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

COUNTRY REPORT 2012

AUSTRIA

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State of affairs up to 1st January 2013

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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 among 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 (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 provincial 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 provinces have the exclusive power to regulate “anti-discrimination”. The Federation may — and has done so in 1997 regarding disability — introduces 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 provinces: legislation of principles by the federation and implementing legislation by the provinces (Art. 12 *B-VG*).

Legislation in respect of employees (civil servants) of the nine provinces and of local authorities (regional public employment) rests exclusively with those provinces 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 provinces and the Federation; the provinces 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 provinces 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 provinces are competent to adopt the provisions necessary for the regulation of subject also in the field of criminal and civil law."*

International human rights treaties have to be incorporated into national law to come to effect, in principle. The actual effect of those international obligations is varying widely, although in general, Austria has a quite good reputation for reacting and actively participating in international instruments.

The European Convention on Human Rights forms an integral part of the Austrian Constitution.

In reaction to the UN Convention on the rights of Persons with Disabilities there is a lot of activity going on at the moment on federal level as well as within several provinces.

0.2 Overview/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.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.
This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the

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

domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

Generally it can be stated that – keeping in mind some shortcomings - the relevant Directives on anti-discrimination are completely transposed and implemented into the Austrian legal framework.

The federal legal framework basically consists of:

a) Equal Treatment Act – [Gleichbehandlungsgesetz, Federal Law Gazette I Nr. 66/2004 last amended by BGBl. I Nr. 7/2011]
(Federal Equal treatment provisions binding private entities and fiscal activities)
The Equal Treatment Act covers the private sector and protects against discrimination in employment on the following grounds: gender, ethnic affiliation (ethnische Zugehörigkeit), religion and belief, sexual orientation and age. Protection against discrimination on the ground of ethnic affiliation also extends to 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.

b) Federal-Equal Treatment Act – [Bundes-Gleichbehandlungsgesetz], BGBl. I Nr. 65/2004), Federal Law Gazette I Nr. 65/2004, last amended by BGBl I Nr. 120/2012
(Federal equal treatment provisions binding the federal administration)
It covers (Federal) public employment and protects against discrimination on the following grounds: gender, ethnic affiliation (ethnische Zugehörigkeit), religion and belief, sexual orientation and age and installs a Federal-Equal Treatment Commission, Officers for Equal Treatment and Contact Women.

c) Act on the Equal Treatment Commission and the Equal Treatment Office [Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft], BGBl. I Nr. 66/2004), Federal Law Gazette I Nr. 66/2004 last amended by BGBl. I Nr. 7/2011
It installs and regulates the functions of the Equal Treatment Commission and the National Equality Body (for grounds of sexual identity and gender, ethnic affiliation, religion and belief, sexual orientation and age)

d) Act on the Employment of People with Disabilities, Behinderteneinstellungsgesetz, Federal Law Gazette Nr. 22/1970, last amended by BGBl. I Nr. 51/2012.
The Act inter alia protects against discrimination on the ground of disability in employment and occupation including the concept of reasonable accommodation.

e) Federal Disability Equality Act, [Behindertengleichstellungsgesetz], BGBl I Nr. 82/2005, Federal Law Gazette I Nr 82/2005, last amended by BGBl I Nr. 7/2011.

(Regulation on the non-employment part of protection against discrimination on the ground of disability) It protects against discrimination on the ground of disability in access to and supply of goods and services, which are available to the public, including housing. This means that the level of protection goes beyond the minimum requirements of the Directive 2000/78/EC. Nevertheless, there is a gradual approach on the interpretation of "disproportionate burden" for reasonable accommodation. This means that for a range of circumstances, there are increasing nominal limits for costs of accommodation which are considered proportionate. This gradual development ends in 2015.

f) Federal Disability Act, [Bundesbehindertengesetz], BGBl Nr. 283/1990, last amended by Federal Law Gazette I Nr. 51/2012
(Installing the Ombud for Disabled Persons (Behindertenanwalt))

Shortcomings on Federal Level:

- Burden of proof: The wording of the (federal) Equal Treatment Act does lower the burden of proof for the plaintiff but in a way that is different from the way stated in the directives and this continues to be a strange legal construction. Nevertheless, in its important decision 9ObA177/07f, from 09/07/2008, the Supreme Court ruled that this regulation has to be interpreted as being in line with the Directive - meaning that: "*In case the establishment of discriminatory infringements is successful – it is for the respondent to prove that he or she did not discriminate*."
- Penalties: a maximum administrative fine of as low as EUR 360, and exclusion of punishment for employers as first-time-offenders (admonition only) in cases of discriminatory job-advertisements and (introduced in 2011) discriminatory housing advertisements. These sanctions are not effective, dissuasive and proportionate, neither.
- For cases of discrimination of university-students [apart from access to university] the legislation lacks any sanction (lex imperfecta). This means that all forms of discrimination (including harassment) against students who are admitted to the university cannot be legally redressed.
- No legal means of redress for cases similar to the Feryn case (ECJ-*Case C-54/07)* where discriminatory statements without a known individual victim were found to be unlawful in the light of the Directive. In Austria - without an individual claiming to have suffered damage from such conduct – no one has the legal right to sue or start a proceeding.
- Compensation: limitation to a maximum amount (as low as EUR 500) if the employer proves that the victim would not have been recruited or not promoted anyway. This sanction is not effective, dissuasive and proportionate.
- Independent bodies: Following an amendment[2] to Art. 20/2 of the Federal-Constitution (B-VG) in January 2008 the "independent bodies" are formally

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

independent in performing their functions. The financial resources for these bodies are still marginal in relation to the tasks assigned to them.

- Limited NGO legal standing: Third party intervention within the regime of the Equal Treatment Act (nota bene: different from Federal-Equal Treatment Act) is only allowed for one specific NGO explicitly ('Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern' [Litigation Association of NGOs Against Discrimination]) in the courts (§. 62 GIBG [Equal Treatment Act]). 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. If other NGOs want to use the tool of legal intervention, they have – like all other legal parties - to prove their legal interest in the case.
- The same construction was chosen under the Act on the Employment of People with Disabilities [Behinderteneinstellungsgesetz], here the Österreichische Arbeitsgemeinschaft für Rehabilitation [Austrian National Council of Disabled Persons] is the NGO entitled to intervene in court cases.
  In addition, for the purposes of the new Federal Disability Equality Act [Behindertengleichstellungsgesetz] there is a limited and so far unused competence for this NGO to initiate a group litigation.

All provinces have enacted implementing legislation.

The general implementation in the provinces is done by enforcing different legal acts, whereby one is usually concerning equal treatment within the provincial and municipal (Gemeinden) workforce (civil servants and contracted workers for the public authorities).[3] This is either named Provincial Equal Treatment Act and/or Provincial Anti-Discrimination Act. These Acts also contain the prohibition of discrimination in regard to social security, social benefits, social security and health, education and access to and supply with goods and services including housing. The latter prohibition is targeting the public employees in fulfilment of their duties for the respective province. If they fulfil a duty for the Federation, the Federal-Equal Treatment Act is covering their behaviour. Provinces are also competent to regulate the labour relations of forestry- and agricultural workers and therefore have to implement the rules of the Directives into their specific legislation (Usually: Agricultural Labour Relations Act). All provinces have respective legislation in place by now.

Still the scope of protection is varying regarding the non-employment areas. In eight provinces a horizontal approach has been chosen to guarantee the same level of protection regarding all grounds extended to the non-employment fields. Only the Province of Lower Austria does not go beyond the minimum standards of protection of the Directives.

[3] The competency to regulate private labour relationships lies exclusively with the Federation.

All the Provinces are obliged to install specialised bodies, which meet the requirements of Art 13 of the Directive 2000/43/EC. These bodies are shaped quite differently throughout the country and quite varying in their level of activity and visibility. While the bodies of Styria, Salzburg, Vienna, Upper-Austria, Tyrol, and Lower Austria are quite visible and active, it is - on the other end of the spectrum – complicated to even locate and contact the body of Burgenland.

List of most important provincial acts:

Styrian Equal Treatment Act
[Steiermärkisches Gleichbehandlungsgesetz, Steirisches Landesgesetzblatt Nr. 66/2004 idF 81/2010]

Styrian Disability Act
[Steiermärkisches Behindertengesetz, LGBl. 26/2004] idF 83/2012

Styrian Agricultural Labour Relations Act
[Steiermärkische Landarbeitsordnung Landesgesetzblatt Nr. 39/2002 idF 35/2012

Viennese Anti-Discrimination Act
[Wiener Antidiskriminierungsgesetz, Landesgesetzblatt für Wien Nr. 35/2004 idF LGBl Nr.88/2012]

Viennese Service Order
[Wiener Dienstordnung idF Landesgesetzblatt für Wien Nr.42/2006 zg Nr. 88/2012]

Viennese Agricultural Labour Equal Treatment Act
[Wiener Land-und forstwirtschaftliches Gleichbehandlungsgesetz LGBl.. 25/1980, zuletzt geändert durch LGBl. 15/2012]

Lower Austrian Equal Treatment Act
[Niederösterreichisches Gleichbehandlungsgesetz, Niederösterreichisches Landesgesetzblatt Nr. 69/1997 idF 109/2011]

Lower Austrian Anti-Discrimination Act
[Niederösterreichisches Antidiskriminierungsgesetz, Niederösterreichisches Landesgesetzblatt 45/2005 idF Nr. 113/2011]

Lower Austrian Agricultural Labour Relations Act
[Niederösterreichisches Landarbeitsordnung Niederösterreichisches Landesgesetzblatt Nr. 185/1973 idF 137/2012]

Carinthian Anti-Discrimination Act
[Kärntner Antidiskriminierungsgesetz, Kärtner Landesgesetzblatt Nr. 63/2004 idF Nr. 11/2010]

Carinthian Agricultural Labour Relations Act
[Kärntner Landarbeitsordnung Kärntner Landesgesetzblatt Nr. 97/1995 idF 60/2006 zuletzt geändert durch Nr. 33/2012]

Upper Austrian Anti-Discrimination Act
[ÖO Antidiskriminierungsgesetz, Oberösterreichisches Landesgesetzblatt Nr. 50/2005 idF Nr. 68/2012]
Upper Austrian Agricultural Labour Relations Act
[Oberösterreichische Landarbeitsordnung, Oberösterreichisches Landesgesetzblatt Nr. 25/1989 idF 73/2005 zuletzt geändert durch Nr. 57/2012]

Salzburg Equal Treatment Act
[Salzburger Gleichbehandlungsgesetz, Salzburger Landesgesetzblatt 31/2006 idF 6120/2012]

Salzburgian Agricultural Labour Relations Act, Provincial Law Gazette Nr. 7/1999 as amended by Nr. 44/2009
[Salzburger Landarbeitsordnung, Salzburger Landesgesetzblatt Nr. 7/1996 idF 107/2012

Tyrolian Equal Treatment Act
[Tiroler Landes-Gleichbehandlungsgesetz, Tiroler Landesgesetzblatt Nr. 1/2005 idF Nr. 150/2012]

Tyrolian Anti-Discrimination Act
[Tiroler Anti-Diskriminierungsgesetz, Tiroler Landesgesetzblatt Nr. 25/2005 idF Nr. 150/2012]

Tyrolian Equal Treatment Act for Municipalities
[Tiroler Gemeinde-Gleichbehandlungsgesetz, Tiroler Landesgesetzblatt Nr. 2/2005 idF Nr. 40/2008]

Tyrolian Agricultural Labour Relations Act
[Tiroler Landarbeitsordnung, Tiroler Landesgesetzblatt Nr. 27/2000 idF 61/2005 zuletzt geändert durch 77/2011]

Tyrolian Provincial Teachers Employment Act
[Tiroler Landeslehrer-Diensthoheitsgesetz, Tiroler Landesgesetzblatt Nr. 74/1998, zuletzt geändert durch LGBl. 125/2012]

Vorarlbergian Anti-Discrimination Act
[Vorarlberger Antidiskriminierungsgesetz, Vorarlberger Landesgesetzblatt Nr. 17/2005 idF Nr. 91/2012]

Burgenlandian Anti-Discrimination Act

[Burgenländisches Antidiskriminierungsgesetz, Burgenländisches Landesgesetzblatt Nr. 84/2005 idF LGBL 17/2010]

Burgenlandian Agricultural LabourRelations Act
[Burgenländische Landarbeitsordnung Burgenländisches Landesgesetzblatt Nr.37/1977, zuletzt geändert durch LGBl. Nr. 37/2012]

0.3 Case-law

*Provide a list of any important case-law in **2012** within the national legal system relating to the application and interpretation of the Directives. (The **older case-law mentioned in the previous report should be moved to Annex 3)**. This should take the following format:*

Name of the court
Date of decision
Name of the parties
Reference number (or place where the case is reported).
Address of the webpage (if the decision is available electronically)
Brief summary of the key points of law and of the actual facts (no more than several sentences).
➔Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law falling under both anti-discrimination Directives (Please note that you may include case-law going beyond discrimination in the employment field for grounds other than racial and ethnic origin)

Case 1 (disability)

Name of the court: Josefstadt District Court
Date of decision: 14 November 2011
Name of the parties: withheld
Reference number: 4C 707/11 z-14
Address of the webpage: http://www.klagsverband.at/dev/wp-content/uploads/2012/02/BG-Josefstadt-4C707_11z-anonym.pdf
Brief summary: A bakery in Vienna, which had formerly been fully accessible to people using wheelchairs was completely renovated in 2008 and in the course of this, a new stair of 15,5 cm height was newly built at the entrance, while new ramps at the side-entrances showed a gradient of 22% which also made it inaccessible. The plaintiff, a wheelchair user, used to be frequent customer at the bakery before the renovation and filed a claim on discrimination, demanding € 1.000,-- in compensation after the compulsory reconciliation attempt had failed.

The court of first instance found a clear breach of § 4 Federal Disability Act and awarded € 1.000,-- in compensation.

The judgment is a very important clarification that all business-owners cannot continue ignoring the regulations on accessibility. All barriers are illegal when newly built after 2006. Although there is no legal duty to remove the barrier, the risk of on-going claims for compensation might be an "incentive" to think about it.

