: "Eine Verletzung des verfassungsgesetzlich gewährleisteten Rechtes auf Gleichheit aller Staatsbürger vor dem Gesetz kann . . . nur vorliegen, wenn der angefochtene Bescheid auf einer dem Gleichheitsgebot widersprechenden Rechtsgrundlage beruht, wenn die Behörde der angewendeten Rechtsvorschrift fälschlicherweise einen gleichheitswidrigen Inhalt unterstellt oder wenn sie bei Erlassung des Bescheides Willkür geübt hat."

Provincial level:

Lower Austria: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation (sexuelle Orientierung)

Carinthia: gender, ethnic affiliation, religion or belief, disability, age, sexual orientation (sexuelle Ausrichtung)

Styria: gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation (sexuelle Orientierung)

Vienna: gender, race, ethnic origin, religion, belief, age, sexual orientation (sexuelle Ausrichtung)

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?
b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion')?
c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?

Definition of race and ethnic origin:

The notion of "race" was taken out of the text in the federal legislation and "race and ethnic origin" are now both represented by the term "ethnic affiliation" (ethnische Zugehörigkeit)[8]. This was strongly supported by many NGOs as the German term "Rasse" was one of the most misused expressions under the Nazi regime. This does not change the scope but is an expression of sensitivity regarding language.

The explanatory notes of the new Gleichbehandlungsgesetz (Equal Treatment Act) state[9]:

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

[9] Nr. 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien, p. 14:
Eine Definition der Begriffe „Rasse oder ethnische Herkunft" ist in der Antirassismusrichtlinie nicht enthalten. Zurückgewiesen werden jedoch Theorien, mit denen versucht wird, die Existenz verschiedener menschlicher Rassen zu belegen. Die Verwendung des Begriffs „Rasse" impliziert nicht die Akzeptanz solcher Theorien. Als Auslegungsmaßstab der insoweit offenen und weit auszulegenden Richtlinie kommen völkerrechtliche Normen in Betracht, insbes. das Abkommen zur Eliminierung jeder Form der rassischen Diskriminierung, CERD, ergänzend kann Art. 26 des Internationalen Paktes über zivile und politische Rechte, ICCPR, herangezogen werden. Das CERD erfasst jede „Diskriminierung auf Grund der Rasse, der Hautfarbe, der Abstammung, des nationalen Ursprungs und des Volkstums"; Art. 26 ICCPR verpflichtet die ratifizierenden Staaten, Schutz vor Diskriminierungen unter anderem wegen der Rasse, der Hautfarbe, der Sprache, der Religion und der nationalen Herkunft zu gewähren. Als Auslegungshilfe wird weiters auf das ILO Übereinkommen (Nr. 111) über die Diskriminierung in Beschäftigung und Beruf sowie auf Art. 14 der Konvention zum Schutze der Menschenrechte und Grundfreiheiten (MRK) und die dazu entwickelten Grundsätze hingewiesen. Auch Art. IX Abs. 1 Z 3 des Einführungsgesetzes zu den Verwaltungsverfahrensgesetzen 1991 - EGVG stellt die Benachteiligung einer Person auf Grund ihrer Rasse, ihrer Hautfarbe, ihrer nationalen oder ethischen Herkunft, ihres religiösen Bekenntnisses oder einer Behinderung unter Verwaltungsstrafsanktion und kann daher für die Auslegung des Begriffes „Rasse" herangezogen werden. Die Verwendung des Begriffes „Rasse" in den oben genannten Instrumenten zeigt, dass dieser Ausdruck in der Rechtssprache durchaus gebräuchlich ist, wobei die Begriffe „Rasse oder ethnische Herkunft" - völkerrechtskonform ausgelegt - nicht im Sinne einer Abstammungslehre so verstanden werden dürfen, dass es auf biologische Verwandtschaftsverhältnisse ankomme, die zu einer bestimmten Volksgruppe bestünden. Die oben genannten Rechtsquellen können vielmehr als Unterstützung für eine Definition ethnischer Diskriminierung herangezogen werden, die sich stärker kulturell orientiert. Adressaten der Diskriminierung sind Personen, die als fremd wahrgenommen werden, weil sie auf Grund bestimmter Unterschiede von der regionalen Mehrheit als nicht zugehörig

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

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

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

Definition of religion and belief:

The Austrian legal framework does not contain a legal definition of religion or belief. Nevertheless, the explanatory notes for the „Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften" (Federal Law on the Status of Religious Confessional Communities) contain the following (non binding) definition of the term religion: "*Religion: Historisch gewachsenes Gefüge von inhaltlich darstellbaren Überzeugungen, die Mensch und Welt in ihrem Transzendenzbezug deuten sowie mit spezifischen Riten, Symbolen und den Grundlehren entsprechenden Handlungsorientierungen begleiten*.„[Religion: A structure of convictions whose content is representable and has been growing in history to explain human kind and the world in its transcendent meaning and to accompany them with specific rites, symbols and give them orientation in accordance with basic principles and doctrine.]

The explanatory notes of the amended Equal Treatment Act state:

"Also the terms "religion and belief" are not defined by European law. Regarding the aims of the "framework-directive" they must be interpreted in a broad manner. Especially "religion"

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angesehen werden. Sie knüpft überwiegend an Unterschiede an, die auf Grund von Abstammungs- oder Zugehörigkeitsmythen als natürlich angesehen werden und die die betroffenen Personen nicht ändern können. Häufige Erscheinungsformen sind Diskriminierung wegen der Hautfarbe und anderer äußerer Merkmale sowie wegen einer als fremd angesehenen Muttersprache. Auch bei Ethnien handelt es sich um „imaginierte Gemeinschaften", die durch Bekenntnis oder Fremdzuschreibung entstehen können und sich nicht allein auf biologische oder sonstige tatsächliche Unterscheidungen stützen können. Sie bezieht sich auf Gemeinsamkeiten von Menschen, die sich auf Grund ihrer Hautfarbe, Herkunft, Religion, Sprache, Kultur oder Sitten ergibt.

is not restricted to churches and officially recognised religious communities. Nevertheless, it has to be noted that for a religion there are minimum requirements concerning a statement of belief, some rules for the way of life and a cult. Religion is any religious, confessional belief, the membership of a church or religious community. Brockhaus defines Religion formally as a system to address in its dogma, practice and social manifestations the last questions of human society and individual life and to find answers to these. According to the respective basic philosophy of salvation and in relation to the respective "experience of mischief" every religion has got its own goal of salvation and its way to salvation. This exists in close relation to the ²unavailability² which is perceived as a personal (god, gods) and impersonal (rules, cognition, knowledge) transcendence. Also the wearing of religious symbols and clothes is covered by the scope of protection, as the membership to a specific religion can be assumed by these or these are perceived as an expression of a certain religion. It constitutes an infringement of the prohibition of discrimination, if the employer acknowledges the wishes of a specific group while not acknowledging those of another group. The term "belief" is tightly connected with the term "religion". It is a classification for all religious, ideological, political and other leading perceptions of life and of the world as a construction of sense, as well as for an orientation of the personal and societal position for the individual understanding of life.

In the context of this law, "belief" means non-religious belief as the religious part is fully covered by the term "religion". Belief is a system of interpretation consisting of personal convictions concerning the basic structure, modality and functions of the world; it is not a scientific system. As far as beliefs claim completeness, they include perceptions of humanity, views of life, and morals. In regard to recruitment conditions it must not be regarded as important whether a (potential) employee is, for example, atheist, as long as there is no justification for this stated by law."[10]

Definition of disability:

The Directive is not yet transposed into Austrian law in regard to disability. Only at provincial level in Lower Austria, Carinthia, Vienna and Styria disability is dealt with in the implementing legislation. Only the Styrian Law [Steirisches Landes-Gleichbehandlunggsgesetz, Stmk. LGBl. 66/2004, vom 6.Juli 2006 [Styrian Provincial Equal

[10] German original reads: Auch die Begriffe „Religion oder Weltanschauung" sind auf europarechtlicher Ebene nicht definiert.Wegen des Ziels der Rahmen-Gleichbehandlungsrichtlinie sind sie weit auszulegen. Insbesondere ist„Religion" nicht auf Kirchen und anerkannten Religionsgemeinschaften beschränkt. Es ist jedoch davon auszugehen, dass für eine Religion zumindest ein Bekenntnis, Vorgaben für die Lebensweise und ein Kult vorhanden sein müssen. Religion umfasst jedes religiöse, konfessionelle Bekenntnis, die Zugehörigkeit zu einer Kirche oder Glaubensgemeinschaft. Brockhaus - die Enzyklopädie (20., überarbeitete und aktualisierte Auflage) definiert Religion formal als ein (Glaubens-)-System, das in Lehre Praxis und Gemeinschaftsformen die letzten (Sinn-)Fragen menschlicher Gesellschaft und Individuen aufgreift und zu beantworten sucht. Entsprechend den jeweiligen Heilsvorstellungen, die ihr zugrunde liegen und in Relation zur jeweiligen „Unheils" Erfahrung hat jede Religion ein „Heilsziel" und zeigt einen „Heilsweg". Dieses steht in enger Beziehung zur jeweiligen „Unverfügbarkeit", die als personale (Gott, Götter) und nichtpersonale (Weltgesetz, Erkenntnis, Wissen) Transzendenz vorgestellt wird. Auch das Tragen von religiösen Symbolen und Kleidungsstücken (z.B. Turbane) fällt in den Schutzbereich, da aus den Kleidungsstücken eine bestimmte Religionszugehörigkeit der Träger/innen abgeleitet bzw. diese als Ausdruck einer bestimmten Religion aufgefasst werden. Ein Verstoß gegen das Diskriminierungsverbot liegt auch vor, wenn der/die Arbeitgeber/in die Wünsche einer spezifischen Gruppe berücksichtigt, die Wünsche der anderen Gruppe jedoch nicht. Der Begriff „Weltanschauung" ist eng mit dem Begriff „Religion" verbunden. Er dient als Sammelbezeichnung für alle religiösen, ideologischen, politischen, uä. Leitauffassungen vom Leben und von der Welt als einem Sinnganzen sowie zur Deutung des persönlichen und gemeinschaftlichen Standortes für das individuelle Lebensverständnis. Im hier verwendeten Zusammenhang sind mit „Weltanschauung" areligiöse Weltanschauungen gemeint, da religiöse Weltanschauungen mit dem Begriff „Religion" abgedeckt werden. Weltanschauungen sind keine wissenschaftliche Systeme, sondern Deutungsauffassungen in der Form persönlicher Überzeugungen von der Grundstruktur, Modalität und Funktion des Weltganzen. Sofern Weltanschauungen Vollständigkeit anstreben, gehören dazu Menschen- und Weltbilder, Wert-, Lebens- und Moralanschauungen (vlg. Brockhaus - die Enzyklopädie, 20., überarbeitete und aktualisierte Auflage). Es darf für den Abschluss eines Arbeitsvertrages z.B. keine Rolle spielen, welche Gesinnung (z.B. Atheismus) ein/e Arbeitnehmer/in hat, sofern nicht ein gesetzlicher Rechtfertigungsgrund gegeben ist.

Treatment Act of July 6th 2004, Styiam Provincial law Gazette 66/2004]) contains a definition of disability: "§ 4 (4) *People with disabilities are persons whose corporal functions, mental ability or psychological condition will - presumably for a period longer than six months - diverge from a condition typical for their specific age; and whose participation at the life in society is therefore restricted.*[11]"

Generally, in Austria, defining "disability" is a matter of statutory law rather than of case law. Several fields of law entail lengthy definitions of the term "disability". Courts did not come up with definitions of their own. The subsequent three definitions are the most important statutory definitions. None of them specifically pertains to anti-discrimination law:

- Statutory law on employment of people with disabilities — the *Behinderteneinstellungsgesetz 1969* — frames "disability" as follows: "Disability is the result of a deficiency of functions that is not just temporary and based on an abnormal physiological, mental, or psychological condition. A condition is not deemed temporary if it will presumably last for more than 6 months."[12]
- Under state law on public assistance the term "disabled people" (*Behinderte*) applies to "people who are, because of an impairment, permanently and severely restricted in their ability to live an independent life, especially with regard to adequate education, vocational training, and suitable employment"[13] or to "people who, as a result of physiological, mental, psychological, or multiple impairments not specifically related to age, and because of the loss of essential functions, are permanently and severely restricted in their vital social relations, especially with regard to education, vocational training, development of personality, employment, and integration into society; the term also applies if these restrictions will, according to medical sciences, take place in the foreseeable future, in particular in the case of young children".[14]
- The definition laid down by Austrian pension law (traditionally, a part of social security law) reads: "Persons insured under the ASVG 1955 are deemed disabled if — without rehabilitation — they would, because of an impairment, now or in the foreseeable future probably qualify for an invalidity pension; impairments primarily related to age are not deemed impairments under this paragraph."[15]

These definitions are clearly shaped by the legal context they relate to. The first definition governs the employers' duty to employ people with disabilities, the second one relates to means-tested benefits, the third one to medical, vocational, and social rehabilitation in the

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[11] The German text reads: „*Menschen mit Behinderungen sind Personen, deren körperliche Funktion, geistige Fähigkeit oder psychische Verfassung voraussichtlich länger als sechs Monate von dem für das Lebensalter typischen Zustand abweichen und deren Teilhabe am Leben in der Gesellschaft dadurch beeinträchtigt ist.*"

[12] § 3 *Behinderteneinstellungsgesetz 1969* reads in German: "Behinderung im Sinne dieses Bundesgesetzes ist die Auswirkung einer nicht nur vorübergehenden Funktionsbeeinträchtigung, die auf einem regelwidrigen körperlichen, geistigen oder psychischen Zustand beruht. Als nicht nur vorübergehend gilt ein Zeitraum von mehr als voraussichtlich sechs Monaten."

[13] § 2(1) *Sbg. BhG 1981*: "Behinderte im Sinne dieses Gesetzes sind Personen, die infolge ihres Leidens oder Gebrechens (Behinderung) in ihrer Fähigkeit dauernd wesentlich beeinträchtigt sind, ein selbständiges Leben in der Gesellschaft zu führen, insbesondere eine angemessene Erziehung und Schulbildung oder Berufsausbildung zu erhalten oder eine ihnen auf Grund ihrer Schuld- oder Berufsausbildung zumutbare Beschäftigung zu erlangen bzw. zu sichern".

[14] § 1(2) *Oö. BhG 1991*: "Als behinderte Menschen im Sinne dieses Landesgesetzes gelten Personen, die auf Grund nicht vorwiegend altersbedingter körperlicher, geistiger, psychischer oder mehrfacher derartiger Leiden oder Gebrechen bzw. Sinnesbehinderungen in einem lebenswichtigen sozialen Beziehungsfeld, insbesondere im Zusammenhang mit ihrer Erziehung, ihrer Schulbildung, ihrer Berufsbildung, ihrer Persönlichkeitsentwicklung bzw. Persönlichkeitsentfaltung, ihrer Erwerbstätigkeit sowie ihrer Eingliederung in die Gesellschaft wegen wesentlicher Funktionsausfälle dauernd erheblich beeinträchtigt sind oder bei denen eine solche Beeinträchtigung nach den Erkenntnissen der Wissenschaft in absehbarer Zeit eintreten wird, insbesondere bei Kleinkindern.

[15] § 300(2) *ASVG 1955*: "Versicherte gelten als behindert . . . , wenn sie infolge eines Leidens oder Gebrechens ohne Gewährung von Maßnahmen der Rehabilitation die besonderen Voraussetzungen für eine Pension aus dem Versicherungsfall der geminderten Arbeitsfähigkeit . . . wahrscheinlich erfüllen oder in absehbarer Zeit erfüllen werden; vorwiegend altersbedingte Leiden und Gebrechen gelten nicht als Leiden und Gebrechen im Sinne dieses Absatzes."

context of pension law. Differences in context generate different meanings. The third definition (context: pension law) is very narrow. The right to be granted an invalidity pension remains limited to a rather small group of disabled people. The scope of the second definition (context: public assistance) is utterly broad, covering a wide range of individual needs. Notwithstanding the differences, the definitions share a common element: The definitions are all based on a medical understanding of disability. The definitions draw attention to deficiency and abnormality, the lack or loss of ability to conform with what is considered normal, and on measures to overcome those deficiencies or burdens. Austrian legislation on social and labour law is not familiar with the social model of disability.

Definition of age:

The explanatory notes of the amended Equal Treatment Act state[16]:

"*Regarding the criterion "age" all workers are protected irrespective of minimum or maximum ages, unless specific requirements of training require the establishment of a maximum age for recruitment. Regulations restricting the access to a certain career with a certain maximum age are inadmissible. The ground "age" also covers discrimination on the ground of young age."*

Definition of sexual orientation:

The explanatory notes of the amended Equal Treatment Act state[17]:

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

2.1.2 Assumed and associated discrimination

a) Does national law prohibit discrimination based on assumed characteristics?

In regard to assumed criteria for discrimination the explanatory notes[18] to the Gleichbehandlungsgesetz (Equal Treatment Act) are very clear:

"Der Gleichbehandlungsgrundsatz gilt unabhängig davon, ob der Umstand, auf Grund dessen die Diskriminierung erfolgt (z.B. Rasse oder ethnische Herkunft, etc.), tatsächlich vorliegt oder vermutet ist." [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.]

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[16] Zum Kriterium „Alter" ist auszuführen: alle Arbeitnehmer/innen sind unabhängig von einem Mindest oder Höchstalter geschützt, es sei denn, spezifische Ausbildungsanforderungen erfordern die Festsetzung eines Höchstalters für die Einstellung. Ebenso sind Vorschriften unzulässig, welche insbesondere den Einstieg in eine bestimmte Laufbahn nur bis zu einem bestimmten Lebensalter gestatten. Der Diskriminierungstatbestand des Alters umfasst auch Diskriminierungen auf Grund des jugendlichen Alters.

[17] „Das Kriterium der „sexuellen Orientierung" entspricht dem in der Richtlinie verwendeten Begriff der „sexuellen Ausrichtung", im Gesetzestext wird die gängigere und eingeführte Bezeichnung „sexuelle Orientierung" verwendet. Der Begriff ist weit auszulegen und wird allgemein als „heterosexuell, homosexuell und bisexuell" definiert und verstanden. Es soll vor allem ein Diskriminierungsschutz für schwule und lesbische Arbeitnehmer/innen geschaffen werden. Auch die Benachteiligung homosexueller Lebensgemeinschaften gegenüber unverheirateten heterosexuellen Paaren ist unzulässig, betriebliche Sozialleistungen z.B. dürfen entweder nur allen eheähnlichen Gemeinschaften zustehen oder nur an Ehepaare geleistet werden. Eine Privilegierung der Ehe bleibt aber weiter zulässig.", see 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien, p. 15

[18] 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien, p. 15

The wording of the Viennese Anti-Discrimination Act, Viennese Law Gazette 35/2004 [Wiener Antidiskriminierungsgesetz, LGBl 35/2004] seems to exclude assumed discrimination as its § 3 (1) defines direct discrimination: …, *when a person – on the ground of one of the attributes listed (*gender, race, ethnic origin, religion, belief, disability, age, sexual orientation*) - is put on a disadvantage in a comparable situation compared to another person to whom this attribute does not apply.* [19]

b) Does national law prohibit discrimination based on association with persons with particular characteristics?

No federal Austrian law expressly deals with the question of discrimination on the ground of association. The idea of protecting this kind of possible discrimination is not very widespread in Austria but a clear answer can only be given by the courts. The formulation *"on the ground of…"* that is used by the Gleichbehandlungsgesetz (Equal Treatment Act) is in principle open to such an interpretation though there is no hint that the lawmakers had this meaning in mind when deciding on the bill.