Case 2 (disability)

Name of the court: Viennese Civil Provincial Court
Date of decision: 05 December 2012
Name of the parties: M.L. vs. the Republic of Austria
Reference number: 36 R96/12b
Brief summary: On 03.12.2008, the plaintiff, a man using an electric wheelchair, tried to enter the premises of a recently established public service named "help.gv.at – service for citizens {Bürgerservice}". The premises are part of the medieval complex of the "Hofburg" {former emperors castle}. The front door of the service centre was not accessible to the plaintiff, as it features three stairs. The plaintiff could not even ring the doorbell as this was not reachable for him – so he sent another person inside to announce that he wanted to enter. A staff-member then accompanied him through a cobblestone paved courtyard where at the opposite side a glass door on equal level existed. The glass door held a sign saying: "no entry – staff only" and only opened to staff-members who therefore held a magnetic card. The plaintiff complained about the non-accessibility of this place and stated that he felt indirectly discriminated against as the decision to use these premises must have been taken after the coming into force of the Federal Disability Equality Act – as it was opened on October 26th 2008 only. He claimed that therefore, when making the choice of the premises for services to the public, the Republic was obliged to safeguard accessibility. After an unsuccessful compulsory attempt for conciliation the plaintiff filed a law-suit (supported by the Litigation Association of NGOs Against Discrimination) and claimed Euro 720,-- to compensate his immaterial damages caused by the indirect discrimination on the ground of disability.

The court of second instance followed the findings of the court of first instance and dismissed the claim. Basically, the judgement says that the Federal Disability Equality Act was not applicable to this case as the premises had been built according to a building permission issued long before January 1st 2006 and no new barriers had been built. The court very clearly rejected the argument that making a decision about using non-accessible premises after the Federal Disability Equality Act had come into force was forbidden, as in its effects it clearly equals the building of new barriers (arg.: in both cases the service is not accessible). The court stuck to the wording of the law that only prohibits the building of new barriers for the access to goods and services. The judgment is only dealing with the formal aspects of the lawsuit and is not allowing for an analogous application of the Federal Disability Equality Act. In fact the judgement clearly states that it is not necessary to even consider questions of accessibility if one establishes new services in old premises, as long as no new barriers were built.

Case 3 (ethnic affiliation)

Name of the court: Supreme Court
Date of decision: 27 February 2012
Name of the parties: S.B. vs. E.K.
Reference number: 9ObA21/12x
Address of the webpage: www.ris.bka.gv.at
Brief summary: The case concerns a lawsuit of a cleaning worker who claimed harassment on the ground of ethnic affiliation by her former employer. The alleged harassment took the form of an insulting letter (with negative ethnicity-related remarks), which was sent to the plaintiff during a written dispute about owing payments after the work-relationship had already ended. After this letter the two parties had never been in contact again.

The Supreme Court decided that in that case it was clear that the conduct of the defendant was unwanted and inappropriate and related with the ethnic affiliation in the meaning of the definition of harassment. The court held that it could even be argued that the incident happened in the course of dismissal and was therefore still included by the definition of "in the workplace". Nevertheless, the court dismissed the claim, stating that the fact that there had been no further contact between the parties made clear that by sending the letter in question the respondent was not able to create an intimidating, hostile, degrading, humiliating or offensive environment – as they did not share any environment.

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

Generally, in Austria, discrimination cases brought to the authorities are still low in numbers and there is a lack of Roma related cases – so a trend cannot be nailed down. There are no figures available about cases concerning Roma.

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?

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

It is undisputed that the equal protection clause of the Constitution is legally binding for legislative powers as well as law enforcement agencies.[4] A decision of a law enforcing agency violates the equal protection clause if the decision is based on law violating the equal protection clause, if the agency has interpreted the law in a way that is not in harmony with the equal protection clause, or if the agency otherwise has acted arbitrarily. More importantly, acts of parliament violate the constitutional equal protection clause when differences in treatment or equality of treatment are not based on objective grounds or objective justifications.

The Constitutional Court concentrates in its rulings 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 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 contains some special provisions banning discrimination on the basis of race, language or religion

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

(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 disabled and non-disabled persons in all areas of daily life (Art. 7/1 *B-VG*) and to real equalisation of man and woman (Art. 7/2 *B-VG*).

In addition to those provisions of the federal constitution, some of the constitutions of the nine Austrian provinces contain fundamental rights, among them equality rights.

b) Are constitutional anti-discrimination provisions directly applicable?

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

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

The constitutional equality clause cannot be enforced against private actors as it binds the state only.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

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

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

Provincial level:

Lower Austria:
gender, ethnic affiliation, religion or belief, disability (only in employment related fields) age, sexual orientation

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

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

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

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

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

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

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

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: (the expert can provide first a general explanation under a) and then has to provide an answer for each ground)

i) racial or ethnic origin,

The notion of "race" was removed from the text in the federal legislation and "race and ethnic origin" are now both represented by the term "ethnic affiliation" (ethnische Zugehörigkeit).[5] This was strongly supported by many NGOs as the German term "Rasse" was one of the most misused expressions under the Nazi regime. This does not change the scope but is an expression of sensitivity regarding language. Nevertheless, a legal definition of these terms does not exist in national law.

ii) religion or belief,

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

> *"Also the terms "religion and belief" are not defined by European law. Regarding the aims of the "framework-directive" they must be interpreted in a broad manner. Especially "religion" is not restricted to churches and officially recognised religious communities. Nevertheless, it has to be noted that for a religion there are minimum requirements concerning a statement of belief, some rules for the way of life and a cult. Religion is any religious, confessional belief, the membership of a church or religious community. Brockhaus defines Religion formally as a system to address in its dogma, practice and social manifestations the last questions of human society and individual life and to find answers to these. According to the respective basic philosophy of salvation and in relation to the respective "experience of mischief" every religion has got its own goal of salvation and its way to salvation.*
>
> *This exists in close relation to the "unavailability" which is perceived as a personal (god, gods) and impersonal (rules, cognition, knowledge)*

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

transcendence. Also the wearing of religious symbols and clothes is covered by the scope of protection, as the membership to a specific religion can be assumed by these or these are perceived as an expression of a certain religion.

It constitutes an infringement of the prohibition of discrimination, if the employer acknowledges the wishes of a specific group while not acknowledging those of another group.[6] *The term "belief" is tightly connected with the term "religion". It is a classification for all religious, ideological, political and other leading perceptions of life and of the world as a construction of sense, as well as for an orientation of the personal and societal position for the individual understanding of life.*

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

iii) disability. Is there a definition of disability at the national level and how does it compare with the concept adopted by the Court of Justice of the European Union in Case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

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

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

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

§ 3 of the Federal Disability Equality Act [Behindertengleichstellungsgesetz] defines: "*For the purposes of this Act, disability is the result of a deficiency of functions that is not just temporary and based on an physiological, mental, or psychological condition or an impairment of sensual functions which constitutes a possible complication for the participation in society. Such a condition is not deemed temporary if it is likely to last for more than 6 months*."

At provincial level disability is dealt with in the implementing legislation. For example, the Styrian Provincial Equal Treatment Act [Steirisches Landes-Gleichbehandlunggsgesetz], contains a definition of disability: "§ 4 (4) *People with disabilities are persons whose corporal functions, mental ability or psychological condition will - presumably for a period longer than six months - diverge from a condition typical for their specific age; and whose participation at the life in society is therefore restricted.*"

It can be stated that these definitions (given the specific context of the respective areas of application) are in line with – or even considerably broader than ECJ case C-13/05, Chacón Navas, Paragraph 43, according to which "*the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life*".

Recital 17 of Directive 2000/78/EC is not reflected in legislation but the ruling of the Administrative High Court Nr. 2006/12/0223[7] is clearly reflecting the spirit of this recital without quoting it. In this case the employment of a person who became unable to fulfil the duties of his post was discontinued and the court found no discrimination, considering that redeployment to another post was not possible.

In the same judgement the Administrative High Court puts forward a symmetric view on disability discrimination. It states that a dismissal of an able bodied employee in order to empty the post for purposes of reasonable accommodation for a disabled employee would constitute discrimination on the ground of disability.

iv) age,

There is no explicit legal definition of age.

v) sexual orientation?

There is no explicit legal definition of 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? Is

[7] See details of the ruling in Annex 3, case D.

recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?
i) racial or ethnic origin

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

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

Also Art. IX para. 1 fig. 3 of the Introductory Provisions to the Code of Administrative Procedure (EGVG) states an administrative penal sanction for discrimination of a person due to his/her race, skin-colour, national or ethnic origin, religious faith or disability and can therefore also be used to interpret the term "race".
The use of the term "race" in the above mentioned instruments shows that the term "race" is quite commonly used in legal texts, albeit the terms "race and ethnic origin" – understood correctly according to international law – cannot 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 cannot 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 cannot solely be based on biologic

or other factual differences. Ethnic groups refer to commonalities stemming from skin-colour, descent, religion, language, culture, or customs."[8]

ii) religion or belief (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)?

The Austrian legal framework does not contain a legal definition of religion or belief. Nevertheless, the explanatory notes for The Federal Law on the Status of Religious Confessional Communities [Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften] contains the following (non binding) definition of the term religion:

> *"Religion: Historisch gewachsenes Gefüge von inhaltlich darstellbaren Überzeugungen, die Mensch und Welt in ihrem Transzendenzbezug deuten sowie mit spezifischen Riten, Symbolen und den Grundlehren entsprechenden Handlungsorientierungen begleiten*.„[Religion: A structure of convictions whose content is presentable and has been growing in history to explain human kind and the world in its transcendent meaning and to accompany humans with specific rites, symbols and give them orientation in accordance with basic principles and doctrine.]

iii) disability

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

Under the law on public assistance the term "disabled people" (Behinderte) applies to "people who are, because of an impairment, permanently and severely restricted in their ability to live an independent life, especially with regard to adequate education, vocational training, and suitable employment" or to "people who, as a result of physiological, mental, psychological, or multiple impairments not specifically related to age, and because of the loss of essential functions, are permanently and severely restricted in their vital social relations, especially with regard to education, vocational training, development of personality, employment, and integration into society; the term also applies if these restrictions will, according to medical science, occur in the foreseeable future, in particular in the case of young children".

The definition laid down by Austrian pension law (traditionally, a part of social security law) reads: "Persons insured under the ASVG 1955 are deemed disabled if

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

— without rehabilitation — they would, because of an impairment, now or in the foreseeable future be likely to qualify for an invalidity pension; impairments primarily related to age are not deemed impairments under this paragraph."

These definitions are clearly shaped by the legal context they relate to. The above mentioned definition in the Act on the Employment of People with Disabilities governs the employers' duty to employ people with disabilities without discrimination, the one in the Federal Disability Equality Act regulates prohibition of discrimination in the access to goods and services, the one in law on public assistance relates to means-tested benefits, the one in pension law to medical, vocational, and social rehabilitation in the context of pension law. Differences in context generate different meanings. The fourth definition (context: pension law) is very narrow. The right to be granted invalidity pension remains limited to a rather small group of disabled people. The scope of the third 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.

iv) age

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

v) sexual orientation

The explanatory notes of the Equal Treatment Act state:

"*This law uses the term "sexuelle Orientierung" in translating the term "sexual orientation" used by the Directive. This is a commonly used and accepted term. The term is to be interpreted broadly and generally means "heterosexual, homosexual and bisexual".*

The main target of the law is to safeguard protection of gay and lesbian workers from discrimination. Discrimination of homosexual partnerships compared to unmarried heterosexual partnerships is prohibited; voluntary social benefits are to be granted to all partnerships or only to married couples. Privileges for marriage remain permissible". The introduction of legal partnership for homosexual couples does not

change much in this respect. The lawmakers insisted on a construction that made sure that this partnership is a legal "aliud" to marriage.

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)?*

All workers are protected irrespective of minimum or maximum ages, unless specific requirements of training require the establishment of a maximum age for recruitment.

2.1.2 Multiple discrimination

a) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*
Would, in your view, national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?

The law does not provide very specific rules on how to deal with cases of multiple discrimination but since legal amendments in 2008 it mentions that multiple discrimination has to be taken into account. It will be up to the courts to develop rules on the determination of awarded compensation. § 19a Federal-Equal Treatment Act and §§ 12/13, 26/13, and 51/10 Equal Treatment Act state:

"In a case of multiple discrimination this fact has to be considered when assessing the amount of the immaterial damages." The explanatory notes state that these regulations clarify that cases of discrimination based on multiple grounds need to be assessed in an overall view and that the claims cannot be separated or cumulated by grounds.

§ 9 (4) of the Federal Disability Equality Act and §7o of the Act on the Employment of People with Disabilities also give a hint in stating: "In assessing the amount of the immaterial damages, the duration of the discrimination, the gravity of guiltiness, the relevancy of the adverse effect and multiple discrimination have to be taken into account."

The Act on the Equal Treatment Commission and the National Equality Body – Equal Treatment Commission [Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft] states in its § 1(3) that in the procedure before the Equal Treatment Commission, cases of multiple discrimination including the gender aspect (in the workplace) have to be dealt with by Senate I, which is in principle in charge of gender cases. The senate has to apply the rules on the other grounds accordingly.

§ 1 (5) states: If the case inter alia contains the allegation of discrimination on the ground of disability than the Equal Treatment Commission is not competent to deal with it, but – for the whole case – the procedure under the Act on the Employment of

People with Disabilities, [Behinderteneinstellungsgesetz], or the Federal Disability Equality Act, [Behindertengleichstellungsgesetz], has to be applied. So there has to be a compulsory attempt to settle the case before the Federal Social Service. Only if this conciliation process has ended unsuccessfully, a law-suit can be filed with the competent courts (civil and labour courts).

It remains hard to decide whether more specific legislation would be an advantage in adjudication. At least it can be expected that judges' awareness of discrimination and its functioning could be developed by giving formal legal weight to issues of multiple or intersectional discrimination.

b) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

So far one case of multiple discrimination has been dealt with by the Supreme Court. In this case the fact that the discrimination was multiple was clearly addressed. However, in case Nr. 80bA63/09m from 22.09.2010 the Supreme Court did not seize the chance to bring clarification to this issue. In that case of discrimination on the basis of gender and ethnicity – committed by separate acts -, the court stated that it had no obligation to come to a "final conclusion" regarding the question whether such a case is actually demanding for a cumulative approach in awarding compensation (meaning that every affected ground is to be compensated separately) or for a general approach where the "overall picture" is to be evaluated by the court. So the Supreme Court so far just put forward the questions without providing an answer.

2.1.3 Assumed and associated discrimination

a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

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

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

This is also reflected in case law (see case LG ZRS Wien, Nr. Nr. 35R68/07w).[9]

[9] See Annex 3, case C.

The wording of the Viennese Anti-Discrimination Act [Wiener Antidiskriminierungsgesetz] seems to possibly exclude assumed discrimination as its § 3 (1) defines direct discrimination: *…, when a person – on the ground of one of the attributes listed - is put on a disadvantage in a comparable situation compared to another person to whom this attribute does not apply, did not apply or would not apply.*

b) Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?