The Styrian Equal Treatment Act expressly prohibits discrimination of persons on the ground of the disability of a relative.[20] As relatives the law defines[21]: the spouse, all relatives in direct line, the collateral relatives of second degree, even if the relation is misbegotten, brothers and sisters-in-law, adoptive parents and adopted children as well as common law spouses and their children.

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

a) How is direct discrimination defined in national law?

Generally, with the exception of the Viennese Laws[22], all laws passed in transposing the directives so far use the wording of the Directives to define direct discrimination.

b) Does the law permit justification of direct discrimination generally, or in relation to particular grounds?

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

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

Also the exceptions to this general rule are strictly taken from the Directives. Also in regard to age discrimination the (Federal) Equal Treatment Act quotes the Directive.

The law does not give hints on how to test "less favourable treatment".

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

a) How is indirect discrimination defined in national law?

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[19] The same definition is used in the ,18th amendment to the Service Order 1994, Viennese Provincial law Gazette 36/2004.

[20] § 3 (4) Styrian Equal Treatment Act: *Die Bestimmungen dieses Gesetzes sind auch auf Personen anzuwenden, die auf Grund der Behinderung eines Angehörigen diskriminiert werden.*

[21] See: § 4 (5) Styrian Equal Treatment Act, Styrian Provincial Law Gazette Nr. 66/2004

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

The Equal Treatment Act defines: "*Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of an ethnic origin or persons with a particular religion or belief, a particular age or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*"[23]

b) What test must be satisfied to justify indirect discrimination?

The explanatory notes give no further help for the interpretation of a "legitimate aim", and "appropriate" and "necessary" means. So it will be up to jurisprudence to find a standard test for these criteria. It seems clear that "legitimate" has to be interpreted narrowly, not just meaning "legally allowed" and that necessary means a "condition sine qua non".

c) Is this compatible with the Directives?

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

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

No. The law quotes the Directive only in this respect. There is no case law on it so far.

2.4 Harassment (Article 2(3))

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

Harassment is dealt with in the workplace and the "other" scope of directive 2000/43/EC. So protection against harassment is provided for, when a person at the workplace is harassed by the employer himself/herself or if the employer is guilty not to use appropriate means given by legal act, norms of collective labour law or the employment contract, to take remedial action when the employee is harassed by any third person, even beyond a workplace relationship.

§ 21 (2) of the Equal Treatment Act[24] defines:

Harassment is unwanted conduct related to one of the grounds listed in § 17 which

1. infringes a person's dignity,

2. is unacceptable, undesirable and offensive (indecent) to the person affected and

3. creates an intimidating, hostile or humiliating environment for the person affected.

The legislation is falling short in implementing the Directives as they restrict the prohibition of harassment to the (successful) violation of dignity and the creation of a certain environment and do not cover (unsuccessful) conduct *with (only) the purpose* of violating dignity and creating the specific environment, as required by the Directives.

Only the Carinthian Anti-Discrimination Act [Kärtner Antidiskriminierungsgesetz] and the Lower Austrian Equal Treatment Act [Niederösterreichisches Gleichbehandlungsgesetz) do not demand for successful violation of dignity to safeguard protection against harassment.

[23] § 19 (2) Gleichbehandlungsgesetz, BGBl.: I 2004/66 [Equal Treatment Act, Federal Law Gazette Nr. I 2004/66] and similar or exactly alike is the wording of all the definitions in the existing provincial legislation (Styria, Carinthia, Lower Austria, Vienna)

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

Another provision coming close to racist or religious harassment is Art. 117 para. 3 of the Criminal Code in connection with § 115 Criminal Code (§ 117 Abs. 3 StGB/Strafgesetzbuch) that accepts the fact that verbal insults because of the membership to a certain ethnic, racial or religious group ask for a better protection than "normal" insults to a person's honour. This provision gives the victim of racist insults the possibility to enable the public prosecutor to prosecute the matter (Ermächtigungsdlikt) whereas "normal" insults (§ 115 StGB) have to be brought to court by the victim in private - facing a great risk of cost.

b) Is harassment prohibited as a form of discrimination?

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

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

No.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Instruction to discriminate is defined as being deemed to be discrimination just as the directive says. Instruction to harassment is also defined as being discrimination in the federal laws as well as by respective laws of Vienna, Styria, and Carinthia.

The Lower Austrian Equal Treatment Act[25] does not deal with instruction to discrimination.

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

a) How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?

For the time being, Austrian law does not impose upon employers the duty to provide reasonable accommodation. Under the Behinderteneinstellungsgesetz 1969, employers (or disabled people) may apply for grants or loans compensating for special costs related to the employment of people with disabilities (technical appliances, personal assistance, training, creation of suitable jobs, wage). Nevertheless, the Behinderteneinstellungsgesetz 1969 does not confer "rights" or "titles", neither upon employers nor upon disabled people. Whether or not grants, loans, or wage subsidies are eventually accorded, lies in the unfettered discretion of the Ausgleichstaxfonds administered by the Secretary of State for Social Security.

Over the last decades, however, courts have developed guidelines involving aspects of "reasonable accommodation", at least in the context of dismissal. When ruling upon the lawfulness of a dismissal, the Administrative Court (VwGH) as well as the Supreme Court (OGH)[26] consistently held that an employer may not dismiss instantaneously if the employee has lost the physical or mental aptitude necessary to carry on with the job.[27] The employers'

[25] Niederösterreichisches Gleichbehandlungsgesetz, NÖ-LGBl Nr. 69/97 idF. 65/04 [Lower Austrian Provincial Law Gazette Nr. 96/1997 as last amended by 65/2004]

[26] It is up to the *VwGH* (Administrative Court) to decide upon the lawfulness of a dismissal if the employee is covered by the *Behinderteneinstellungsgesetz 1969*; otherwise the decision lies with the Supreme Court (OGH).

[27] See, e.g., *OGH* 29/04/1992, 9 ObA 18/92; *OGH* 11/01/2001, 8 ObA 188/00f; *VwGH* 22/02/1990, 89/09/0147; *VwGH* 25/04/1991, 90/09/0139; *VwGH* 04/10/2001, 97/08/0469.

duty to care for the employees (Fürsorgepflicht) demanded — so the courts ruled — otherwise. Under that duty, employers must first try to adjust the employee's duties (adjustments with regard to physical requirements of the job, stress factors, time, place, working environment, colleagues, technical appliances, etc.). Dismissal ought to be regarded as a last resort: "Dismissal on account of incompetence must take place only if the employee has lost the ability to do his or her former job and the ability to perform well in another position that is reasonable and adequate, both from the perspective of the employer and the employee".[28]

Although "reasonableness" (of adjustment) is certainly not a clear-cut concept, case law offers some important elements: The employers' duty to care (Fürsorgepflicht) is activated only when employees can be expected (if necessary: after re-training) to be able to fulfil the new terms of their contract.[29] The larger the number of employees is, the stricter is the employer's duty to make reasonable adjustments.[30] Dismissal must never be pronounced solely on account of an employee's disability.[31] If (suitable) other positions are in principle at hand the employer must even consider assigning a post that gives title to an increased rate of pay.[32] Allowances and grants available under the Behinderteneinstellungsgesetz 1969 are to be taken into account when the "reasonableness" of adjustments is to be judged.[33] However: The employer is not obliged to create a "new" post in the company, specifically tailored to meet the needs of the employee.[34] And if dismissal seems necessary to prevent the company's bankruptcy or other grave disturbances, the employee's interests are usually outweighed by the interests of the employer.[35]

To enhance predictability and publicity, parliament decided in 1998 to convert some of the courts' principles into statutory law. Since January 1999, the Behinderteneinstellungsgesetz 1969 explicitly demands that support available under § 6(2) Behinderteneinstellungsgesetz 1969 (grants, loans) is to be taken into account when the employers' and the employees' interests are to be balanced.[36] The Behinderteneinstellungsgesetz 1969 also provides that an employer cannot reasonably be expected to continue employment if

- the work formerly allotted under contract becomes redundant and assigning a new position involved a heavy burden (*erheblicher Schaden*);
- the disabled person is no longer able to fulfil the contract and assigning a new position involved a heavy burden;
- the disabled person persistently breaches the terms of the contract and continuing employment undermined work discipline.[37]

Case law and statutory law, therefore, do to some extent cover "reasonable accommodation". Yet, case law and statutory law are concerned with dismissal only. The Framework Directive

[28] *OGH* 11/01/2001, 8 ObA 188/00f: Der Dauertatbestand der mangelnden Eignung aus körperlichen und geistigen Gründen ist "nur dann erfüllt, wenn der Vertragsbedienstete sich auf Grund seiner körperlichen und geistigen Fähigkeiten als ungeeignet erweist, nicht nur die bisherige Tätigkeit zu verrichten, sondern auch alle anderen Tätigkeiten, die unter Bedachtnahme auf seine Kenntnisse und Fähigkeiten sowie die Natur des Unternehmens und der Fürsorgepflicht des Arbeitgebers beiden Vertragsteilen zumutbar und angemessen sind". Similar *OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions]

[29] *OGH* 29/04/1992, 9 ObA 18/92.
[30] *OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions]
[31] *VwGH* 22/02/1990, 89/09/0147. [Administrative Court Decisions]
[32] *OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions]
[33] *VwGH* 14/12/1999, 99/11/0246. [Administrative Court Decisions]
[34] *OGH* 11/01/2001, 8 ObA 188/00f: Der Arbeitgeber ist nicht verpflichtet, "auf Dauer einen der Arbeitsfähigkeit des Arbeitnehmers entsprechenden neuen Posten zu schaffen". [Supreme Court Decisions]
[35] See, e.g., *VwGH* 22/02/1990, 89/09/0147; *VwGH* 11/06/2000, 2000/11/0096; *VwGH* 04/10/2001, 97/08/0469. [Administrative Court Decisions]
[36] § 8(3) *Behinderteneinstellungsgesetz 1969.*
[37] § 8(4) *Behinderteneinstellungsgesetz 1969.*

2000 goes further. The Directive encloses access to employment (selection criteria, conditions for recruitment), training, and promotion as well.[38] Parliament is still called to act.