With the amendment in BGBl I Nr 7/2011 discrimination by association is now explicitly covered in the Equal Treatment Act (§§ 5/4, 6/4, 19/4, 21/4, 32/4, 35/3, 44/4, 46/4, 47/4); the Federal Disability Equality Act (§ 4/2); the Act on the Employment of People with Disabilities (§ 7b/5).

For the Federal-Equal Treatment Act with BGBl I Nr 120/2012 the regulation was made in §§ 4a/5 and 13a/4.

In all those paragraphs the norm reads: It is also to be deemed discrimination if a person is discriminated against on the ground of a close relation (or affiliation) with a person on the ground of his/her (according to the respective context of the law: sex, ethnic affiliation, disability, religion or belief, age, sexual orientation).
With this amendments the federal legal situation is clearly in line with the requirements of the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law. Provincial legislators are required to amend their laws according to §$ 44/4 and 47/4 Equal Treatment Act.

The Styrian Equal Treatment Act and the Viennese Anti-Discrimination Act expressly prohibit discrimination of persons on the ground of the disability of a relative. As relatives the law defines:[10] the spouse, all relatives in direct line, the collateral relatives of second degree, even if the relation is illegitimate, brothers and sisters-in-law, adoptive parents and adopted children as well as common law spouses and their children. The Viennese Act also expressly includes same-sex partnerships.

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

a) How is direct discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

[10] See: § 4 (5) Styrian Equal Treatment Act, Styrian Provincial Law Gazette Nr. 66/2004and §§ 4/2 and 4/3 Viennese Anti-Discrimination Act, Viennese Provincial Law Gazette Nr. 44/2010.

Generally, with the exception of the Viennese Laws,[11] all laws passed in transposing the directives so far use the wording of the Directives to define direct discrimination.

b) Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).

Generally, discriminatory statements are not tackled by law as long as they are not qualified as incitement to hatred.

Discriminatory job vacancies announcements are forbidden by §§ 23; 24 Equal Treatment Act. This prohibition is reinforced with an administrative penal sanction. This sanction is quite weak as it is limited to a maximum administrative fine of as low as EUR 360, and exclusion of punishment for employers as first-time-offenders (admonition only).

Still, there is some case law on the subject: The Viennese Independent Administrative Senate (UVS-Wien) decided in its judgement 06/42/318/2008 dating from 11.03.2008 that a placement company [Arbeitsvermittler] was guilty of discriminatory job advertisement by placing an ad looking for an unskilled kitchen assistant while demanding for “excellent proficiency in German” and EU-citizenship. The Senate found that both requirements were racially discriminatory (not stating whether directly or indirectly) and set the fine to 100 Euros.

The more important problem here is that prosecution is limited as it is not started ex officio but only after notification of an affected job seeker or the National Equality Body.

This regulation has proven to be ineffective as NGOs have reported hundreds of discriminatory advertisements to the authorities – with no effect.

Due to its very limited resources, the National Equality Body is incapable of dealing with all these cases and just starts a couple of procedures every now and then. It remains unclear, why this issue is not prosecuted ex officio.

Generally, it can be doubted very strongly that a case similar to the Feryn case could be dealt with properly within the Austrian legal system as there is no body or person having the right to sue. All existing systems regarding remedies and sanctions rely on the action of an individualised victim with the small and ineffective exception of a

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

legal standing of the National Equality Body for cases of discriminatory job vacancy announcements.

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

According to the definition taken literally from the Directives there is generally no way of justifying direct discrimination but for the exceptions used by the Directives.

d) *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?*

The exceptions to this general rule are strictly taken over from the Directives. In regard to age discrimination the (Federal) Equal Treatment Act quotes the Directive, as well.

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

2.2.1 Situation Testing

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

The method of situation testing is not mentioned by any legislation. Generally there are no formal limits to establish evidence to a court as long as there is no explicit legal rule against it. So situation testing will be in principle permitted.

There are no defined conditions for using this kind of evidence in court and as we do not have any case law yet, there is no information about how courts will handle such cases.

b) *Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc.).*

Situation testing has so far only been used by NGOs and only in relation to prove racist "entrance policies" in bars and restaurants.

NGOs are preparing situation testing but so far no such cases have been brought before a court. The process of preparation includes the introduction of a small handbook or guideline setting strict standards for testers and for documentation of the testing. The NGO ZARA has produced an unofficial short guide to testing (on the race ground) but the use and usefulness of testing is still disputed among NGOs. On

May 26th 2012 ZARA participated in the "European Testing Night" by the European Antiracist Grassroots Movement (EGAM). They were testing the entrance policy of bars in Vienna, - with the result that 25% of the tested locations were found to be discriminatory. Some of these findings were brought to the attention of the administrative authorities in order for them to initiate administrative penal procedures. As there is no legal standing for the victim in such procedures, the outcome is unknown.

Generally, still there seems to be only limited interest in situation testing.

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

Testings end with a report of infringement to the authorities and can lead to an administrative fine for the perpetrators. The reporting person(s) only have the procedural standing of a witness and are not informed about the outcome of the administrative process. So it is impossible to assess how this type of evidence is dealt with. NGOs prepare to use situation testing in court procedures also. The examples from other countries are a motivating factor for NGOs but the process of developing standards for testing has not yet led to an increase of its use. Apart from methodological and ethical issues the main reason for this situation seems to be a general struggle for resources which does not leave enough room for developing and applying alternative methods.

Another problem with testing is the unresolved question whether or not any discrimination experienced during the testing (discrimination of testers) should be a separate case in its own right or it should just be used to prove a discriminatory policy and produce evidence for other complainants. It is unclear how courts will react to what someone might (falsely) call "provoked discrimination". Courts are free in their consideration of evidence and might be quite hesitant in giving considerable weight to such evidence. Still, - as there is no experience and case law on that issue this is just speculation.

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

There is no case-law on this issue.

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

a) How is indirect discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

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.*"[12]

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

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

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

c) Is this compatible with the Directives?

The wording is directly taken from the Directives so it is compatible. As there is no relevant jurisprudence on that provision up to now, we cannot say anything about practice. It is interesting to note that courts seem to show a tendency to avoid clear statements about certain discrimination being direct or indirect. In dubious cases they prefer to stay silent on that issue. Only in cases regarding disability, indirect discrimination is explicitly mentioned.

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

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

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

[12] § 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).

There is little case law on this issue so far but it seems quite clear that, for example, the still rather widespread practice of demanding “native speakers” for jobs where this requirement is not necessary constitutes discrimination on the ground of ethnic affiliation. (It could even be argued to be direct discrimination).

As discriminatory advertisements constitute an administrative offence – almost no data on such cases is available but we have one decision of the Viennese Independent Administrative Senate (UVS-Wien) which decided in its judgement 06/42/318/2008 dating from 11.03.2008 that a placement company [Arbeitsvermittler] was guilty of discriminatory job advertisement by placing an ad looking for an unskilled kitchen assistant but demanding for “excellent proficiency in German” and EU-citizenship. The Senate found that both requirements were racially discriminatory (not stating whether directly or indirectly) and set the fine to 100 Euros.

2.3.1 Statistical Evidence

a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?

There is no case law, but also no general restriction for the use of statistical data. Until now no case of discrimination was brought to court using statistical data as evidence.

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

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

c) Please illustrate the most important case law in this area.

There is no case law so far.

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

The Austrian Act on Data Protection [Datenschutzgesetz] defines in its § 4/2 as “sensitive data” the following: racial and ethnic origin, political opinion, membership of

a trade union, religious or philosophic belief, health and sexual life (including sexual orientation).

These data can only be collected after undergoing a detailed special procedure and assessment by the Data Protection Council (Datenschutzrat). So we can say that it is not completely prohibited by law to collect these data, but employers will generally not be able to prove any sufficient justification for being allowed to collect these data of their employees.

They will nevertheless have records on the number and the classification of their disabled employees, as this is important information in regard to their specific labour law position (dismissals protection, quota limits). It is possible to collect data on country of birth, citizenship (employers have to have records on citizenship) and language.

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

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

There is a whole set of different definitions of disability throughout the country due to the federalist structure. In regard to people with disabilities in the workforce there is a legal system to determine whether someone is disabled (resulting in a percentage classification; e.g. 75% disabled) according to the Act on Employment of People with Disabilities [Behinderteneinstellungsgesetz]. As there is an obligation for all companies with more than 25 employees to employ at least one disabled person, this data is also collected and kept by the Federal Office for Social Affairs (Bundessozialamt).

Most other issues concerning disability are dealt with by the provinces, records and files are kept in the respective offices and not administered centrally.

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

2.4 Harassment (Article 2(3))

a) How is harassment defined in national law? Does this definition comply with those of the directives? 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 defines:

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

The provisions protecting against harassment on the ground of disability as well as the respective provincial provisions use the same wording (some provincial acts were amended in 2012 to include the phrase "*with the purpose*" now.

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

b) Is harassment prohibited as a form of discrimination?

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

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

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

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

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

2.5 Instructions to discriminate (Article 2(4))

a) *Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

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

The liability of legal persons is regulated generally and the field of anti-discrimination is not dealt with separately. So generally, it is safeguarded that legal persons can be held liable for discriminatory actions.

b) *Does national law go beyond the Directives' requirement? (e.g. including incitement)*

No, the law does not go beyond the minimum requirements set out in the Directive. There is a separate provision penalising incitement (§ 283 Criminal Code) but this requires definitely a more intense and dangerous behaviour than instructions to discriminate in the sense of the Directive.

c) *What is the scope of liability for discrimination)? 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?

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

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

From 1.1.2006 Austrian law has imposed upon employers the duty to provide reasonable accommodation.

§ 6 of the Act on the Employment of People with Disabilities states:

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

A failure to meet this obligation is deemed indirect discrimination.

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

"It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers[13] would be illegal or would pose an unreasonable and disproportionate burden on the employer. When testing whether a burden is disproportionate, the following has to be taken into account in particular:

- *the necessary effort to eliminate the conditions constituting the disadvantage,*
- *the economic capacity of the employer*
- *public financial assistance available for the necessary improvements*
- *the time span between the coming into force of this Act and the alleged discrimination.*

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

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

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

The idea of reasonable accommodation is not completely new to the Austrian legal system. Even without specific legislation, over the last decades, however, courts have developed guidelines involving aspects of "reasonable accommodation", at least in the context of dismissal. When ruling upon the lawfulness of a dismissal, the Administrative Court (VwGH) as well as the Supreme Court (OGH)[14] has consistently held that an employer may not dismiss instantaneously if the employee has lost the

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

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

physical or mental aptitude necessary to carry on with the job.[15] The employers' duty to care for the employees (Fürsorgepflicht) demanded — so the courts ruled — otherwise.

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

Dismissal ought to be regarded as a last resort: "Dismissal on account of incompetence must take place only if the employee has lost the ability to do his or her former job and the ability to perform well in another position that is reasonable and adequate, both from the perspective of the employer and the employee".

The employers' duty to care (Fürsorgepflicht) is activated only when employees can be expected (if necessary: after re-training) to be able to fulfil the new terms of their contract.[16] The larger the number of employees is, the stricter is the employer's duty to make reasonable adjustments.[17] Dismissal must never be pronounced solely on account of an employee's disability.[18] 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.[19]

Allowances and grants available under the Act on the Employment of People with Disabilities are to be taken into account when the "reasonableness" of adjustments is to be judged.[20] However:

The employer is not obliged to create a "new" post in the company, specifically tailored to meet the needs of the employee. And if dismissal seems necessary to prevent the company's bankruptcy or other grave disturbances, the employee's interests are usually outweighed by the interests of the employer.[21]

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

[15] 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.
[16] *OGH* 29/04/1992, 9 ObA 18/92.
[17] *OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions].
[18] *VwGH* 22/02/1990, 89/09/0147. [Administrative Court Decisions].
[19] *OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions].
[20] *VwGH* 14/12/1999, 99/11/0246. [Administrative Court Decisions].
[21] See, e.g., *VwGH* 22/02/1990, 89/09/0147; *VwGH* 11/06/2000, 2000/11/0096; *VwGH* 04/10/2001, 97/08/0469. [Administrative Court Decisions].

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

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

b) *Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

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

c) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of "disproportionate burden" in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

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

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

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

Indirect discrimination shall be taken to occur where apparently neutral provisions, criterions or practices or characteristics of constructed areas [Merkmale gestalteter Lebensbereiche][22] would put people with disabilities at a particular disadvantage compared with other persons, unless that provisions, criterions or practices or characteristics of constructed areas is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[§ 5(2) Federal Disability Equality Act]

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

(1) It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers[23] would be illegal or would pose a disproportionate burden on the employer. When testing whether a burden is disproportionate, the following has to be taken into account in particular:

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

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

(3) When assessing whether certain circumstances constitute indirect discrimination it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent it has been complied with.

(4) Premises or other facilities, means of transport, technical equipment, information systems or other dedicated spheres of life shall be deemed

[22] This rather strange wording obviously tries to be as broad as possible including physical barriers and technical equipment.

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

accessible [barrierefrei] if they can be accessed and used by people with disabilities in a customary way, unassisted and without extra difficulty."

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

Although so far we have no court cases on the interpretation of the scope of protection the outcome of some confidentially concluded dispute resolution processes seem to show that the Federation accepts this wide scope of protection.

One specific problem of protection lies in the Federal structure of the Austrian legal order where the competences in the areas of social security and healthcare, education and infrastructure are split between the Federation and the provinces. By 2010, for all provinces but Lower Austria full protection including reasonable accommodation is provided for in all the areas mentioned. So, for example, in a primary school maintained by the province of Lower Austria or a local community of Lower Austria, no protection against discrimination in regard to disability and no duty to provide reasonable accommodation in the field of education exist whereas in other institutions of the same kind in other provinces a full protection is guaranteed. This is an important problem as the provinces are important operators of pre-school education institutions (kindergartens), schools, hospitals and infrastructure and largely competent for matters of social security.

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

A failure to meet the duty of reasonable accommodation is deemed indirect discrimination. The reasonable accommodation itself cannot be claimed in court – only financial compensation can be requested. This corresponds to the general decision the Austrian Lawmaker made for all discrimination claims outside an existing work-relationship by allowing only financial compensation but no restitution in natura. The idea behind that is to not force someone to conclude a contract with anyone by law (apart from existing duties to contract; like for monopolists, etc.). It might be a decision to be questioned but seems to be in line with the requirements of the Directive.

e) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)*

Only the Viennese Anti-Discrimination Act in its amended version from November 2010 includes the concept of "disproportionate burden" for all grounds (§ 3a), by that the law implicitly introduces the duty to reasonable accommodation for all grounds.

§ 3a/3 states: *" Indirect discrimination shall be deemed to occur when the complete removal of conditions which led to the disadvantage qualifies as disproportionate burden as stated in sub para 2 but there is a failure to implement reasonable measures in order to achieve at least significant improvement of the situation of the respective person in the sense of a maximally possible approximation to equal treatment."*
Unfortunately, there is no case law on this provision so far.

Apart from this, reasonable accommodation does not explicitly exist as a concept for grounds other than disability within the Austrian legal framework.

Not applicable.
i) race or ethnic origin
ii) religion or belief
iii) age
iv) sexual orientation

f) Please specify whether this is within the employment field or in areas outside employment

Not applicable.
i) race or ethnic origin
ii) religion or belief
iii) age
iv) sexual orientation

g) Is it common practice to provide for reasonable accommodation for other grounds than disability in the public or private sector?

No.

h) Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?

Yes, in § 7p Act on the Employment of People with Disabilities and § 12 Federal Disability Equality Act.

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

Yes. The Federal Disability Equality Act provides for protection against direct and indirect discrimination (which includes "barriers" as a possible means of discrimination) in the following fields:

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

Step by step improvement:

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

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

Section 4 states that that until December 31st 2008 a physical barrier in a means of public transport (except rail vehicles) does not constitute discrimination if the facility has been constructed according to a permission issued before January 1st 2006. Section 5 states that notwithstanding the above sections, there might be discrimination in case,

- the removal of the barrier does not cost more than 1000,-- Euros; or
- regarding buildings, traffic facilities and rail vehicles, if
- the alleged discrimination happens after January 1st 2010 and the removal of the barriers does not cost more than 3000,-- Euros; or
- the alleged discrimination happens after January 1st 2013 and the removal of the barriers does not cost more than 5000,-- Euros.

By the end of 2010 the federal lawmaker introduced an important setback in this development. By Federal Law Gazette I Nr. 111/2010 an addition to § 8/2 was enacted (which entered into force on January 1st 2011) stating that: *All federal ministries, the presidents of the Constitutional Court, the Administrative High Court, the Court of Auditors, the National Council, the Federal Council (Bundesrat) as well as the National Ombudsman Institution have to publish their plans for improvement of accessibility on their respective websites. When the plan is published, indirect discrimination by physical barriers in buildings utilized by the Federation is only deemed to occur, when the removal of these barriers is scheduled in that plan and when this has not been implemented until December 31st 2019."*

By this, basically, the Federal Government and some federal institutions have reached a status of impunity in discrimination issues connected with physical barriers until 2020.

j) Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?

The law seems to refer to individual accessibility not to accessibility by anticipation. But it is definitely deemed discrimination when someone creates new barriers.

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

There is a range of social benefits or exemptions from fiscal charges for people with disabilities. Most other rights connected with disability are fitting more under the definition of reasonable accommodation than “special rights”.

One important speciality is the higher protection for people with disabilities against dismissal provided for by § 8 of the Act on the Employment of People with Disabilities.

2.7 Sheltered or semi-sheltered accommodation/employment

a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?

Generally, sheltered employment is possible under the requirement that the person with disability is still able to achieve half the productivity of a regular worker [Normalarbeitskraft]. In this case the employment is treated in the same way as any other employment, so the protection against discrimination will apply to those contracts and working conditions.

b) Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?

Below the above mentioned level of ability (half productivity) people with disabilities will not be treated as employees, but will live on social security and their activities will not constitute employment. Nevertheless, there is protection against discrimination for them (exception: Lower Austria) as the protection for the disability ground is also reaching into the area of social security and supply with goods and services.

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)

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

Generally the federal 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.

The amended Viennese Anti-Discrimination Act (§ 2/5) or the Upper Austrian Anti-Discrimination Act (§ 1/2) also protect legal persons, when the discrimination is directed against its members, partners or organs on one of the protected grounds in connection with their activities for the legal person

b) *Is national law applicable to both private and public sector including public bodies?*

Often, there are different legal acts for the public and the private sector. On federal level, the Equal Treatment Act regulates the private and the Federal-Equal Treatment Act the public sector. Public bodies are counted with the public sector. There are, nevertheless, some hybrid entities like for example public universities and public schools, which have to be legally bound by specific legislation.

3.1.3 Scope of liability

Are there any liability provisions than those mentioned under harassment and instruction to discriminate? (e.g. employers, landlords, tenants, clients, customers, trade unions)

No additional liability provisions.

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

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

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

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

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.
In addition please complete the tables below, (if there are several laws involved, please repeat for each law according to the same template).

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

1. *access to employment*
2. *pay*
3. *voluntary social benefits*
4. *measures of vocational training, advanced vocational training and retraining*
5. *professional career, especially promotion*

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

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

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

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

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

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

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

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

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

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

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

In 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 federal level § 31 of the Equal Treatment Act restricts the protection to discrimination on the ground of ethnic affiliation (and gender). 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.

On provincial level, most provinces explicitly cite the Directive and fully forbid discrimination in all these fields on the grounds of ethnic affiliation, religion or belief, disability, age, sexual orientation and gender.

This implementation goes quite far beyond the minimum requirements of the Directives. Only Lower Austrian legislation restricts the protection to ethnic affiliation.

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

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

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

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

The provincial legal acts, which deal with the issue, generally, do not explicitly mention social advantages but protect the broad scope of "social affairs" (Soziales). It must be assumed that also the issues of social advantages are covered by this formulation. Note that – different from the Federal regulations - most provincial acts (except in Lower Austria) extend protection also to other grounds of discrimination.

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

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.
Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported.

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

The protection regarding universities is limited to access to universities and lacks sanctions beyond this field (lex imperfecta).

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

In regard to policy towards disability and education the last decade has brought a clear shift into the direction of integration not separation.

Many schools host so called "Integration classes" where able bodied and pupils with disabilities are educated together. There are additional specialised teachers performing in such classes in order to safeguard progress and tailor made assistance. There exists a whole range of specific measures, comprising extra classroom assistance, adapted equipment and other accommodation measures. From 1994/95 to 2006/07 the number of pupils in "special schools" has decreased from 19.000 to 13.200 while the number of pupils in "integrated schooling" has increased from 4.731 to 13.741.[24] (No more up to date figures available, yet) The parents can chose between the two forms of education for their children with disabilities. It is a clear goal of the governmental policy to further support the integrated approach.

[24] See: Behindertenbericht 2008; Bericht der Bundesregierung über die Lage von Menschen mit Behinderungen 2008; http://www.bmask.gv.at/cms/site/attachments/7/4/9/CH2092/CMS1359980335644/behindertenbericht_09-03-17.pdf.

Austria's first report for CRPD[25] in 2010 states that for the last years, more than 50% of all children with special educational needs were educated in such integrated schools. The "National Action Plan regarding Disability"[26] was enacted by the Council of Ministers on July 24th 2012. This contains inter alia a clear commitment for further development of "inclusive schooling" instead of segregated "special schooling".

On provincial level (with the exception of Lower Austria) the legal acts state that organs (civil servants and public contracted workers) under their legislation must refrain from any form of discrimination in regard to education. These general norms seem to be broad enough to cover the protection the Directives demand for.

Segregation in schools is not a topic touched upon intensively by public or scientific discourse in Austria. ECRI finds in its report on Austria that the disadvantaged position of Roma, for the most part non-autochthonous Roma, in education at all levels plays a central role in excluding them from most other areas of public life.

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

Segregation is also discussed in relation to primary schools where – especially in Vienna - there are concentrations of pupils (up to 80%) who are not German native speakers in some areas.

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

Research[27] indicates that 50 per cent of the Roma pupils in Oberwart, where Austria's Roma born between 1975 and 1985 are concentrated, faced severe problems with school education during their first year in primary school. However, around 40 per cent of younger Roma children (born after 1985) were doing well pursuing upper secondary and one (born in 1980) even higher education. Most adult Roma suffer from serious education deficits. Education policy towards Roma is concentrating on youth whereas there are very few attempts to remedy the education deficits of adult Roma.

[25] See: http://www.bmask.gv.at/cms/site/attachments/7/4/9/CH2092/CMS1359980335644/1__staatenbericht_crpd_englische_endfassung_-_stand_20_10_2010.pdf.
[26] See: http://www.behindertenarbeit.at/bha/wp-content/uploads/NAP-Behinderung.pdf.
[27] See for this section: EUMC, Roma and Travellers in public education, report 2006.

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

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

a) Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.

In this respect the Equal Treatment Act only cites the text of the Directive literally.[28] So it applies to goods and services available to the public only and in regard to ethnic affiliation (and gender).

The Federal Disability Equality Act also provides for protection in the area of access to goods and services (§ 2). (See case – concerning the production and sale of a DVD without subtitles which was found to be indirect discrimination regarding deaf customers.)

The protection provided by the Provinces is generally (again except in Lower Austria) also covering the other grounds of the Directive 2000/78/EC.

There is case law on the meaning of "available to the public":

In its decision 1R 129/10g (from 19.01.2011), the Viennese Court of Commerce (as a court of second instance) has ruled: "*The term "available to the public" indicates some restriction of the goods and services covered but, according to the judgements of the ECJ, exceptions are always to be interpreted narrowly. Goods and services are available to the public whenever an offer is directed to an undefined group of potential customers. Only such offers are excluded from the principle of equal treatment which are directed towards a close circle of family and friends."*

b) Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?

The regulations on financial services fall under federal competence. As on federal level age is not a protected ground against discrimination in the provision of services, there is no limitation for a different treatment on the basis of age.

[28] § 31 (1) fig. 4. Equal Treatment Act (Gleichbehandlungsgesetz).

Disability is protected against such discrimination on federal level. The law does not especially mention financial services or assessment of risks so it will be up to the courts to decide whether or not disability may be taken into account for those purposes. It is obvious that the mere fact of a certain disability must not be the reason for different treatment.

This is also reflected in a legal amendment of § 1d of the Insurance Contracting Act (Versicherungsvertragsgesetz) envisaged for 2013, which will explicitly state that the mere fact of disability is not a permitted reason for different treatment but a concrete risk assessment must take place that might take into account the health status (not disability) of the person involved.

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

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

§ 31/1 of the Equal Treatment Act clearly states that access to and supply of housing is covered by the protection regarding goods and services. However the protection on federal level only extends to ethnic affiliation and gender.

The protection of the Federal Disability Equality Act (§§ 2 – 5) also extends to housing.

This protection is valid for *"all legal relationships including their initiation and conclusion as well as the claiming or assertion of benefits outside a legal relationship".*

This constitutes a very broad scope for the protection of housing on the (important) federal level.
The provincial laws use the same quotation from the Directive but in most cases[29] the scope of protection is extended to all grounds covered by the respective legislation. This is a very important regulation on the provincial level as the provinces are extremely important landlords. For example the Vienna Province is Austria's biggest owner of housing space and the most important landlord in eastern Austria.

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

[29] Again: except in Lower Austria.

(disability) accessible constructions and reconstructions. A rather recent debate on the costs of public social housing might bring a setback for these developments as some big stakeholders started to argue that a general duty to build new housing accessible will increase construction costs beyond all budgets.
Segregated Roma settlements do exist in Austria, especially in Burgenland.

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

The equal treatment legislation does apply to the access to and supply of housing without any legal restrictions or exceptions. It will, nevertheless, be up to the courts to decide whether and how far these provisions also protect from harassment by neighbors.

There is no specific legislation regarding housing segregation.

Generally, housing segregation is not publicly discussed under this topic, but described as a concentration of “foreigners” (meaning migrants regardless of citizenship) in certain areas of larger towns and cities. So, for example, a certain part of the 16th District in Vienna is called “Little Istanbul” and there are other districts with a larger migrant population.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

All existing pieces of legislation for the implementation of the Directives quote the Directives in this respect. So for example § 20 (1) of the Equal Treatment Act reads: "*Different treatment in relation to the grounds mentioned in § 17 shall not constitute discrimination where, by reason of the of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."* § 7c(3) of the Act on the Employment of People with Disabilities uses the same quotation.

The explanatory notes state: *"These specific requirements shall be understood in a narrow sense, meaning that they only cover such occupational requirements which are essentially necessary to conduct the specific occupation. The justification refers to the means and the context in or under which the respective occupation has to be carried out. We can in this respect think of a case where for reasons of authenticity an actor or actress affiliated to a certain ethnic group is needed. The exception also comprises the areas of health and safety. This comprises especially those protective provisions regulating a duty to wear uniforms or helmets for reasons of safety".*

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

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

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

The law does not explicitly mention that this exception should not justify discrimination on another ground. Still, the provision could be interpreted well in line with the Directive. As there is no case law so far, it is just an area to pay attention to, as there might be also a potential breach of the requirements of the Directive. So far, we do not have a court decision on cases involving an ethos based institution. All

cases which were brought up so far (concerning mainly the Catholic church) have been settled out of court.

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

Especially in rural areas the Catholic Church is a very influential employer. It seems that the lawmakers want to grant the benefit of the exception also to such enterprises as breweries, lumber-mills and hotels. It will be a challenge for judiciary to define the fine lines of this concept in line with the Directive.

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

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? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground).

No. It remains to be seen how the judiciary 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.

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

In Austria the situation is similar to Italy and Spain. Generally, the respective faith community selects religious teachers. This is governed by an international agreement with the Holy See for catholic teachers as well as by national law. In principle, teachers for religion of all officially recognised faith communities[30] are employed by the state (federal or provincial) according to the "mission" by the religious community. So the selection and the refusal or withdrawal of the permission to teach lies entirely with the religious communities. The state has to make the teachers redundant or at least cannot use them as teachers of religion without this "missions".

[30] A list of the 14 recognised churches and faith communities can be found on this official website: http://www.bmukk.gv.at/ministerium/kultusamt/ges_anerk_krg.xml.

The relevant legal basis for this (for Catholic Faith) lies with § 6 of the Act on the Relations of School and Church [RGBl. Nr. 48/1868]

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

- § 3 of the Schools Regulation [Schulwesen-Regelung, BGBl Nr. 273/1962];
- §3 of the Act on Religious Education [Religionsunterrichtsgesetz BGBl Nr. 190/1949].

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

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

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

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].[31] (regarding age). The relevant § 13b (3)–(5) read:

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

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

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

1. *the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*
2. *the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*

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

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

It seems that the legislator saw no need to mention further exceptions (especially regarding disability) in this respect and relied on the genuine occupational requirement test only.

As we can see by the Supreme Court decision Nr. 60b246/10k , Dr. H. L. vs. Oberösterreichische Gebietskrankenkasse,[32] courts tend to be very strict and stick to a narrow interpretation of these exceptions.

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.

4.4 Nationality discrimination (Art. 3(2)

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

a) *How does national law treat nationality discrimination? Does this include stateless status?*
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?