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

As the duty is not clearly stated in the law this is not yet clear. The different drafts of a future "Behindertengleichstellungsgesetz" [Equal Status Act for People with Disabilities] all explicitly deal with this aspect, but none of them is yet agreed on.

3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

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

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

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

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

3.1.3 Scope of liability

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

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

[38] Article 5 *Framework Directive 2000.*

discriminator can be held liable in any case. The employer is always liable for discriminatory decisions of superiors affecting their subordinates. There is no specific regulation for trade/professional associations, so mere membership of a perpetrator will not activate the union's liability.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

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

The federal legal framework basically consists of:

1. **Equal Treatment Act** – ETA (Gleichbehandlungsgesetz)
2. **Act on the Equal Treatment Commission and the Equal Treatment Office** – ETC/O (Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, BGBl. I Nr. 66/2004), both Federal Law Gazette I Nr. 66/2004
3. **Federal-Equal Treatment Act** – F-ETA (Bundes-Gleichbehandlungsgesetz, BGBl. I Nr. 65/2004), Federal Law Gazette I Nr. 65/2004
4. **Provincial Equal Treatment Acts and/or Provincial Anti-Discrimination Acts**

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

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

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

For the scope of federal government civil servants, the Federal – Equal Treatment Act – F-ETA (Bundes-Gleichbehandlungsgesetz) was amended and the grounds mentioned in directives 2000/43 and 2000/78 were added to the scope of protection.

So mainly (on Federal level) there is now a separation into one act concerning the material scope and one act dealing with the specialised institutions.

As the Directives are not yet implemented in all the federal provinces, public employment in the missing provinces is not yet covered by the protection.

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

Concerning material scope, the federal acts are covering all discrimination 'in connection with employment'. The Equal Treatment Act also prohibits discrimination in access to vocational guidance, vocational training, advanced vocational training and retraining outside of employment, and discrimination concerning membership and involvement in an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided for by such organisations. In self-employment the Equal Treatment Act[39] covers only access to self-employment.

Austrian administrative penal law protects social groups characterised by their 'race', ethnicity, nationality, religion and (since 1997) disability against disadvantage[40] (Art. IX par. 1 lit. 3 Introductory Law to the Administrative Procedures Code 1925; [Einführungsgesetz zu den Verwaltungsverfahrensgesetzen' 1925, EGVG]. Since 'disadvantage' is not in any way restricted to certain fields, also disadvantage in employment and occupation is theoretically covered. But no such cases are known in practice.

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

The Equal Treatment Act defines the areas where protection against discrimination shall be granted in § 17: *"… in relation to a working relationship nobody must be directly or indirectly discriminated against, especially not in relation to*

1. access to employment

2. pay

3. voluntary social benefits

4. measures of vocational training, advanced vocational training and retraining

5. professional career, especially promotion

6. other working conditions

7. ending of the working relationship (including dismissal)"

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

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

measures of vocational training, advanced vocational training and retraining (§ 17), and access to vocational guidance, vocational training, advanced vocational training and retraining beyond a working relationship (außerhalb eines Arbeitsverhältnisses) (§ 18)

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

[39] § 18 fig. 3 Equal Treatment Act
[40] Until 1997 the offence covered only public disadvantage. Since 1997 also non-public disadvantage is an offence (Federal law Gazette I 63/1997).

This protection clause was literally taken from the directive and incorporated into the Equal Treatment Act in § 18 fig. 2.

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

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

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

On provincial level, Styrian and the Lower Austrian legislation so far do not at all deal with this part of the implementation, whereas the Carinthian Anti-Discrimination Act explicitly cites the Directive and fully forbids discrimination in all these fields on the grounds of ethnic affiliation, religion or belief, disability, age, sexual orientation and gender. This implementation goes quite far beyond the minimum requirements of the Directives. The Viennese Anti-Discrimination Act[41] also quotes the Directive for this part of the scope and provides for protection against discrimination on the grounds of race and ethnic origin, religion, belief, age and sexual orientation (note that disability and gender are not covered).

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

The scope of social advantages is generally covered by the federal legislation (§ 31 Equal Treatment Act). The explanatory notes state that *"among the social advantages in the sense of this law we count for example cost-free or reduced in price use of public transport, price reductions for admission tickets for cultural or other events or price reductions for meals in school for children from low-income families."*[42]

So in this case the Equal Treatment Act binds the state as well as private actors of all kinds to refrain from discriminatory practices on the ground of ethnic affiliation in regard to social advantages.

The two provincial legal acts which deal with the issue (Vienna and Carinthia) do not explicitly mention social advantages but protect the broad scope of "social affairs" (Soziales). It must be assumed that also the issues of social advantages are covered by this formulation. Note that the two provincial acts extend protection also to other grounds of discrimination[43].

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

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

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

[42] German text: „Zu den sozialen Vergünstigungen der Z 2 des vorliegenden Entwurfes zählen beispielsweise kostenlose oder verbilligte Fahrten in öffentlichen Verkehrmitteln, Preisnachlässe auf Eintrittskarten für kulturelle oder andere Veranstaltungen oder verbilligte Mahlzeiten in der Schule für Kinder aus einkommensschwachen Familien."

[43] Vienna: race, ethnic origin, religion, belief, age, sexual orientation; Carinthia: ethnic affiliation, religion, belief, disability, age, sexual orientation, gender

On provincial level both the Viennese as well as the Carinthian legislation state that organs (civil servants) under their legislation must refrain from any form of discrimination in regard to education. These general norms seem to be broad enough to cover the protection the Directives demand for.

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

In this respect the Equal Treatment Act only cites the text of the Directive literally[44]. So it applies to goods and services available to the public only and in regard to ethnic affiliation.

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

In regard to housing the Equal Treatment Act quotes the Directive saying *"… regarding access to and supply of goods and services which are available to the public, including housing."* (see FN 44)

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."*[45]

This constitutes a very broad scope for the protection of housing on the (important) federal level. The protection is limited to the ground of ethnic affiliation.

The Viennese and the Carinthian laws use the same quotation from the Directive but in both cases the scope of protection is extended to all grounds covered by the respective legislation[46]. This is a very important regulation on the provincial level as the provinces are extremely important landlords. For example the Vienna Province is Austria's biggest owner of housing space and the most important landlord in eastern Austria.

4. EXEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

All existing pieces of legislation for the implementation of the Directives quote the Directives in this respect. So for example § 20 (1) of the Equal Treatment Act reads: *"Different treatment in relation to the grounds mentioned in § 17 shall not constitute discrimination where, by reason of the of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."*

The explanatory notes state: *"These specific requirements shall be understood in a narrow sense, meaning that they only cover such occupational requirements which are essentially necessary to conduct the specific occupation. The justification refers to the means and the context in or under which the respective occupation has to be carried out. We can in this respect think of a case where for reasons of authenticity an actor or actress affiliated to a*

[44] § 31 (1) fig. 4. Equal Treatment Act (Gleichbehandlungsgesetz)
[45] see § 30 Equal Treatment Act: *„Die Bestimmungen dieses Abschnittes gelten für Rechtsverhältnisse einschließlich deren Anbahnung und Begründung und für die Inanspruchnahme oder Geltendmachung von Leistungen außerhalb eines Rechtsverhältnisses (…)"*
[46] see footnote 43

certain ethnic group is needed. The exception also comprises the areas of health and safety. This comprises especially those protective provisions regulating a duty to wear uniforms or helmets for reasons of safety."

4.2 Employers with an ethos based on religion or belief

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

Yes, this exception is transposed inter alia by § 20 (2) Equal Treatment Act, stating: "*In the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. "*

The law does not explicitly mention that this exception should not justify discrimination on another ground.

The explanatory notes state in regard to the scope of this exception: "Also the usage of self-contained forms of enterprises is not excepted from the application of this exception in fulfilment of the legitimate aims of the above mentioned churches and organisations, where ethos is inseparably connected with the object of the enterprise."

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

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

4.3 Armed forces and other specific occupations

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?

There is no specific regulation concerning the armed forces, police, prison or emergency services, but the general exceptions of § 13b (3)-(5) of the Federal-Equal Treatment Act [Bundes-Gleichbehandlungsgesetz[47]]. In regard to disability the implementation is not yet fulfilled so the exceptions mentioned below are so far only connected to age. The relevant § 13b (3)–(5) read:

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

1. it is objective and appropriate

2. it is justified by a legitimate aim especially from the fields of employment policy, labour market and vocational training.

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

3. the means of achieving that aim are appropriate and necessary.

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

1. the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

3. the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

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

4.4 Nationality discrimination

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).

a) How does national law treat nationality discrimination?

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

The Equal Treatment Act states in §§ 17 (2) and 31 (2) that the principle of equal treatment *"does not cover difference of treatment based on citizenship as well as the treatment which arises from the legal status of the third-country nationals or stateless persons."*

The explanatory notes to the Equal Treatment Act state: *"This provision shall clarify that different treatment based on citizenship is not prohibited when it is based on objective reasons, but and not where racist behaviour is the aim. This exception can not be used to legitimate discriminations on the grounds covered in this act. The prohibition of discrimination also protects third country nationals. Provisions regulating the entrance and the residence of third country nationals as well as their access to employment and self employment are not affected by the new regulations."*

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

The issue of protection against discrimination on the basis of nationality or citizenship is crucial for the Austrian situation as most of the racist discourse is not labelled with terms like race or ethnic origin, but the scapegoats and concept of the enemies is to a very large extent about "foreigners", "asylum seekers", "asylum-frauds". Especially discriminatory small-ads, advertising for jobs or housing regularly demand for "Austrians", "genuine Austrians" or state

"no foreigners". These cases will be rather difficult to deal with in courts if the exemption for the nationality ground will be interpreted broadly by the courts. It is likely that the onus of proof will be mainly on the plaintiff to show the racist background of these actions. As there is no relevant case-law on the issue so far, no clear evaluation of practice can be made.