After an important amendment in 2008, the Equal Treatment Act now abandoned a general exception of nationality and states in §§ 17 (2) and 31 (2) that the principle of equal treatment *"does neither affect the regulations and conditions on immigration of*

[32] Details see: Annex 3, case H.

citizens of third countries or stateless persons or their residence nor the treatment which arises from the legal status of the third-country nationals or stateless persons".

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". So the 2008 amendment is a very useful and constructive way of dealing with the actual Austrian situation and discourse as it exempts only those areas from protection where the difference in treatment is based on an objective legal condition.

The first judgement[33] on that issue was very clear in stating that "we do not sell to foreigners" was indeed racial discrimination and not covered by the (then legally enshrined) nationality exception. This discrimination was obviously seen as a direct one.

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

The Equal Treatment Act states in §§ 17 (2) and 31 (2) that the principle of equal treatment *"does neither affect the regulations and conditions on immigration of citizens of third countries or stateless persons or their residence nor the treatment which arises from the legal status of the third-country nationals or stateless persons."*

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

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?

The text of the laws does not touch this issue but 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*

[33] See: Annex 3, case C.

benefits are to be granted to all partnerships or only to married couples. Privileges for marriage remain permissible. This results from Recital 22 of the Framework Directive stating that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon".

So preferential treatment for married workers remains permissible while unmarried heterosexuals may not be put on advantage in comparison to homosexuals.

It is questionable whether this interpretation will be reflected by case-law, as the law itself is open to the interpretation that privileges for married couples constitute indirect discrimination.

In Austria only from 1.1.2010 there is legally recognised partnership for same-sex couples – a legal instrument bearing important differences to marriage but bringing equality in many aspects.

Apart from some grave distinctions between registered partnerships (which can only be formed by same-sex couples) and marriages directly imposed by the Act on Registered Partnerships and other laws (like prohibition of artificial fertilisation and adoption, introduction of surnames instead of family names)[34] other forms of discrimination related to employment are definitely forbidden.

b) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?

Discrimination of homosexual partnerships compared to unmarried heterosexual partnerships is clearly prohibited in the workplace.

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

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

There are no explicit exceptions mentioned by law.
§ 7c/3 of the Act on the Employment of Persons with Disabilities contains a general "genuine occupational requirements" clause this includes issues relating to health and safety.

[34] A differentiation which seems extremely strange, especially in view of ECHR Decision Schalk and Kopf vs. Austria (24.06.2010) where the Court "*considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life.".*

b) 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.)?

There are no explicit exceptions, but the test for "genuine occupational requirements" can comprise questions of health and safety.

In regard to the exception for "genuine occupational requirements" the explanatory notes to the Equal Treatment Act[35] state:" *The exception also comprises the areas of health and safety. This comprises especially those protective provisions regulating a duty to wear uniforms or helmets for reasons of safety."*

So this exception is not restricted to the ground of disability as permitted by the Directive, but valid for all the grounds dealt with by the Equal Treatment Act but it always has to stand the test to be a "genuine occupational requirement". Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78).

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

4.7.1 Direct discrimination

Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the Court of Justice of the European Union in the Case C-144/04, Mangold and Case C-555/07 *Kucukdeveci?*

The general exceptions in regard to age can be found in §§ 13b (3)-(5) of the Federal-Equal Treatment Act [Bundes-Gleichbehandlungsgesetz][36] and in §§ 20 (3)-(5) of the Equal Treatment Act [Gleichbehandlungsgesetz][37]

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

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

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

1. *the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and*

[35] 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien, p. 16.
[36] Das Bundes-Gleichbehandlungsgesetz, [Federal-Equal Treatment Act].
[37] Gleichbehandlungsgesetz, BGBl I Nr. 66/2004 [Federal Law Gazette 66/2004].

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."

As these provisions are literally transferred from the Directive we must assume that the implementation is in principle in line with the Directive. The legal situation, therefore, appears to be in compliance with the test in Art. 6 Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold.

As the text contains 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.

As we can see from the Supreme Court decision Nr. 60b246/10k , Dr. H. L. vs. Oberösterreichische Gebietskrankenkasse,[38] courts tend to be very strict in sticking to a narrow interpretation of these exceptions.

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

Yes, by quoting the permissible exceptions from the Directive.

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

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

[38] Details see: Annex 3,case H.

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

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

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

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

4.7.3 Minimum and maximum age requirements

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

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

4.7.4 Retirement

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

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

a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?

Generally, individuals who have collected the necessary months of paying into the pension scheme can collect a pension and still work.

Workers in the private sector are not required to retire at the pensionable age and cannot be forced into retirement. Collective agreements might include different regulations. Only for older people who are unemployed, special regulations force them to change into the pension system. A (minimum) 62-year-old worker, who has lost or is losing his/her job, can stay unemployed for one more year.

Then if he/she has not found a new job, he/she is obliged to change into the pension system.

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

b) Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?

Still the general retirement (pensionable) age is 65 years for male and 60 years for female workers in the private sector, for civil servants it is for both sexes at 61,5 years. These periods will be harmonised gradually until 2024 when the general retirement age will be 65 years.[39]

A very vague political discussion on the possibility of increasing the general retirement age has started recently without any immediate conclusions or effects. The requirements of Directive 2000/78 did not influence the discussion.

Generally, Individuals who have collected the necessary months of paying into the pension scheme can collect a pension and still work.

[39] Budgetbegleitgesetz 2003,BGBl I Nr. 71/2003, [Law Accompanying the Budget 2003, Federal Law Gazette 71/2003].

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

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.

d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

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

e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?*

Age is not a permissible reason for dismissal and there is no upper age limit for protection against unfair dismissal.

f) *Is your national legislation in line with the CJEU case law on age (in particular Cases C-229/08 Wolf, C-499/08 Andersen, C-144/04 Mangold and C-555/07 Kücüdevici C-87/06 Pascual García [2006], and cases C-411/05 Palacios de la Villa [2007], C-488/05 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform [2009], C-45/09, Rosenbladt [2010], C-250/09 Georgiev, C-159/10 Fuchs, C-447/09, Prigge [2011] regarding compulsory retirement.*

The legislation is in line with the CJEU case law as it directly quotes the Directive. The application of the legislation may not always be in line but can rather easily be adapted accordingly.

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 (see also ECJ C-132/11 Tyrolean Airways). Basically, the ECJ stated in this judgement that the employer was not in conflict with the prohibition of age discrimination when paying employees differently on the basis of their experience acquired within versus outside his own company. So, seniority as such seems to be a permissible reason for different treatment. Generally, in Austria age might be taken into account as there is a special provision declaring "socially unfair" [sozialwidrige] dismissals illegitimate.

105 (3) fig. 2 Labour Constitution Law [Arbeitsverfassungsgesetz] 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 Employment Equality 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[40] state:" *The exception also comprises the areas of health and safety. This comprises especially those protective provisions regulating a duty to wear uniforms or helmets for reasons of safety."* So this exception is not restricted to some grounds but valid for all the grounds dealt with by the Equal Treatment Act.

4.9 Any other exceptions

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

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

[40] 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien, p. 16.

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

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

All the laws implementing the Directives only state that generally, positive action (positive measures) is permissible and does not constitute discrimination. There is neither important case law nor discussion (apart from academic ground) on this topic.

b) Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.

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

National minorities
Protection of recognized national minorities (Volksgruppen: Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma) is provided according to the state treaties of 1919 and 1955, their legal status and rights is guaranteed by various constitutional provisions and partly implemented by the National Minorities Act of 1976 [Volksgruppengesetz].[41]

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.

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

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

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

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

Research[42] indicates that Roma born before 1985 suffer from serious education deficits whereas the educational situation of younger Roma seems to improve considerably.

In 1993, the “Romani Project” a co-operative effort of the Roma community and the Linguistics Department of Graz University developed writing conventions and teaching material for Roman (the Burgenland variety of the Roma language). An amendment of the Burgenland Minority School Act laid the legal basis for the language to be taught in schools in the province of Burgenland. Since 1999, Roman is offered as a voluntary subject for groups of at least five pupils. Classes are held jointly by a non-Roma school teacher and a language competent Romani. In the school year 2004/2005, classes were held in two primary schools and one main general secondary school. In some Vienna schools with a high concentration of immigrant Roma pupils, Roma teaching assistants were assigned to support teachers, pupils, and parents and facilitate interaction between Roma and non-Roma since 2000.

Following a racist bomb attack in February 1995, which had killed four Roma men from the Oberwart Roma settlement, the efforts have been significantly increased to improve the general situation of these Roma: Specific vocational training projects and general counselling services were installed and improved and the whole infrastructure and the housing in the Roma settlement were improved.

Nevertheless, these activities followed a mere welfare approach not an anti-discrimination approach. The Roma were left – following their own wish – in their segregated settlement outside the borders of the city of Oberwart. An explanation for

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

this wish to stay cannot be found in reports, but maybe the history of the Oberwart Roma might help to understand.

As early as under Empress Maria Theresia they have been forcefully settled and resettled and under the Nazi-Regime most of them were transferred and killed in concentration camps. So maybe the idea of "being resettled" might give rise to considerable fear.

The National Strategy on Roma Integration is envisaged for early 2013 to be formally put into action. The Federal Chancellery has so far set up a website containing the few pieces of information existing so far.[43] Most of the measures mentioned in this context[44] are not especially targeting people with Roma background. The actual support measures are quite few and not given a strong effort until now. The process within the EU Framework on National Roma Integration Strategies is an on-going one, though and there is a National Contact Point set up at the Federal Chancellery and a Platform for Dialogue.

One of the more outstanding projects was "Thara", which includes community work, coaching and training. The previous Thara project (2011-2012) focused on access of national and immigrant Roma to employment, reaching out to 107 Roma and 56 participants from public administration and civil society.

Building on its findings the current project aims more specifically at labour market integration including support for self-employment.

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 lose 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.

[43] http://www.bka.gv.at/site/7660/default.aspx.
[44] European Commission, National Roma Integration Strategies, http://ec.europa.eu/justice/discrimination/files/roma_nat_integration_strat_en.pdf, pp 49ff.

- 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 provincial 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 provinces 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 *provinces.*
- Measures organised by the employment agencies (*Arbeitsmarktservice*) under the *AMSG 1994* are closely related to *unemployment insurance* and *labour law*. The purpose of these measures is to prevent or shorten unemployment and to help to find employment. Employment agencies are explicitly required by law to pay special attention to people with disabilities when rendering their services. Employment agencies may also grant payments (*Beihilfen*) with a view to overcoming the costs for taking up employment, promoting training or re-training, or integrating people in the labour market. Provisions on payments (*Beihilfen*) are general in terms; employment agencies are not required treat disabled people favourably. Measures under the *AMSG 1994* are not means-tested and funded by contributions of employers and employees, by the Federation, and by the European Social Fund.
- The most pertinent legal source on employment of people with disabilities is, however, the Act on the Employment of People with Disabilities [Behinderteneinstellungsgesetz]. The Act on the Employment of People with Disabilities imposes (upon employers) a duty to employ disabled people (according to a quota system), confers protection against dismissal, and

arranges for grants or loans. The Act on the Employment of People with Disabilities applies to employment in private sectors and employment in public services:

- Under § 1(1) *Act on the Employment of People with Disabilities*, all employers employing 25 employees or more in Austria are obliged to employ at least 1 person with disabilities for each group of 25 employees (the ratio, therefore, being 1:25).[45] 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.[46]
  The duty to employ does not relate to all people with disabilities.
  The duty only relates to disabled people who qualify under a certain standard: To qualify under the *Act on the Employment of People with Disabilities*, disabled people must be Austrian nationals or nationals of one of the Member States of the European Economic Area; third country nationals only qualify if they were granted asylum.[47] Furthermore, the degree of disability must reach at least 50 percent.[48]
- If employers do not comply with their duty under § 1(1) *Act on the Employment of People with Disabilities*, they are obliged to pay a fee (*Ausgleichstaxe*). The fee amounts to 232 Euro (year 2012) per month and person that ought to be employed.[49] These fees go to a special fund designated to sponsor measures promoting the employment of people with disabilities (*Ausgleichstaxfonds*).[50] The Minister for Social Affairs administers the fund. This possible exception is widely used by both private companies and public authority. People seem to prefer paying the tax to employing people with disabilities.
- Employers who employ (or are willing to employ) people with disabilities of the relevant class may qualify for support under § 6(2) *Act on the Employment of People with Disabilities*. Allowances or loans granted under § 6(2) *Act on the Employment of People with Disabilities* aim at (a) facilitating technical appliances making the working place suitable to people with disabilities, (b) promoting working or training places suitable to

[45] For certain economic sectors, the Secretary of State for Social Security may, by regulation, increase the relevant ratio from 1:25 to up to 1:40; § 1(2) *Behinderteneinstellungsgesetz* idF. BGBl. I Nr. 71/2003 [Act on the Employment of People with Disabilities 1969, as last amended by Federal Law Gazette I Nr. 71/2003].
[46] § 4(1) *Behinderteneinstellungsgesetz*.
[47] § 2(1) *Behinderteneinstellungsgesetz*.
[48] § 2(1) *Behinderteneinstellungsgesetz*. The "degree of disability" is essentially a medical concept first employed in the context of war veterans and victims. 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*.
[49] § 9(2) *Behinderteneinstellungsgesetz*.
[50] § 10 *Behinderteneinstellungsgesetz*.

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 *Act on the Employment of People with Disabilities* is twofold. Firstly: It is proscribed by law that the termination of the contract takes effect only after a notice period of at least 4 weeks has passed.[51] Secondly: Dismissal may be pronounced only if the Disability Board, established with the *Bundesamt für Soziales und Behindertenwesen* (federal office for social affairs and matters relating to people with disabilities) has given prior consent to the dismissal.[52]

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?

[51] § 8(1) *Behinderteneinstellungsgesetz*.
[52] § 8(2) *Behinderteneinstellungsgesetz*.

6 REMEDIES AND ENFORCEMENT

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

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

a) What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?

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

Administrative penal law is only a remedy against discriminatory advertisement.

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

The legal situation regarding discrimination is very complicated and the laws are not intelligible for people without legal education. So also in cases where it is not compulsory to be represented by a lawyer, it seems necessary to have access to legal aid. The powers of the National Equality Body are restricted to help in the procedure before the Equal Treatment Commission, but their help ends at the doors of the courts. One great obstacle is the absence of an established framework of case law – especially regarding the amount of compensation of non-pecuniary damages. As the costs of civil law procedures are related to the amount in dispute[53] this is a crucial question and it bears a lot of risks.

Also NGOs cannot provide for a complete relief, as their procedural rights are limited to side intervention at court. In labour law cases the trade unions or the Chamber of Labour can grant their members a complete protection so that they do not have to fear any costs.