4.5 Family benefits

Work-related benefits include, for example, survivor's pension entitlements, free or discounted travel for certain family members, free or discounted health insurance, parenting leave to care for the child of a partner, etc.

a) How does the law treat work-related family benefits that are restricted to opposite-sex couples (whether married or unmarried)?

b) Is there an exception in the national law, particularly in relation to sexual orientation discrimination, for national laws on marital status and work-related benefits dependent thereon (Recital 22, Directive 2000/78)?

The explanatory notes to the Equal Treatment Act state*: "The main target of the law is to safeguard protection of gay and lesbian workers from discrimination. Discrimination of homosexual partnerships compared to unmarried heterosexual partnerships is prohibited; voluntary social benefits are to be granted to all partnerships or only to married couples. Privileges for marriage remain permissible. This results from Recital 22 of the Framework Directive stating that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon."*

c) In states where other forms of legally-recognised partnership exist (e.g. registered partnership), does the law permit restrictions on work-related family benefits that exclude such couples?

There is no legally recognised partnership for same-sex couples in Austria.

4.6 Health and safety

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

There is no implementation of Directive 2000/78/EC in regard to disability in Austria.

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

In regard to the exception for "genuine occupational requirements" the explanatory notes to the Equal Treatment Act[48] state:" *The exception also comprises the areas of health and safety. This comprises especially those protective provisions regulating a duty to wear uniforms or helmets for reasons of safety."* So this exception is not restricted to the ground of disability as permitted by the Directive, but valid for all the grounds dealt with by the Equal Treatment Act.

[48] 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien, p. 16

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78?

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

The general exceptions in regard to age can be found in §§ 13b (3)-(5) of the Federal-Equal Treatment Act [Bundes-Gleichbehandlungsgesetz[49]] and in §§ 20 (3)-(5) of the Equal Treatment Act [Gleichbehandlungsgesetz[50]] as quoted above under 4.3.

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

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

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

There are frequently positive action measures to support younger or older people and people with caring responsibilities in regard to their opportunities on the labour market. There is a rather wide range of different governmental policies in this respect. There are tax advantages for single-parents educators, and special programs to promote the employment of younger or older workers. These policies are mainly coordinated and financed by the Labour Market Service [Arbeitsmarktservice – AMS]. Such regulations and programs now have to stand the test stipulated in the above mentioned §§ 13b (3)-(5) of the Federal-Equal Treatment Act and 20 (3)-(5) of the Equal Treatment Act.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training?

Yes, §§ 13b (3)-(4) of the Federal-Equal Treatment Act and §§ 20 (3)-(4) of the Equal Treatment Act state this clearly. See quotation above under 4.3.

4.7.4 Retirement

a) What is the retirement age? Have there been recent changes in this respect or are any planned in the near future?

Still the general retirement age is 65 years for male and 60 years for female workers in the private sector, for civil servants it is for both sexes at 61,5 years. These periods will be harmonised gradually until 2024 when the general retirement age will be 65 years[51]. A very

[49] Das Bundes-Gleichbehandlungsgesetz, BGBl. Nr. 100/1993, zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 65/2004 [Federal-Equal Treatment Act, Federal Law Gazette Nr. 100/1993, as last amended by Federal Law Gazette I Nr. 65/2004]
[50] Gleichbehandlungsgesetz, BGBl I Nr. 66/2004 [Federal Law Gazette 66/2004]
[51] Budgetbegleitgesetz 2003,BGBl 71/2003, [Law Accompanying the Budget 2003, Federal Law Gazette 71/2003]

vague political discussion on the possibility of increasing the general retirement age has started recently without any immediate conclusions or effects.

b) Does national law require workers to retire at a certain age?

c) Does national law permit employers to require workers to retire because they have reached a particular age? In this respect, does the law on protection against dismissal apply to all workers irrespective of age? For both of the above questions, please indicate whether the ages different for women and men.

Workers in the private sector are not required to retire at the pension age mentioned above. Only for older people who are unemployed, special regulations force them to change into the pension system. A 62 year old worker who has lost or is losing his job, can stay unemployed for one more year. Then if he/she has not found a new job, the forced pension starts. Age is not a permissible reason for dismissal.

The possibility to retire civil servants against their will was declared unconstitutional by the Constitutional Court in 2003. But still civil servants can ex officio be forced to retire after reaching an age of 738 months (=61,5 years) if there are important official reasons (no legal definition of these reasons provided) for that. Age as such is not deemed a permissible reason.

4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

Seniority as such is not a protected element in the Austrian labour law. Age might be taken into account as there is a special provision declaring "socially unfair" [sozialwidrige] dismissals illegitimate.

§ 105 (3) Z 2. Arbeitsverfassungsgesetz, ArbV, BGBl Nr. 22/1974, idF. BGBl I Nr. 72/2003 [§ 105 (3) fig. 2 Labour Constitution Law, Federal law Gazette Nr. 22/1974, as last amended by Federal Law Gazette I Nr. 72/2003] states:

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

a) circumstances lying in the person of the worker which affected negatively the companies´ interests; or

b) operational requirements of the company which are opposed to a further employment.

(…) in case the works council [Betriebsrat] entered an objection against a dismissal according to heading b), the dismissal is deemed socially unfair when a comparison of social aspects shows a bigger social hardship for the affected worker than for other workers of the same company and the same field of occupation, whose work to do is possible and desired by the dismissed worker.

In cases of older workers the test of social unfairness and the comparison of social aspects must take into consideration facts of longstanding staff-membership (seniority) and the complications on the basis of higher age he or she has to face in trying to reintegrate into the labour process. (…)

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

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

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

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

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

No provision explicitly refers to these issues.

Only in regard to the exception for "*genuine occupational requirements*" the explanatory notes to the Equal Treatment Act[52] state:" *The exception also comprises the areas of health and safety. This comprises especially those protective provisions regulating a duty to wear uniforms or helmets for reasons of safety."* So this exception is not restricted to some grounds but valid for all the grounds dealt with by the Equal Treatment Act.

4.9 Any other exceptions

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

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

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

What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation?

Do measures of positive action exist in your country? Which are the most important?

Refer, in particular, to the measures related to disability and any quotas for access of disabled persons to the labour market.

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

National minorities

Protection of recognized national minorities (Volksgruppen: Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma) is provided according to the state treaties of 1919 and 1955, their legal status and rights is guaranteed by various constitutional provisions and partly implemented by the National Minorities Act of 1976 (Volksgruppengesetz)[53].

[52] 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien, p. 16
[53] Bundesgesetz über die Rechtsstellung von Volksgruppen in Österreich. BGBl. 396/1976, last amended by BGBl. I Nr. 35/2002.

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

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

Disability

In Austria, measures specifically promoting employment of disabled people are closely related to social or labour law:

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

- Measures are associated with *compensation law* (*Versorgungsrecht*) if they have their basis in laws addressing disabled people of defined classes, such as invalids of World Wars I and II (*Kriegsopferversorgung*), victims of Nazi persecution (*Opferfürsorge*), people disabled on account of military service (*Heeresversorgung*), or victims of crimes (*Verbrechensopferversorgung*). When disability is related to one of the defined causes, the persons are entitled not only to invalidity pensions and medical treatment, but also to vocational and social rehabilitation (*berufliche und soziale Maßnahmen*), including vocational training with a view to re-gaining earning capacity and employment. The body administering the law may also grant payments in order to compensate either the employer or the disabled person for the loss in productivity (*wage subsidies*). The measures are not means-tested and financed by the *Bund* (federal government).

- Measures are linked with *public assistance law* on state level (*Sozialhilferecht, Behindertenrecht*) if disabled persons are entitled neither to insurance benefits nor to benefits provided for by compensation law, yet in need and not able to take care of themselves. Based on a means-test, all states arrange for “assistance for people with disabilities” (*Hilfe für behinderte Menschen*), including vocational integration (*berufliche Eingliederung*) and sheltered workshops (*geschützte Werkstätten*). Vocational integration encompasses measures enabling disabled people to find suitable employment (training, re-training, or work trial, each in close co-operation with the employment agencies). Sheltered workshops, again, are designed for people with disabilities who — on account

of their disability — cannot (or can no longer) compete with non-disabled people. Employment in a sheltered workshop is supposed to provide specially equipped working places or master-tailored working conditions with a view to optimising individual productivity (if need be: on the basis of a state subsidy). Measures under public assistance law are funded by the *Länder* (states).

- Measures organised by the employment agencies (*Arbeitsmarktservice*) under the *AMSG 1994* are closely related with *unemployment insurance* and *labour law*. The purpose of these measures is to prevent or shorten unemployment and to help to find employment. Employment agencies are explicitly requested by law to pay special attention to people with disabilities when rendering their services. Employment agencies may also grant payments (*Beihilfen*) with a view to overcoming the costs for taking up employment, promoting training or re-training, or integrating people in the labour market. Provisions on payments (*Beihilfen*) are general in terms; employment agencies are not requested to treat disabled people favourably. Measures under the *AMSG 1994* are not means-tested and funded by contributions of employers and employees, by the *Bund*, and by the European Social Fund.

The most pertinent legal source on employment of people with disabilities is, however, the Behinderteneinstellungsgesetz 1969. The Behinderteneinstellungsgesetz 1969 imposes (upon employers) a duty to employ disabled people (according to a quota system), confers protection against dismissal, and arranges for grants or loans. The Behinderteneinstellungsgesetz 1969 applies to employment in private sectors and employment in public services:

- Under § 1(1) *Behinderteneinstellungsgesetz 1969*, all employers employing 25 employees or more in Austria are obliged to employ at least 1 person with disabilities for each group of 25 employees (the ratio, therefore, being 1:25).[54] People classify as employees if they are gainfully employed and subjected to personal and economic dependency or subordination, with the exception of apprentices, yet including home workers and trainees.[55]

- The duty to employ does not relate to all people with disabilities. The duty only relates to disabled people who qualify under a certain standard: To qualify under the *Behinderteneinstellungsgesetz 1969*, disabled people must be Austrian nationals or nationals of one of the Member States of the European Economic Area; third country nationals only qualify if they were granted asylum.[56] Furthermore, the degree of disability (*Grad der Behinderung*) must reach at least 50 percent.[57]

- If employers do not comply with their duty under § 1(1) *Behinderteneinstellungsgesetz 1969*, they are obliged to pay a fee (*Ausgleichstaxe*). The fee amounts to € 196,22 per month and person that ought to be employed.[58] These fees go to a special fund designated to sponsor measures promoting the employment of people with disabilities (*Ausgleichstaxfonds*).[59] The fund is administered by the Secretary of State for Social

[54] For certain economic sectors, the Secretary of State for Social Security may, by regulation, increase the relevant ratio from 1:25 to up to 1:40; § 1(2) *Behinderteneinstellungsgesetz 1969* idF. BGBl. I Nr. 71/2003 [Act on the Eployment of People with Disabilities 1969, as last amended by Fedeeral Law Gazette I Nr. 71/2003]
[55] § 4(1) *Behinderteneinstellungsgesetz 1969*.
[56] § 2(1) *Behinderteneinstellungsgesetz 1969*.
[57] § 2(1) *Behinderteneinstellungsgesetz 1969*. The "degree of disability" is essentially a medical concept first employed in the context of *Kriegsopferversorgung* (war veterans). Regulations under the *KOVG 1957* associate a list of impairments with a corresponding list of degrees of disability. According to these regulations, the loss of the right hand, for instance, equals a degree of disability of 50% if the person concerned is right-handed. For further details see *Ernst/Haller* 2000 p. 577. This concept is also applied in the context of *Behinderteneinstellungsgesetz 1969*.
[58] § 9(2) *Behinderteneinstellungsgesetz 1969*.
[59] § 10 *Behinderteneinstellungsgesetz 1969*.

Security. This possible exception is widely used by both private companies and public authority. People seem to prefer paying the tax to employing people with disabilities.

- Employers who employ (or are willing to employ) people with disabilities of the relevant class may qualify for support under § 6(2) *Behinderteneinstellungsgesetz 1969*. Allowances or loans granted under § 6(2) *Behinderteneinstellungsgesetz 1969* aim at (a) facilitating technical appliances making the working place suitable to people with disabilities, (b) promoting working or training places suitable to people with disabilities, (c) subsidising the wages of disabled employees or trainees, (d) alleviating the costs for personal assistance (*Arbeitsassistenz*), (e) facilitating training, re-training, or work trial, (f) contributing to the costs linked with taking up employment, or (g) promoting self-employment of people with disabilities. The measures are funded by the *Ausgleichstaxfonds*.
- Protection against dismissal under the *Behinderteneinstellungsgesetz 1969* is twofold. Firstly: It is proscribed by law that the termination of the contract takes effect only after a notice period of at least 4 weeks has passed (*Kündigungsfrist*).[60] Secondly: Dismissal may be pronounced only if a panel established with the *Bundesamt für Soziales und Behindertenwesen* (federal office for social affairs and matters relating to people with disabilities) has given prior consent to the dismissal.[61] When deciding upon dismissal, the panel has to weigh the employer's interests militating for dismissal against the interests of the disabled person, the main question being: Can the employer reasonably be expected to carry on with employment?

With effect from January 1, 2001, the Austrian government launched an additional programme on employment of people with disabilities (worth 1 billion ATS = 72,7 millions EUR), financed mainly by the Bund. The programme concentrates on the employment of young people with disabilities (Jugendliche), disabled people aged 50 or more, and disabled people whose employment proves especially difficult. The programme arranges for a wide variety of measures, such as wage subsidies, job coaching, personal assistance (Arbeitsassistenz), training, creation of jobs, or incentives to self-employment. The programme and other programmes were eventually included into a nation-wide initiative to promote employment of people with disabilities and re-launched in 2003/04Measures relating to social security law, compensation law or public assistance law are accorded by administrative agencies on the basis of individual entitlements. Disabled people meeting the legal requirements may claim a "right", namely the right to be granted the benefit or, at least, the right not to be denied the benefit arbitrarily. Measures under the AMSG 1994, the Behinderteneinstellungsgesetz 1969 or the special programme launched in 2001, however, are not rights-based. Neither people with disabilities nor employers do have standing when applying for grants, loans, or wage subsidies.[62] They cannot appeal to court for judicial review. While all these measures are — from a systematic point of view — connected with social or labour law, they may also be coined "positive action". By and large, these measures are exclusively designed for disabled people in order to facilitate employment (benign intent), and the measures do — in fact — serve this purpose (benign effect). Or, to cite Article 7 of the Framework Directive 2000, the measures are "specific measures to prevent or compensate for disadvantages linked to" disability. I would, therefore, plead to not put the concept of "positive action" into opposition of social law too sweepingly.

[60] § 8(1) *Behinderteneinstellungsgesetz 1969*.
[61] § 8(2) *Behinderteneinstellungsgesetz 1969*.
[62] See, e.g., *Richtlinien 1989*: "Auf die Gewährung von Sach- und Geldleistungen aus den Mitteln des Ausgleichstaxfonds besteht kein Rechtsanspruch" (benefits funded by the *Ausgleichstaxfonds* cannot be claimed as of a right).

6. REMEDIES AND ENFORCEMENT

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

What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)? Are these binding or non-binding?

With only a few exceptions the generally used procedures will be civil law procedures or employment law procedures.

Administrative penal law is only a remedy against discriminatory advertisement.

The decisions of the civil and labour courts will be the only binding decisions as the procedures at the Equal Treatment Commission only result in a non-binding "opinion" [Gutachten]. However, the Equal Treatment Act states in its § 61 that courts have to take these opinions into consideration and that they have to give clear reasons in case they come to a dissenting decision.

Please note whether there are different procedures for employment in the private and public sectors.

For the area of public employment there exists a different treatment of civil servants [Beamte] and contracted public workers [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.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?

All claims are subject to strict time-limits. The normal time-limit for bringing civil-law claims is three years.

The legal situation regarding discrimination is very complicated and the laws are not understandable for people without legal education. So also in cases where it is not compulsory to be represented by a lawyer, it seems necessary to have access to legal aid. The powers of the National Equality Body are restricted to help in the procedure before the Equal Treatment Commission, but their help ends at the doors of the courts. Also NGOs cannot provide for a complete relief, as their procedural rights are limited to side intervention at court. In labour law cases the trade unions or the Chamber of Labour can grant their members a complete protection so that they do not have to fear any costs.

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

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

What are the criteria for an association to engage in judicial or other procedures?

a) in support of a complainant?

b) on behalf of one or more complainants?

In court cases, associations, organisations or other legal entities may engage on behalf of their clients within the scope of the directive in proceedings, where no representation through an attorney is compulsory (Anwaltszwang). This is compulsory for most civil procedures at court and before the courts of public law so there is extremely few place for NGO representation in civil law courts but more at lower levels of administative proceedings.. In these cases associations, organisations etc. as other physical persons can represent parties in so far as they have been formally mandated by these parties. The Equal Treatment Act expressly allows NGOs to represent alleged victims of discrimination in the rather informal proceedings before the Equal Treatment Commission; nevertheless this is not a special right, as every adult physical person is allowed to do the same. The Federal-Equal Treatment Act does not foresee any third party intervention.

On provincial level, the **Viennese Anti-Discrimination Act** states in § 4 (2) that the plaintiff can use the help of any legitimate non-profit organisation to be represented in all forms of legal proceedings under this act, as long as the organisations aims include the safeguarding of the adherence of the two EU-Anti-Discrimination Directives. The **Carinthian Anti-Discrimination Act** is weaker in this point as it only gives the right to intervene [Nebenintervention] to all associations whose statutes state their interest in the adherence of the prohibition of discrimination [§§ 24 (6) and 27 (4) of the Carinthian Anti-Discrimination Act]. Such associations are generally only allowed to represent their members or clients before the Styrian Equal Treatment Commission according to the **Styrian Equal Treatment Act**; the **Lower Austrian Legislation** so far does not mention this aspect at all.

In penal administrative proceedings there is no legal standing for interest groups (indeed not even legal standing for the victim of discrimination itself) at all. In some cases of discriminatory advertising the National Equality Body[Gleichbehandlungsanwaltschaft] has a legal standing and can oppose to the abatement of the proceedings[63].

Class actions (Verbandsklagen) are not allowed in the area of discrimination in Austria, they do exist in the area of consumer protection (Konsumentenschutzgesetz).

According to the **Equal Treatment Act**, third party intervention is only allowed for one specific NGO ('**Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern'** [Litigation Association of NGOs Against Discrimination]) in the courts (§. 62 GIBG [§ 62 Equal Treatment Act]). The Litigation Association is a body set up by several NGOs dealing with different grounds of discrimination. This association is open for all specialised NGOs to join in but all NGOs not joining the Litigation Association are excluded from any special procedural rights. The Litigation Association is a NGO-tool to safeguard best quality counsel and legal representation for victims of discrimination. The form of the intervention is rather limited by the law. It only allows the Association to intervene in court proceedings if the plaintiff wants so. This right to intervention as a third party in support of the plaintiff is a rather weak construction as it generally does not allow to take over costs and risks from the plaintiff, but needs action by the victim of discrimination first and the right to independent action or remedies is not included.

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

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

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

The amended federal acts lower the burden of proof for the plaintiff - but in a way that is different from the way stated in the directives. The burden of proof does not completely switch over to the respondent, when the plaintiff establishes facts from which it may be presumed that there has been direct or indirect **discrimination**. The law states that the respondent has to prove that "it is likely that a different motive – documented by facts established by the respondent - was the crucial factor in the case or that there has been a legal ground of justification (in cases of indirect discrimination)". In cases concerning **harassment**, the respondent has to prove that – taking into account all the circumstances – it is likely that the facts established by the respondent are true[64]. So in any case the respondent is obliged to prove the likelihood of established facts". The law does not say anything about the degree of propability needed, as it only has to prove likely. In my view this does not constitute a clear shift of the burden of proof as the directive lays down, - even though the burden is lowered considerably. The government is already aware of this problem and is at the moment preparing an amendment to this, inserting that the respondent has to prove that his/her arguments are more likely to be true.

For cases of **victimisation** the same burden of proof provision applies..