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

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

Claimants have to undergo such a procedure and can only access the courts after the conciliation process has failed within three months. This process has been the most used tool (732 cases handled from mid 2006 until mid 2010, and 1000 until the end of 2011)[54] and seems to be quite successful in achieving settlements.[55]

Apart from these statistics, there are no figures available regarding discrimination cases brought to justice.

b) Are these binding or non-binding?

The decisions of the civil and labour courts (as well as administrative decisions in cases brought by civil servants) are the only legally binding decisions as the procedures at the Equal Treatment Commission only result in a non-binding "opinion" [Gutachten, Einzelfallprüfung]. However, the Equal Treatment Act states in its § 61 that courts have to take these opinions into consideration and that they have to give clear reasons in case they come to a dissenting decision.

c) What is the time limit within which a procedure must be initiated?

All claims are subject to strict time limits. The normal time limit for bringing civil-law claims is three years, whereas dismissals have to be challenged in court within two weeks.

d) Can a person bring a case after the employment relationship has ended?

Yes, but the time limits are tight (two weeks).

e) 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).

There are quite some deterrents for litigants. One of the most severe might be the risk of costs for formal judicial procedures, which is even aggravated by the very unclear and contradictory case-law on the amounts awarded in compensation for immaterial damages. Some cases have turned out very badly in respect, when plaintiffs have won the case as they could establish that they have been discriminated against but the court lowered the amount of compensation awarded below half of the claimed amount which had the effect that the "victorious" plaintiff had to pay the complete cost of the procedure which was usually more than the amount gained in compensation.

[54] More recent data is not yet available.
[55] Find more details about these cases under section 7. specialised bodies.

Another deterrent is the problem that the legal basis is scattered through the whole legal framework and is using a very complicated and confusing language. Even many people from the legal professions need help from experts in this field just to understand the basics.

The procedures before the Equal treatment Commission on the other hand are not satisfying for many claimants as their result is not legally binding and the overall status of the Commissions' judgements is not very high.

f) Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

No, there are no such figures for the court system.

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

Please list the ways in which associations may engage in judicial or other procedures

a) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association, organisation, trade union, etc.).

In court cases, associations, organisations or other legal entities may engage on behalf of their clients within the scope of the directive in proceedings, where no representation through an attorney is compulsory (Anwaltszwang).

This is compulsory for most civil procedures at court and before the courts of public law so there is extremely few place for NGO representation in civil law courts but more at lower levels of administrative proceedings.

In these cases associations, organisations etc. as other physical persons can represent parties in so far as these parties have formally mandated them.

The Equal Treatment Act expressly allows NGOs to represent alleged victims of discrimination in the rather informal proceedings before the Equal Treatment Commission; nevertheless this is not a special right, as every adult physical person is allowed to do the same. The Federal-Equal Treatment Act does not foresee any special third party intervention.

According to the Equal Treatment Act, third party intervention is expressly allowed for one specific NGO ('Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern' [Litigation Association of NGOs Against Discrimination]) in the courts (§. 62 GIBG [§ 62 Equal Treatment Act]). The Litigation Association is a body set up by several NGOs dealing with different grounds of discrimination. This association is open for all specialised NGOs to join but all NGOs which are not

members of the Litigation Association are not granted any special procedural rights: If they want to use the tool of legal intervention, they have – like all other legal parties - to prove their legal interest in the case. The Litigation Association is an NGO-tool to safeguard best quality counsel and legal representation for victims of discrimination.

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

For the scope of discrimination on the ground of disability the NGO "Austrian national Council of Disabled Persons" (Österreichische Arbeitsgemeinschaft für Rehabilitation –ÖAR) has been given a similar position in regard to the right of intervention in court cases as well as a restricted position to file a group litigation [§ 13 Federal Disability Equality Act] on behalf of an unidentifiable group of affected persons.

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.[56]

On provincial level, the Viennese Anti-Discrimination Act [§ 4 (2)], the Lower Austrian Anti-Discrimination Act [§ 18(3)], the Upper Austrian Anti-Discrimination Act [§ 8(3)], the Salzburgian Equal Treatment Act [§ 29(4)], Styrian Equal Treatment Act [§ 33(3)] state that the plaintiff can use the help of any legitimate non-profit organisation to be represented in all forms of legal proceedings under these acts, as long as the organisations aims include the safeguarding of the adherence of the two EU-Anti-Discrimination Directives.

The Carinthian Anti-Discrimination Act [§§ 24 (6) and 27 (4)], the Burgenlandian Anti-Discrimination Act [§ 32], the Tyrolean Anti-Discrimination Act [§ 12], and the Vorarlbergian Anti-Discrimination Act [§ 7(4)] are weaker in this point - they only give the right to intervene [Nebenintervention] to associations whose statutes state their interest in the adherence of the prohibition of discrimination.

b) What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific

[56] 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.".

chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?

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

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

So, the basic requirement is a „legal interest" in one parties victory. In practice, this requirement is not very hard to fulfil for NGOs who are working actively in the field of anti-discrimination.

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

So it can be presumed that NGOs with a statutory (self-defined) mandate to deal with anti-discrimination will not face many obstacles in intervening in support of victims of discrimination. Albeit, not many organisations have tried this so far, as this procedural right is not overly useful, but the only way to legally act in support of a victim.

In Austria, all associations have to be registered and get their statutes checked by an authority before they come into legal existence, so there are no non-registered NGOs. None of the legal provisions dealing with NGO involvement are requiring anything more than a legal interest – which can only be proved by an examination of the organisations´ statutes (or charter). So basically, the statutes have to clearly state that it is within the mandate of the respective organisation to deal with (certain types of) discrimination. This will be sufficient to prove legal interest in discrimination cases.

Apart from certain administrative proceedings (e.g. complaints against police officers), NGOs can only act on behalf of a victim according to the Viennese Anti-Discrimination Act [§ 4 (2)], the Lower Austrian Anti-Discrimination Act [§ 18(3)], the Upper Austrian Anti-Discrimination Act [§ 8(3)], the Salzburgian Equal Treatment Act [§ 29(4)], Styrian Equal Treatment Act [§ 33(3)] which state that the plaintiff can be represented by specialised NGOs in all forms of legal proceedings under these acts.

One further – and still unused – possibility is the restricted position to file a group litigation [§ 13 Federal Disability Equality Act] on behalf of an unidentifiable group of

affected persons given to the “Austrian national Council of Disabled Persons” (Österreichische Arbeitsgemeinschaft für Rehabilitation –ÖAR).

c) Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?

When organisations want to intervene in support of a victim, the victim has to give its consent to this step.

d) Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.

All associations act according to their own discretion; there is no legal duty to take action.

e) What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.

Civil proceedings:
Right to intervention, no representation but for “limited group litigation” in disability cases.

Administrative proceedings:
Right to representation (every adult person has) but for those cases where a law states that only professional representation is allowed or even mandatory

Criminal proceedings:
Not applicable in discrimination cases, representation only by attorneys.

f) What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.

NGOs can seek no other remedies than actual victims can, as they can only act in support or on behalf of an individual victim. Exception: “limited group litigation” in disability cases.

g) Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?

No. The rules on the burden of proof are not affected by NGO engagement.

*h) Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Only for the scope of discrimination on the ground of disability the NGO "Austrian national Council of Disabled Persons" (Österreichische Arbeitsgemeinschaft für Rehabilitation –ÖAR) has been given a restricted position to file an action [§ 13 Federal Disability Equality Act] on behalf of an unidentifiable group of affected persons.

This possibility has not yet been used – mainly because it is very restricted, as it is bound to the following conditions:

- The discrimination in question must affect adversely, severely and permanently the general interests of the protected group of people (people with disabilities).
- The Federal Council on Disability [§ 8 Federal Disability Act] must recommend to file the action with a resolution backed by two thirds of the votes.

If these conditions are fulfilled the NGO can file an action to establish that a discrimination on the ground of disability has actually occurred (no financial compensation or other remedies are possible here).

The Austrian model of (very limited) group litigation is neither establishing the figure of class action nor is it clearly allowing actio popularis. The collective interests defended by the action mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement; whereas this is without prejudice to individual actions brought by individuals who have been harmed by an infringement[57] and the aim of the action is limited to judicial certification.

*i) Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Class action in the sense of a concentrated process filed by an association on behalf of a group of identifiable individuals affected by the same infringement is not possible in discrimination cases. The Austrian model of (very limited) group litigation is neither establishing the figure of class action nor is it clearly allowing actio popularis. The

[57] See: European Directive on Injunctions for the Protection of Consumers' Interests.

restricted rights of the NGO “Austrian National Council of Disabled Persons” (Österreichische Arbeitsgemeinschaft für Rehabilitation –ÖAR) to group litigation do not include the cumulation of interests of individuals who have been harmed by an infringement and the aim of the action is limited to judicial certification in the sense of a judgment ruling whether certain conduct or measure is to be deemed as discriminatory on the ground of disability. Remedies including financial compensation can only be filed by the individuals who have been harmed.

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

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

The federal acts lower the burden of proof for the plaintiff - but in a way that is different from the way stated in the directives. The burden of proof does not completely switch over to the respondent, when the plaintiff establishes facts from which it may be presumed that there has been direct or indirect discrimination.

The law states that the respondent has to prove that “it is more likely that a different motive – documented by facts established by the respondent - was the crucial factor in the case or that there has been a legal ground of justification (in cases of indirect discrimination)”. In cases concerning harassment, the respondent has to prove that – taking into account all the circumstances – it is more likely that the facts established by the respondent are true. So in any case the respondent is obliged to prove the likelihood of established facts.

In its important decision 9ObA177/07f, from 09/07/2008, the Supreme Court ruled that this regulation has to be interpreted as being in line with the Directive - meaning that: “*In case the establishment of discriminatory infringements is successful – it is for the respondent to prove that he or she did not discriminate*.”

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

On provincial level, a full shift of the burden of proof applies, stating that in court the plaintiff only has to establish facts about the discrimination or victimisation and then the respondent has to prove that no infringement of the prohibition of discrimination or victimisation has occurred.

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 people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

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

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

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

Since the explicit amendment in BGBl I Nr 98/2008 it is clarified that the same sanctions and remedies as foreseen for discrimination are applicable in cases of victimisation. But still, there is no case law or any case pending touching the issue of victimization.

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

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

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 or housing 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 for discrimination within a continuing employment relationship – a victim of discrimination can choose between undoing of the act of discrimination or compensation of pecuniary damage, in both cases with 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.

Since the amendment in BGBl I Nr 98/2008 in a case of discriminatory termination of employment a victim can challenge the termination or take the option to accept the termination and claim pecuniary and non-pecuniary damages.[58]

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[59] this restriction[60] might be questionable. A maximum amount of EUR 500 can only be considered purely nominal compensation, while we have to take into account that general Austrian civil and labour law does not provide for similar non-pecuniary damage claims.

The mere concept of punitive damages is unknown to the Austrian legal tradition, while from a dogmatic point of view the minimum non-pecuniary damages in cases of harassment (EUR 720 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.

In case the discrimination proves decisive for non-employment, the Equal Treatment Act states a minimum compensation of two months` salary.[61] In court, the plaintiff can only demand for financial compensation, not for actually being employed.

In case of discrimination of university-students [apart from access to university] the legislation lacks any sanction.

The Equal Treatment Act establishes a (in principle) very effective sanction for companies not observing the prohibition of discrimination: exclusion from public funding granted by the Federation[62] but it does not extend the exclusion to public procurement, what would render the effectiveness of this sanction perfect.[63] It is, nevertheless, quite unclear in practice how these provisions are surveyed and how the sanction is triggered.

[58] § 26 (7) Equal Treatment Act.
[59] 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.
[60] 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.
[61] § 26 (1) Equal Treatment Act.
[62] §§ 14, 26, 37 Equal Treatment Act.
[63] 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).

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

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

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

c) Is there any information available concerning:

i) the average amount of compensation available to victims?

The case law reflects uncertainties the plaintiffs face regarding the amount of compensation. To illustrate this, see two decisions issued by the same court (Viennese Commercial Court, Handelsgericht Wien) in 2011 on more or less identical cases with highly contradicting outcomes concerning the assessment of the amounts awarded in compensation:

Judgement 1: Case Nr. 1R129/10g, names withheld, 19.01.2011

Issue: A dark skinned man had been not admitted into a restaurant to celebrate someone´s birthday, while his partner and her colleagues (all white) had been admitted without any problem. The court of first instance had found discrimination and awarded the 1.000,-- Euro the plaintiff had demanded for.

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

Result: Compensation of Euro 1.000,-- upheld. All procedural costs have to be paid for by the respondent.

Judgment 2: Case Nr. 60R101/10y, names withheld, 14.09.2011

A dark skinned woman had been not admitted into a restaurant, as the bouncer refused to let her in with a reference to her skin-colour. The court of first instance had found discrimination and awarded the 1.500,-- Euro the plaintiff had demanded for.

Main argument when assessing the amount of compensation: "*The reason for the regulations on compensation for immaterial damages within the Austrian legal order is to balance the feelings of aversion [Unlustgefühle] caused by a certain incident.*

When judging on the amount it stands to reason to refer to the amounts usually awarded to compensate pain and suffering [Schmerzengeld]. Those reach from € 100,-- to € 300,-- per day, graded in light, medium and grave pain. (…)
The plaintiff has been discriminated against by the conduct of the bouncer, while the immaterial damage done was calculated with an amount clearly beyond the margin of discretion – especially when relating it to the amounts awarded for light pain. The court of appeal sees an amount of € 250,-- to be an appropriate compensation for the personal damage suffered by the plaintiff."

Result: Compensation reduced from 1.500,-- to 250.--, which at the same time means that the plaintiff (the victim) has to fully pay the cost of the proceeding – in this case only the costs of the respondent which had to be paid by the plaintiff in addition to her own costs, amounted to € 925,61. As a result, the victim of discrimination suffered a financial loss of minimum € 675,61.

ii) the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?

In an overall assessment the effectiveness of sanctions seems to be rather limited. The main issue here is that the only instrument used as a sanction basically is compensation for material and immaterial damages. While in most cases brought to courts so far, material damage was not playing a major role, the Austrian legal system does not otherwise contain an elaborate legal tradition regarding immaterial damages. Basically, the idea of using compensation for damages in a directive, punitive and thereby dissuasive way is very unfamiliar if not bizarre to judges so far. The lawmakers has so far seen the need to constantly raise the minimum amount of compensation for harassment from originally 400 to 1.000 Euros since 2004, as practice showed that this figure given in the legislation was in fact used by many courts as a reference point for their decision-making. In most cases, the minimum amount was treated as a maximum amount at the same time by courts.