On provincial level, the Viennese Anti-Discrimination Act provides a full shift of the burden of proof stating that in court the plaintiff only has to establish fact about the discrimination or victimisation and then the respondent has to prove that no infringement of the prohibition of discrimination or victimisation has occurred[65], the same goes for the Viennese Service Act[66] and for the Styrian Equal Treatment Act[67], and for the Carinthian Anti-Discrimination Act[68], and for the Lower Austrian Equal Treatment Act[69]

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

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses)

The Equal Treatment Act states that any adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment is forbidden (**victimisation**). Victimisation in the workplace sphere (defined as 'dismissal, notice of quit and any other detriment in reaction to a complaint or to the opening of proceedings enforcing the principle of equality') is prohibited in all bills/drafts, and all of them cover also other employees acting as witnesses or supporting the complaint of a victim.

Also for cases of victimisation the shift of the burden of proof is provided.

The law does not state any consequences for the violation of this rule for the scope of the "race ground" outside the workplace-sphere. Also for victimisation that does not consist of dismissal the law does not provide for an explicit legal consequence. The consequences might be found by way of analogy but they are not clearly stated.

[64] The German original reads: Bei Berufung auf § 21 (harassment) obliegt es dem/der Beklagten zu beweisen, dass es bei Abwägung aller Umstände wahrscheinlich ist, dass die vom/von der Beklagten glaubhaft gemachten Tatsachen der Wahrheit entsprechen.
[65] See § 5 of the Viennese Anti-Discrimination Act [Wiener Antidiskriminierungsgesetz]
[66] See § 67h of the Viennese Service Order [Wiener Dienstordnung]
[67] See § 30 (6) of the Styrian Equal Treatment Act [Steiermärkisches Gleichbehandlungsgesetz]
[68] See § 25 of the Carinthian Anti-Discrimination Act [Kärntner Antidiskriminierungsgesetz]
[69] See § 7 (3) of the Lower Austrian Equal Treatment Act [Niederösterreichisches Gleichbehandlungsgesetz]

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

What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

Are there any ceilings on the maximum amount of compensation that can be awarded?

Is there any information available concerning the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?

Federal level

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

All of the implementing laws provide for civil sanctions, and – as a principle – a victim of discrimination can choose between undoing of the act of discrimination or compensation of pecuniary damage (in the case of non-recruitment or non-promotion: only damage claim), with in both cases the option to claim non-pecuniary damage. So § 26 (3) Equal Treatment Act states that the worker who was deprived of social benefits can choose either to get the respective benefits or compensation for the damage, both possibilities comprise the possibility to get compensation for non-pecuniary damages.

This basic rule is subject to the following exceptions:

In the case of termination of employment a victim can only challenge the termination without the option to accept the termination and claim damage.[70] As many victims, for good reasons, refuse to go back to a discriminatory employer, discrimination of such victims would be left unsanctioned (no reinstatement, no compensation). This (and the absence of a claim to non-pecuniary damage if reinstated) is not a full implementation of the directives.

According to the Equal Treatment Act compensation for non-pecuniary damage, in the case of non-recruitment and non-promotion, is limited to a maximum of EUR 500 if the employer proves that the victim would not have been recruited or not promoted if no discrimination had occurred (so that discrimination did not have the effect of non-promotion or non-recruitment but caused only exclusion from the selection procedure). In the light of the case law of the European Court of Justice[71] this restriction[72] might be questionable. A maximum amount of € 500 can only be considered purely nominal compensation, while we have to see that general Austrian civil and labour law does not provide for similar non-pecuniary damage claims.

The mere concept of punitive damages is unknown to the Austrian legislation, while from a dogmatic point of view the minimum non-pecuniary damages in cases of harassment (€ 400 minimum compensation) can be seen as of a punitive nature or having a punitive element as the court does not have to appraise the value of the concrete damage in case only the minimum is claimed. Due to the low amount of this minimum this is, nevertheless, a mainly academic or dogmatic issue.

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[70] § 26 (7) Equal Treatment Act

[71] European Court of Justice, 22 April 1997, Case C-180/95, *Nils Draehmpaehl v. Urania Immobilienservice OHG* [1997] ECR I-2195, paras. 25 and 29.

[72] European Court of Justice, 10 April 1984, Case 14/83, *Von Colson and Karmann v. Land Nordrhein-Westfalen* [1984] ECR 1891, paras. 23 and 24.

In case the discrimination proves crucial for the non-employment, the Equal Treatment Act states a minimum compensation of one month's salary[73].

In some areas the legislation lacks any sanction. This is the case for discrimination of university-students, for victimization of employees in both federal bills.

The Equal Treatment Act establishes a very effective sanction for companies not observing the prohibition of discrimination: exclusion from assistance granted by the Federation[74] but it does not extend the exclusion to public procurement, what would render the effectiveness of this sanction perfect.[75]

7. SPECIALISED BODIES

Body for the promotion of equal treatment (Article 13 Directive 2000/43)

Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.

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

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

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

Is the work undertaken independently?

The Act on the Equal Treatment Commission and the National Equality Bodyestablishes an Equal Treatment Commission and the Office for Equal Treatment. In transposing Art. 13 of the Race Equality Directive, Austria extended the functions of the present Equal Treatment Commission and the Ombud for Equal Employment Opportunities to deal with discrimination on the ground of gender and on all other grounds mentioned in art 13 ECT except disability.

The fact that constitutional provisions are missing also makes clear that the institutions implemented can not be really independent. For independent structures without a minister's responsibility a norm at constitutional rank is needed under Austrian law. The attempt to provide for a constitutional safeguard of independence for the bodies was blocked in Parliament by the opposition parties.

Equal Treatment Commission

The Equal Treatment Commission will be divided into thee senates, dealing with

1. Equal treatment of men and women in the workplace.
2. Equal treatment within the scope of directive 2000/78/EC without disability, including race and ethnic origin.
3. Equal treatment within the (rest) scope of directive 2000/43/EC for race and ethnic origin.

[73] § 26 (1) Equal Treatment Act
[74] § 28 Equal Treatment Act
[75] See Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (COM/2001/0566 final). See also the Addendum at the start of this Chapter.

All considerations concerning the implementation of the disability ground support the assumption that for this ground there will be completely separate structures so that the Equal Treatment Commission will not be competent for this field.

The Equal Treatment Commission (Gleichbehandlungskommission) shall be set up at the Federal Ministry for Health and Women. The Commission shall have a structure consisting of three specialised senates. The first senate is supposed to deal with issues related to equal treatment of women and men in the workplace, the second senate will be responsible for discrimination in employment and occupation covering all other grounds mentioned in art 13 ECT except disability. The third senate is responsible for the non-employment related scope of the Racial Equality Directive. A major point of criticism is the composition of the senates. Senate II and Senate III shall be composed by members named by Ministers and Social Partners only.

The function of the chairpersons, who are part of the relevant of the three senates, shall be held by federal civil servants appointed by the Minister of Health and Women. The members of the commission shall perform their functions on an unsalaried voluntary basis. Until the end of February 2005 the posts of the chairpersons are still void. The ministry failed to appoint them although all the other ministries and social partners have in time appointed their members to the senates. So the two new senates are not operating, though first applications have already been filed to them.

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

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

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

If the senate comes to the conclusion that a violation of the principle of equal treatment has occurred, it has to issue a written proposal to the employee or to the person responsible for the non-employment related discrimination on how the obligation under the act can rightly be fulfilled. The senate has to call upon the person responsible to end the discrimination. In case the addressee does not follow the instructions of the commission, the institutions represented in the senate or the National Equality Bodycan file a civil action for a declaratory judgment concerning the violation of the obligation to equal treatment. The commission has the right to demand from the person, who is alleged of discrimination a written report concerning the assumed discrimination. The Commission can also order expert opinions on any company concerned.

National Equality Body (Anwaltschaft für Gleichbehandlungsfragen)

The National Equality Body, which will also be set up at the Federal Ministry of Health and Women, will be structured similarly to the Commissions' senates. The already existing institution, called "*Gleichbehandlungsanwältin*" (Office of the Ombud for Equal Employment Opportunities) will remain responsible for equal treatment of women and men at the workplace. Each of the two other so called "*Gleichbehandlungsanwälte (*Ombuds for Equal

Treatment) shall be responsible for discrimination on the basis of race, ethnic origin, religion, age and sexual orientation in relation to employment on the one hand and for discrimination based on race and ethnic origin out side the working environment on the other hand. The Federal Minister for Health and Women shall appoint the two new members of the National Equality Body. The Minister has to entrust state employees with these positions. The National Equality Body is responsible for counselling and supporting victims of discrimination. To fulfil these functions, the Office can hold consultation-hours and consultation days in the whole federal territory.

Most importantly, they can conduct independent inquiries and publish independent reports and recommendations concerning all questions related to discrimination.

In cases of alleged discrimination in relation to employment the NEB can call upon the employee or enterprise concerned to comment on the case in writing. In further investigation, the NEB can request information from the concerned employee, the organisation, the works council or other employees.

All persons involved are obliged to co-operate with the NEB. If the NEB finds a violation of the obligations lay down by the amended Equal Treatment Act likely in a single case, they can establish the case before the Commission for Equal Treatment. The Commission is obliged to take up the case in its next session but at least within one month and can assign the NEB with the necessary inquiry. In this case the Office is allowed enter company premises and inspect company documents. A planned inspection has to be notified to the employer in due time. The non-binding decision about the question of a possible infringement of the equal treatment obligation rests with the Commission.

Provincial bodies

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

In **Vienna**, a "Office for the battle against Discrimination" (Stelle zur Bekämpfung von Diskriminierungen) was set up. The position was set up independently by Provincial Constitutional Law[76]. The duties are not very broad – it is mainly a counselling service and a vague possibility for mediating conflict as well as writing reports and studies. This tasks were given to a already independent body of the Vienna Province, the so called "Bedienstetenschutzbeauftragter" [Commissioner for the Safety of Employees], a position that had nothing to do with issues of discrimination but was responsible for safety issues concerning the employees of the City of Vienna.

Styria sets up a range of bodies for Equal Treatment: The Styrian Equal Treatment Commission, the Commissioner for Equal Treatment[77] and Contact Persons.The Commissions main task is to give statements in individual cases of alleged discrimination (in connection to employment with the province) and to comment on specific legal drafts. The Commissioner(s) for Equal Treatment are mainly counselling bodies and they are entitled to issue independent reports and initiate disciplinary proceedings.The Contact Persons are established in all major municipalities and offices of the Styrian Government. Their task is mainly to counsel individual civil servants.

The Commissioners and the contact Persons are independent in fulfilling their functions; this is safeguarded by a Provincial Constitutional Provision[78].

[76] see § 7 (3) of the Viennese Anti-Discrimination Act [Wiener Antidiskriminierungsgesetz]
[77] and a separate Commissioner fort he City of Graz
[78] see § 44 of the Styrian Equal Treatment Act [Steiermärkisches Gleichbehandlungsgesetz]

Carinthia sets up an Anti-Discrimination Office[79] [Antidiskriminierungsstelle] at the section for civil law within the Office of the Provincial Government. This office entitled to support (counsel) victims of discrimination and to issue recommendations as well as to conduct independent surveys on discrimination. This body is not independent.

Lower Austria sets up a Lower Austrian Commission for Equal Treatment[80] [Niederösterreichische Gleichbehandlungskommission] whose main tasks are to give recommendations in individual cases of alleged discrimination (in connection to employment with the province) and to comment on specific legal drafts. The chairperson of the Commission is at the same time the Lower Austrian Commissioner for Equal Treatment [Niederösterreichische/r Gleichbehandlungsbeauftragte/r]. This Commissioner is mainly a counselling body with powers to initiate proceedings. Lastly Coordinators for Equal Treatment and Promotion of Women are established in all major municipalities and offices of the Styrian 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.

If there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

In March 2005 the two new ombuds for the National Equality Body were chosen and took office in the Ministry of Health and Women. In late April 2005 two chairpersons for new senates within the Equal Treatment Commission were appointed by the Minister. Although there are already reports about cases submitted to the ETC, so far there has been no meeting of the new senates which are dealing with race issues. But, now we can say that the bodies have been set up and are about to start working. The (future) findings on general issues of the ETC will be published on a website (open to the public).

8. IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

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

The duty to disseminate information about the issues at stake is not given a high priority by the Federal Government though there are some activities in this field. The Ministry for Economy and Labour has issued a brochure providing basic information about the principle of equal treatment as set down in the Equal Treatment Act. There was some governmental support for projects to sensitise judges and judges-in-training as well as lawyers and to discuss the new legislation with them. There were no special considerations about accessibility of this information for people with disabilities.

Austria also took part in the European wide campaign against discrimination.

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

[79] see §§ 32, 33 of the Carinthian Anti-Discrimination Act [Kärntner Antidiskriminierungsgesetz]
[80] see §§ 11 and 12 of the Lower Austrian Equal Treatment Act [Niederösterreichisches Gleichbehandlungsgesetz]

Up to now there are no attempts at all from the part of the Federal government to start such a dialogue.

In all the Provincial pieces of legislation such a dialogue is at least mentioned. In Vienna, the National Equality Bodies entrusted with this task and has recently started to informally contact the major non-governmental actors oft the NGO-community.

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

There is regular contact between the social partners and governmental officials but to my knowledge no procedure was set up to ensure regular meeting concerning issues of discrimination or equal treatment.

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

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment?

None of the bills meant to implement the directives contains provisions on that matter.

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

A comprehensive and concluding assessment of the situation in regard to the whole legislation is not possible at the moment. No general assessment has been made in regard to this aspect. So it is highly likely that in the course of time several provisions will show up whose compliance with the principle of equal treatment appears questionable.

Such discriminatory laws can only be abolished by the legislator or the Constitutional Court. Civil servants can challenge decisions by administrative authorities based on such discriminatory legislation in the Constitutional Court. Other employees have to challenge decisions by their employers based on such discriminatory legislation in the labour Courts and could only ask the Court (of second or higher instance) to refer the matter to the Constitutional Court.

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

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

9. OVERVIEW

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

With newly adopted legislation – mainly with the Equal Treatment Act and the Federal-Equal Treatment Act – on Federal level the Austrian legal order now has reached a new dimension in regard to the protection against discrimination. The two specialised EU-Directives have been to a large extent implemented. Nevertheless, there are still grave areas of concern: First of all there is still no proper protection against discrimination on the ground of disability. There have been a few attempts in recent time reach progress in this respect. A still changing

draft law on this topic has been on the schedule of the Council of Ministers for three times already but it was always postponed. So the political process of decision-making is still in motion. The same is true for the factual establishment of the specialised bodies. Neither has the National Equality Body been set up in the amended way, nor are the two new senates of the Equal Treatment Commission ready to work.

The overall awareness concerning the new legislation in the population seems rather low. Also for specialised NGOs it is rather hard to find people who dare to use the new laws to claim their rights, as there are too many factors of uncertainty for them.

The completely missing dialogue with NGOs on Federal level is also a factor which makes many people think that the impact of the Directives is a bit downgraded in Austria.

It is encouraging on the other hand, that on provincial level (where legislation already exists or is in discussion) the decision-makers try to provide for protection against discrimination beyond the minimum-level of the Directives. In the near future there will be new legislation at least by the Provinces of Lower Austria [for the non-employment scope], Vorarlberg and Upper Austria.

A positive reaction, visible in every-day-life, to the new legislation is a massive decline of discriminatory advertisements in the larger newspapers.

10. COORDINATION AT NATIONAL LEVEL

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

In principle it is the task of the Federal Chancellery [Bundeskanzleramt] to coordinate the Activities for the implementation of the Directives within the ministries and the Provinces.

The Equal Treatment Act and the Federal Equal Treatment Act were both coordinated and elaborated by the Federal Minister of Economy and Labour [BMWA, Bundesministerium für Wirtschaft und Arbeit]. The Federal Minister of Justice [Bundesministerium für Justiz] has a rather limited role in the implementation of these regulations.

The implementation regarding disability is in the hands of the Federal Minister of Social Security, Generations and Consumer Protection [Bundesministerium für Soziale Sicherheit, Generationen und Konsumentenschutz].

The provincial regulations are in the hand of the Offices of the Provincial Governments [Ämter der Landesregierungen].

Annex

1. Table of key national anti-discrimination legislation

2. Table of international instruments

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

AUSTRIA Date December 31st 2004

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

65/2004 [Bundes-Gleichbehandlungsgesetz, BGBl. Nr. 100/1993, idF BGBl. I Nr. 65/2004]		orientation			
Law on the Equal Treatment Commission and the Office for Equal treatment, Federal Law Gazette I Nr. 66/2004 [Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, BGBl. I Nr. 66/2004]	July 1st 2004	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation	Administrative Law	Creation of specialised bodies	Creation of specialised bodies
Styrian Equal Treatment Act, Styrian Provincial Law Gazette Nr. 24/2004 [Steiermärkisches Gleichbehandlungsgesetz, Streirisches Landesgesetzblatt Nr. 24/2004]	November 1st 2004	gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation (sexuelle Orientierung)	Civil and administrative Law	Public (provincial) employment	prohibition of direct and indirect discrimination, harassment, victimisation
Viennese Service Order as amended by Viennese Provincial Law Gazette Nr. 36/2004 [Wiener Dienstordnung idF	September 11th 2004	gender, race, ethnic origin, religion, belief, disability, age, sexual orientation (sexuelle	Civil and administrative Law	Public (provincial) employment	prohibition of direct and indirect discrimination, harassment, victimisation

Landesgesetzblatt für Wien Nr. 36/2004]		Ausrichtung)			
Viennese Anti-Discrimination Act, Viennese Provincial Law Gazette Nr. 35/2004 [Wiener Antidiskriminierungsgesetz, Landesgesetzblatt für Wien Nr. 35/2004]	September 9th 2004	race, ethnic origin, religion, belief, age, sexual orientation (sexuelle Ausrichtung)	Civil and administrative Law	Non-employment scope of Directive 200/43/EC	prohibition of direct and indirect discrimination, harassment, victimisation
Lower Austrian Equal Treatment Act, Lower Austrian Provincial Law Gazette Nr. 69/1997 as amended by Nr. 65/2004 [Niederösterreichisches Gleichbehandlungsgesetz, Niederösterreichisches Landesgesetzblatt Nr. 69/1997 idF 65/2004	September 18th 2004	gender, ethnic affiliation, religion or belief, disability, age, sexual orientation (sexuelle Orientierung)	Civil and administrative Law	Public (provincial) employment	prohibition of direct and indirect discrimination, harassment, victimisation
Carinthian Anti-Discrimination Act, Carinthian Provincial Law Gazette Nr. 63/2004 [Kärntner Antidiskriminierungsgesetz, Kärtner Landesgesetzblatt Nr. 63/2004]	December 29th 2004	gender, ethnic affiliation, religion or belief, disability, age, sexual orientation (sexuelle Ausrichtung)	Civil and administrative Law	Public (provincial) employment and non-employment scope. Comprehensive Anti-discrimination legislation	prohibition of direct and indirect discrimination, harassment, victimisation

All Austrian laws can be found by the searchable database of the Austrian Federal Chancellery: http://www.ris.bka.gv.at/auswahl/

All enacted Austrian laws with a focus on anti-discrimination issues can be downloaded from the website of the Litigation Association of NGOs Against Discrimination: http://www.klagsverband.at/recht.php

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country Austria Date 31.12.2004

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	yes	yes	no	yes	yes
Protocol 12, ECHR	yes	no			
Revised European Social Charter	?	no		Ratified collective complaints protocol?	
International Covenant on Civil and Political Rights	yes	yes	no		no
International Convention on Economic, Social and Cultural Rights	yes	yes	no		no
Convention on the Elimination of All Forms of Racial Discrimination	yes	yes	no	yes	no
Convention on the Elimination of	yes	yes	no		no

Discrimination Against Women					
ILO Convention No. 111 on Discrimination	yes	yes	no		no