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

Still, the very low numbers of victims actually bringing their cases to court might not be an indicator whether the sanctions are effective, proportionate and dissuasive, but they indicate that the way to justice seems to be much harder than the benefit expected from a won court case.

7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

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

a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

The Act on the Equal Treatment Commission and the National Equality Body establishes an Equal Treatment Commission[64] and the National Equality Body[65] [. In transposing Art. 13 of the Race Equality Directive, Austria extended the functions of the present Equal Treatment Commission and the Ombud for Equal Employment Opportunities to deal with discrimination on the ground of gender and on all other grounds mentioned in art 13 ECT except disability.

In March 2005 two new Ombuds for the National Equality Body were appointed and took office in the Ministry of Health and Women. In late April 2005 two chairpersons for new senates within the Equal Treatment Commission were appointed by the Minister. The findings on general issues and cases are published in an anonymous and condensed form.[66]

For the ground of disability a separate structure has been set up since 1.1.2006. The Ombud for Persons with Disabilities (Behindertenanwalt) has been appointed by the Minister of Social Security, Generations and Consumer Protection and is responsible for advice and support of people with disabilities. The Ombud can conduct surveys on the situation of people with disabilities and give and publish statements and opinions on this issue.

For Disability, there is no body equivalent to the Equal Treatment Commission, but a compulsory attempt to settle individual cases in a joint dispute resolution process before the *Federal Social Service* (Bundessozialamt).[67]

This form of dispute resolution turned out to be substantially effective and willingly used by people affected.

[64] http://www.bka.gv.at/site/5467/default.aspx.
[65] http://www.gleichbehandlungsanwaltschaft.at/.
[66] http://www.bka.gv.at/site/5542/default.aspx.
[67] http://www.bundessozialamt.gv.at/basb/Behindertengleichstellung.

A report shows that by end of June 2010[68] there have been 732 applications for joint dispute resolution since January 2006. 405 (55,3%) cases concerned the Act on the Employment of People with Disabilities and 327 (44,7%) the Federal Disability Equality Act. Unfortunately, newer data is not available.[69]

47,8 % of the cases ended with a settlement, in 38,5 % of the cases the parties did not reach a settlement, 13,7 % of all applications have been withdrawn (there is an assumption that most might have ended with a silent settlement) and 6,4 % of the cases were still open.

Only in 16 cases (2,2 %) professional mediation was required, all other cases were dealt with by employees of Federal Social Service alone.

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[70] and have no shared responsibilities with the federal structures. As becomes apparent by the impressive list of different bodies it might not always be easy for victims of discrimination to find out where to turn to.

In Vienna, an "Office for the battle against Discrimination" (Stelle zur Bekämpfung von Diskriminierungen) was set up. The position was set up independently by provincial constitutional law.[71] 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. These tasks were given to a already independent body of the Vienna Province, the so called "Bedienstetenschutzbeauftragter" [Commissioner for the Safety of Employees], a position that had nothing to do with issues of discrimination before but was responsible for safety issues concerning the employees of the City of Vienna.

Styria sets up a range of bodies for Equal Treatment: The Styrian Equal Treatment Commission, the Commissioner for Equal Treatment[72] 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

[68] See: http://www.bmask.gv.at/cms/site/attachments/7/4/9/CH2092/CMS1359980335644/1__staatenbericht_crpd_englische_endfassung_-_stand_20_10_2010.pdf.
[69] But the organisation BIZEPS is collecting information on individual cases: http://www.bizeps.or.at/gleichstellung/schlichtungen/ .
[70] Although there are annual meetings of the provincial bodies.
[71] see § 7 (3) of the Viennese Anti-Discrimination Act [Wiener Antidiskriminierungsgesetz].
[72] and a separate Commissioner for the City of Graz.

disciplinary proceedings. The Contact Persons are established in all major municipalities and offices of the Styrian Government. Their task is mainly to counsel individual civil servants.

The Commissioners and the contact Persons are independent in fulfilling their functions; a Provincial Constitutional Provision safeguards this.[73] Since May 2012, the Styrian Government and the City of Graz also fund a general "Anti-Discrimination Office" that offers individual counselling to everybody and issues statements and expert opinions.

Carinthia has set up an Anti-Discrimination Office[74] [Antidiskriminierungsstelle] at the section for civil law within the Office of the Provincial Government. This office entitled to support (counsel) victims of discrimination and to issue recommendations as well as to conduct independent surveys on discrimination. This body is not independent.

Lower Austria has set up up a Lower Austrian Commission for Equal Treatment[75] [Niederösterreichische Gleichbehandlungskommission] whose main tasks are to give recommendations in individual cases of alleged discrimination (in connection to employment with the province) and to comment on specific legal drafts. The chairperson of the Commission is at the same time the Lower Austrian Commissioner for Equal Treatment [Niederösterreichische/r Gleichbehandlungsbeauftragte/r] and heads the Anti-Discrimination Office [Niederösterreichische Antidiskriminierungsstelle]. This Commissioner is mainly a counselling body with powers to initiate proceedings.

The Office can conduct surveys and issue reports. Lastly Coordinators for Equal Treatment and Promotion of Women are established in all major municipalities and offices of the provincial government.

Their task is mainly to counsel individual civil servants and notify grievances to the Commissioner. The members of the Commission and the Commissioner are independent in fulfilling their functions; this is safeguarded by a Provincial Constitutional Provision.

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

[73] see § 44 of the Styrian Equal Treatment Act [Steiermärkisches Gleichbehandlungsgesetz].
[74] See §§ 32, 33 of the Carinthian Anti-Discrimination Act [Kärntner Antidiskriminierungsgesetz].
[75] see §§ 11 and 12 of the Lower Austrian Equal Treatment Act [Niederösterreichisches Gleichbehandlungsgesetz].

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

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

The members of the Commissions and the Commissioners as well as the Coordinators are independent in fulfilling their functions; this is safeguarded by a provincial constitutional provision.

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

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

b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.

The Equal Treatment Commission (Gleichbehandlungskommission) has been set up at the Federal Ministry for Health and Women [now Federal Ministry for Women and Public Service, located at the Federal Chancellery]. The Commissions` structure consists of three specialised senates.

The first senate is supposed to deal with issues related to equal treatment of women and men in the workplace; the second senate is responsible for discrimination in

employment and occupation covering all other grounds mentioned in art 13 ECT except disability. The third senate is responsible for the non-employment related scope of the Racial Equality Directive.

The functions of the chairpersons, who are heading the three senates, are held by federal civil servants appointed by the Minister of Health and Women [since December 2008: Federal Minister for Women and Public Service].

The members of the commission are performing their functions on an unsalaried voluntary basis. It took the minister until April 2005 to appoint the two new chairpersons. These structures started to work in May 2005.

The National Equality Body, which has been set up at the Federal Ministry of Health and Women [now Federal Ministry for Women and Public Service], is structured similarly to the Commissions' senates. This was broadening the mandate of the already existing institution, called "Gleichbehandlungsanwältin" (Office of the Ombud for Equal Employment Opportunities) which has been responsible for equal treatment of women and men at the workplace.

The provincial bodies are generally set up, staffed and financed by the provincial governments, provided with formal independence as regards content of their work but otherwise completely embedded in the provincial administration.

Following an amendment[76] to Art. 20/2 of the Federal-Constitution (B-VG) in January 2008 the "independent bodies" are finally formally independent in performing their functions. Nevertheless, practice shows that there is independence but for resources and budget. The financial resources for these bodies are still marginal in relation to the tasks assigned to them.

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

A major point of criticism in connection with independence is the composition of the senates of the Equal Treatment Commission. Senate II and Senate III are composed of members nominated by Ministers and Social Partners only. Although they can act independently as members of the Commission, the image is that the Commission consists of persons sent by institutions to represent those institution´s attitudes and political opinions.

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

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

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

- equal treatment of men and women in the workplace;
- equal treatment within the scope of directive 2000/78/EC excluding disability, including race and ethnic origin;
- equal treatment within the (rest) scope of directive 2000/43/EC for race and ethnic origin and recently gender regarding the scope of directive 2004/113/EC.

Upon request of the Office for Equal Treatment, of one of the interest groups represented in the given senates or on its own initiative, the responsible senate of the Commission has to give an expert opinion on questions related to the breach of the principle of equal treatment.

These expert opinions on whether a violation of the obligation to equal treatment had occurred have to be made public. The sessions of the senates are confidential and not open to the public.

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

Senate III, dealing with cases falling under the non-employment related scope of the directive 2000/43/EC also has to act upon request of an alleged victim.

Victims of discrimination can decide to be represented before the Commission by a representative of one of the interest groups represented in the responsible senate or by a NGO or by any other person he/ she trusts in.

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

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

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

National Equality Body (Anwaltschaft für Gleichbehandlungsfragen)

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

The National Equality Body is responsible for counselling and supporting victims of discrimination. To fulfil these functions, the Office can hold consultation-hours and consultation days in the whole federal territory.

Most importantly, they can conduct independent inquiries and surveys and publish independent reports and recommendations concerning all questions related to discrimination. So far no such reports have been published. Practice so far has shown that the new Ombuds already receive quite a respectable number of requests and complaints but do not have time (resources) for all other parts of their mandate.

In cases of alleged discrimination in relation to employment the National Equality Body can call upon the employee or enterprise concerned to comment on the case in writing. In further investigation, the National Equality Body 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 National Equality Body. If the National Equality Body 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 National Equality Body with the necessary inquiry. In this case the Body 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.

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

The National Equality Body can provide independent assistance to victims, conduct independent surveys and publish independent reports and issue recommendations on discrimination issues whereas the Equal Treatment Commission can issue recommendations and "expert opinions" [Gutachten].

e) Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).

Following an amendment to Art. 20/2 of the Federal-Constitution (B-VG)in January 2008 the "independent bodies" are finally formally independent in performing their functions. Nevertheless, practice shows that there is independence but for resources and budget. The financial resources for these bodies are still marginal in relation to the tasks assigned to them. Although detailed information about the budgets of all specialised bodies is not readily available, the National Equality Body seems to be the body where the discrepancy between resources and tasks is most obvious. Only few persons are employed to fulfil all the duties of the body related to all protected areas and all grounds except gender and disability.

A major point of criticism in connection with independence is the composition of the senates of the Equal Treatment Commission. Senate II and Senate III are composed of members nominated by Ministers and Social Partners only. Although they can act independently as members of the Commission, the image is that the Commission consists of persons sent by institutions to represent those institution´s attitudes and political opinions.

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

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

The National Equality Body has a legal standing in administrative penal procedures regarding discriminatory job advertisements.

g) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the

power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).

The role of the Equal Treatment Commission can be described as a quasi-judicial one. The decisions are not binding but can trigger a right of action (in court) for the institutions represented in the senate or the National Equality Body. Due to the non-binding nature of the decisions there is no appeal possible.

The Commission cannot impose sanctions and also has the duty to publish its findings in an anonymous form. “So there is no “naming and shaming”.

The question whether the decisions are well respected is hard to answer. One indicator might be that quite a large number of “defendants” [Antragsgegner] voluntarily uses professional legal representation in the process although these costs cannot be reimbursed even in case they win. This indicates that the decision might be feared while it remains unclear whether this fear is accompanied by respect.

Another issue is the treatment of opinions in court. Although courts have to use these opinions as pieces of evidence, their value is quite low, mainly due to the fact that the procedure before the Equal Treatment Commission does not even meet most of the basic procedural standards of courts.

As courts have to produce reasoned judgements in any case there is not much barrier for them to “overrule” a decision of the Equal Treatment Commission.

If we explore this question we see a notable preference of the National Equality Body in providing independent assistance to victims of discrimination in pursuing their complaints about discrimination while the other tasks are considerably underrepresented. The National Equality Body does publish biannual reports[77] (the latest one covering 2010 and 2011), which give a comprehensive insight into their work but are rather retrospective.

Until now the National Equality Body has published four so-called independent surveys of which three were dealing with discriminatory advertisement for housing and one with job-advertisement in regard to gender[78] and ten recommendations.

So the majority of the resources and means are invested into the dealing with individual complaints. Those are the most pressing duties as people rely on the institution and there are time limits to meet, In conclusion it can be stated that the supply of the National Equality Body with human resources is just too sparse in order to be - just by matter of fact – in the position to fulfill all the duties properly. This is a

[77] http://www.gleichbehandlungsanwaltschaft.at/site/7803/default.aspx.
[78] http://www.gleichbehandlungsanwaltschaft.at/site/6449/default.aspx.

clear limitation to its independence, as there is no real choice given the quite impressive numbers of individual complainants (e.g. 1229 non-gender complaints in 2011) finding their way to the National Equality Body.

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

At the moment, there are no such priorities by the specialised bodies. Both, the National Equality Body and the Equal Treatment Commission are just relating their work to complaints they receive. Given the rather poor equipment and budget of the National Equality Body, setting specific priorities seems hardly possible for them. Only an increase of their resources might trigger such activities. The National Strategy on Roma Integration has not been developed fully in 2012. There will be some development expected in this respect in 2013

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[79] 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.
Most of the widely visible activities have been taking place between 2004 and 2007.

During 2012, the National Equality Body and some specialised NGOs have conducted series of workshops and seminars for many different target groups.

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

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

The dialogue started informally, when the National Equality Body accepted the invitations of specialised NGOs and entered into a frequent informal exchange of thoughts and cooperation in individual cases in 2005.

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

The ministers in charge then continued this meeting policy and her successors held other annual meetings.

[79] Some informative brochures were financed by the government – including guidance in discrimination cases.(e.g. http://www.gleichbehandlungsanwaltschaft.at/DocView.axd?CobId=35606).

As these meetings are short single events planned to be held once a year it is a bit hard to call this a dialogue but it seems that both sides do not very actively strive for a more tight relationship.

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

Many NGOs dealing with disability are in constant contact with the competent Minister for Social Affairs and consider themselves well informed and involved.

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

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

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

d) *to specifically address the situation of Roma and Travellers. Is there any specific body or organ appointed on the national level to address Roma issues?*

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

Nevertheless, the government subsidizes or co-funds several projects targeting Roma. Some of them dealing with the long established Roma community in the province of Burgenland and some Equal and other European projects.[80] In 2007 especially in the course of the "Thara"-project (EQUAL) some events and publications have reached the interested public. In general, Roma issues are still quite invisible and usually not in the spotlight of public debates. Only in the course of the prohibition of public begging, Roma play an important role in the recent public discourse – as a target for stereotyping and repression.
Apart from this, the development of a National Strategy for Roma Integration has started in 2011 and was actually formulated in 2012. As one visible outcome of this , the Federal Chancellery set up a so-called "National Contact Point for Roma integration" in June 2012. So far it seems that this Contact Point is mainly

[80] Like INSETROM.

coordinating the governmental activities regarding the Roma strategy and caring for a corresponding “dialogue platform” which is also maintaining contacts with NGOs.

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

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

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

b) Are any laws, regulations or rules that are 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.

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

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

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

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

9 CO-ORDINATION AT NATIONAL LEVEL

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

In principle it is the task of the Federal Chancellery [Bundeskanzleramt] to coordinate the Activities for the implementation of the Directives within the ministries and the Provinces. The specialised bodies are also coordinated by the Federal Chancellery.

The Equal Treatment Act and the Federal-Equal Treatment Act are both coordinated and elaborated by the Federal Ministry for Labour, Social Affairs and Consumer Protection [Bundesministerium für Arbeit, Soziales und Konsumentenschutz. 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 Ministry for Labour, Social Affairs and Consumer Protection.

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

Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

There is no National Action Plan on neither issue. There had been some ideas in this direction in 2009 but nothing has actually happened. Some political parties are still interested in developing this idea further.

ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**
3. **Previous case-law**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the main transposition and Anti-discrimination legislation at both Federal and federated/provincial level

Name of Country: Austrai **Date: 1 January 2013**

Title of Legislation (including amending legislation)	Date of adoption: Day/month/ year	Date of entry in force from: Day/month/ year	Grounds covered	Civil/ Administrative/ Criminal Law	Material Scope	Principal content
Title of the law: Equal Treatment Act (Gleichbehandlungsgesetz) BGBl I Nr. 66/2004 Abbreviation: GlBG Latest amendments: BGBl I Nr. 7/2011 www.ris.bka.gv.at	23/06/2004 l.a.: 15/02/2011	01/07/2004	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
Title of the law: Federal-Equal Treatment Act (Bundes-Gleichbehandlungsgesetz) BGBl I Nr. 65/2004 Abbreviation: GlBG	23/06/2004 l.a.: 28/12/2012	01/07/2004	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation	Administrative and civil law	Public (Federal) employment	prohibition of direct and indirect discrimination, harassment, victimsation

Latest amendments: BGBl I Nr. 120/2012 www.ris.bka.gv.at						
Title of the law: Act on the Equal Treatment Commission and the Equal Treatment Office (Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft) BGBl I Nr. 66/2004 Abbreviation: GBK/GAW-G Latest amendments: BGBl I Nr. 7/2011 www.ris.bka.gv.at	23/06/2004 l.a.: 15/02/2011	01/07/2004	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation	Administrative Law	Creation of specialised bodies	Creation of specialised bodies
Title of the law: Act on the Employment of People with Disabilities (Behinderteneinstellungsgesetz) BGBl I Nr. 22/1970 idF BGBl I Nr. 82/2005 Abbreviation: BEinstG Latest amendments:	10/08/2005 l.a.: 15/02/2011 05/06/2012	11/08/2005	disability	Labour law, civil law	Employment, public/private	Prohibition of discrimination Special protection

BGBl I Nr. 7/2011, BGBl I Nr. 51/2012 (not yet in force) www.ris.bka.gv.at						
Title of the law: Federal Disability Equality Act (Behindertengleichstellungsgesetz), BGBl I Nr. 82/2005 Abbreviation: BGStG Latest amendments: BGBl I Nr. 7/2011 www.ris.bka.gv.at	10/08/2005 l.a. 15/02/2011	11/08/2005	disability	Civil law	Goods and services	accessibility
Title of the law: Federal Disability Act (Bundesbehindertengesetz) BGBl I Nr. 82/2005 Abbreviation: BBG Latest amendments: BGBl I Nr. 58/2011 www.ris.bka.gv.at	10/08/2005 l.a. 29/07/2011	01/01/2006	disability	Administrative Law	Ombud for People with Disabilities	Specialised Body
Styrian Equal Treatment Act (Steiermärkisches Gleichbehandlungsgesetz), LGBl Nr. 66/2004	28/10/2004 l.a. 06/07/2010	01/11/2004	gender, race or ethnic origin, religion or belief, disability,	Civil and administrative Law	Public (provincial) employment	prohibition of direct and indirect discrimination, harassment,

Abbreviation: Stmk-GlBG Latest amendments: LGBl Nr. 81/2010 www.ris.bka.gv.at			disability of a relative, age, sexual orientation (sexuelle Orientierung)			victimisation
Styrian Disability Act (Steiermärkisches Behindertengesetz) LGBl Nr. 26/2004 Abbreviation: Stmk. BHG Latest amendments: LGBl Nr. 83/2012 www.ris.bka.gv.at	25/06/2004 l.a. 19/06/2012	01/07/2004	disability	Administrative Law	Specialised institution	Installment of provincial "Ombud for people with disabilities" – general task to work on complaints. Discrimination not expressly mentioned
Styrian Agricultural Labour Relations Act (Steiermärkische Landarbeitsordnung) LGBl Nr. 39/2002 Abbreviation: STLAO Latest amendments: LGBl Nr. 35/2012 www.ris.bka.gv.at	12/04/2002 l.a. 20/04/2012	01/05/2006	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Civil and administrative Law	Employment of agricultural and forestry workers	prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution

Viennese Anti-Discrimination Act (Wiener Antidiskriminierungs-gesetz), LGBl Nr. 35/2004 Abbreviation: Wr-ADG Latest amendments: LGBl Nr. 88/2012 www.ris.bka.gv.at	08/09/2004 l.a. 31/12/2012	09/09/2004	race, ethnic origin, religion, belief, age, sexual orientation, sexual identity, gender, pregnancy, maternity	Civil and administrative Law	Non-employment scope of Directive 2000/43/EC	prohibition of direct and indirect discrimination, harassment, victimisation
Viennese Service Order (Wiener Dienstordnung); LGBl Nr. 42/2006 Abbreviation: WDO Latest amendments: LGBl Nr. 88/2012 www.ris.bka.gv.at	22/09/2006 l.a. 31/12/2012	23/09/2006	gender, race, ethnic origin, religion, belief, disability, age, sexual orientation (sexuelle Ausrichtung)	Civil and administrative Law	Public (provincial) employment	prohibition of direct and indirect discrimination, harassment, victimisation
Viennese Agricultural Labour Equal Treatment Act, (Wiener Land-und forstwirtschaftliches Gleichbehandlungsgesetz); LGBl Nr. 25/1980, Abbreviation: - Latest amendments: LGBl Nr. 15/2012	08/09/1980 l.a. 17/02/2012	16/07/2005	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Civil and administrative Law	Employment of agricultural and forestry workers	prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution

www.ris.bka.gv.at						
Lower Austrian Equal Treatment Act, (Niederösterreichisches Gleichbehandlungsgesetz); LGBl Nr. 69/1997 Abbreviation: NÖ GlBG Latest amendments: LGBl Nr. 109/2011 www.ris.bka.gv.at	11/07/1997 l.a. 15/09/2011	18/09/2004	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
Lower Austrian Anti-Discrimination Act (Niederösterreichisches Antidiskriminierungsgesetz); LGBl Nr. 45/2005 Abbreviation: NÖADG Latest amendments: LGBl Nr. 113/2011 www.ris.bka.gv.at	29/04/2005 l.a. 15/09/2011	30/04/2005	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, age, and sexual orientation, disability	Administrative and civil law	All forms of discrimination which are not covered in the Lower Austrian Equal Treatment Act. Different protection for ethnic affiliation and other grounds.	prohibition of direct and indirect discrimination, harassment, victimsation

Lower Austrian Agricultural Labour Relations Act (Niederösterreichische Landarbeitsordnung); LGBl Nr. 185/1973 Abbreviation: NÖLAO Latest amendments: LGBl Nr. 137/2012 www.ris.bka.gv.at	30/11/1973 l.a. 15/09/2011	27/09/ 2006	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Civil and administrative Law	Employment of agricultural and forestry workers	prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution
Carinthian Anti-Discrimination Act (Kärntner Antidiskriminierungsgesetz); LGBl Nr. 63/2004 Abbreviation: K-ADG Latest amendments: LGBl Nr. 11/2010 www.ris.bka.gv.at	28/12/2004 l.a. 10/03/2010	29/12/2004	gender, ethnic affiliation, religion or belief, disability, age, sexual orientation (sexuelle Ausrichtung)	Civil and administrative Law	Public (provincial) employment and non-employment scope. Comprehensive Anti-discrimination legislation	prohibition of direct and indirect discrimination, harassment, victimisation
Carinthian Agricultural Labour Relations Act (Kärntner Landarbeitsordnung); LGBl Nr. 97/1995 as amended by Nr. 60/2006 Abbreviation: KLAO	11/09/2006 l.a. 23/04/2012	12/09/ 2006	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Civil and administrative Law	Employment of agricultural and forestry workers	prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised

Latest amendments: LGBl Nr. 33/2012 www.ris.bka.gv.at						institution
Upper Austrian Anti-Discrimination Act (Oberösterreichisches Antidiskriminierungsgesetz); LGBl Nr. 50/2005 Abbreviation: OÖ-ADG Latest amendments: LGBl Nr. 68/2012 www.ris.bka.gv.at	06/05/2005 l.a. 31/07/2012	01/06/2005	gender, racial or ethnic origin religion, belief, disability, age, and sexual orientation	Administrative and civil law	Public (provincial) employment, goods & services, education, social matters (soziales), health	prohibition of direct and indirect discrimination, harassment, victimisation, provincial specialised office
Upper Austrian Agricultural Labour Relations Act (Oberösterreichische Landarbeitsordnung), LGBl Nr. 25/1989 as amended by Nr. 73/2005 Abbreviation: OÖ-LAO Latest amendments: LGBl Nr. 57/2012 www.ris.bka.gv.at	07/04/1989 l.a. 10/07/2012	30/07/2005	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Civil and administrative Law	Employment of agricultural and forestry workers	prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution

Salzburg Equal Treatment Act (Salzburger Gleichbehandlungs-gesetz); LGBl Nr. 31/2006 Abbreviation: S-GlBG Latest amendments: LGBl Nr. 66/2011 www.ris.bka.gv.at	31/03/2006 l.a. 04/08/2011	01/05/2006	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Administrative Law and civil law	Public (provincial) employment, goods & services, education, social matters (soziales), health	prohibition of direct and indirect discrimination, harassment, provincial specialised office
Salzburgian Agricultural Labour Relations Act (Salzburger Landarbeitsordnung), LGBl Nr. 7/1999 Abbreviation: S-LAO Latest amendments: LGBl Nr. 107/2012 www.ris.bka.gv.at	22/04/2009 l.a. 28/12/2012	23/04/2006	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Civil and administrative Law	Employment of agricultural and forestry workers	prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution
Tyrolian Equal Treatment Act (Tiroler Landes-Gleichbehandlungsgesetz); LGBl Nr. 1/2005 Abbreviation: T-GlBG Latest amendments: LGBl Nr. 150/2012	11/01/2005 l.a. 20/12/2012	12/01/2005	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Administrative Law, Civil Law	Public (provincial) employment,	prohibition of direct and indirect discrimination, harassment, victimisation,

www.ris.bka.gv.at						
Tyrolian Anti-Discrimination Act (Tiroler Anti-Diskriminierungsgesetz), LGBl Nr. 25/2005 Abbreviation: T-ADG Latest amendments: LGBl Nr. 150/2012 www.ris.bka.gv.at	31/03/2005 l.a. 20/12/2012	01/04/2005	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Administrative Law, Civil Law	goods & services, education, social matters, health reasonable accommodation for disabled persons	prohibition of direct and indirect discrimination, harassment, provincial specialised office
Tyrolian Equal Treatment Act for Municipalities (Tiroler Gemeinde-Gleichbehandlungs-gesetz); LGBl Nr. 2/2005 Abbreviation: T-GGlBG Latest amendments: LGBl Nr. 40/2008 www.ris.bka.gv.at	11/01/2005 l.a. 01/07/2008	12/01/2005	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Administrative Law, Civil Law	Public employment in municipalities	prohibition of direct and indirect discrimination, harassment, victimisation, (same as Equal Treatment Act)
Tyrolian Agricultural Labour Relations Act (Tiroler Landarbeitsordnung);	26/07/2005 l.a.	27/07/2005	gender, ethnic affiliation (ethnische Zugehörigkeit),	Civil and administrative Law	Employment of agricultural and forestry workers	prohibition of direct and indirect discrimination,

LGBl Nr. 27/2000 as amended by Nr. 61/2005 Abbreviation: T-LAO Latest amendments: LGBl Nr. 77/2011 www.ris.bka.gv.at	07/09/2011		religion, belief, disability age, and sexual orientation			harassment, victimisation provincial specialised institution
Tyrolian Provincial Teachers Employment Act (Tiroler Landeslehrer-Diensthoheitsgesetz); LGBl Nr. 74/1998 Abbreviation: T-LLDHG Latest amendments: LGBl Nr. 125/2012 www.ris.bka.gv.at	01/12/2005 l.a. 20/11/2012	01/01/2006	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Administrative Law	Employment of provincial teachers	provincial specialised institution for teachers (Equal Treatment Commission)
Vorarlbergian Anti-Discrimination Act (Vorarlberger Antidiskriminierungsgesetz), LGBl Nr. 17/2005 Abbreviation: V-ADG Latest amendments: LGBl Nr. 91/2012 www.ris.bka.gv.at	19/05/2005 l.a. 20/12/2012	01/06/2005	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Civil and administrative Law	Public (provincial) employment, goods & services, education, social protection, health	prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised office

Burgenlandian Anti-Discrimination Act (Burgenländisches Antidiskriminierungsgesetz), LGBl Nr. 84/2005 Abbreviation: B-ADG Latest amendments: LGBl Nr. 17/2010 www.ris.bka.gv.at	05/10/2005 l.a. 05/02/2010	06/10/2005	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Civil and administrative Law	Public (provincial) employment, goods & services, education, social protection, health	prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised office
Burgenlandian Agricultural Labour Relations Act (Burgenländische Landarbeitsordnung), LGBl 37/1977 Abbreviation: BLAO Latest amendments: LGBl Nr. 37/2012 www.ris.bka.gv.at	16/05/1977 l.a. 22/05/2012	17/06/2006	gender, ethnic affiliation (ethnische Zugehörigkeit), religion, belief, disability age, and sexual orientation	Civil and administrative Law	Employment of agricultural and forestry workers	prohibition of direct and indirect discrimination, harassment, victimisation provincial specialised institution

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Austria **Date: 1 January 2013**

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	13.12.1957	03.09.1958	No	Yes	Yes, it is part of the Federal Constitution
Protocol 12, ECHR	04.11.2000	Not ratified	N/A	N/A	N/A
Revised European Social Charter	07.05.1999	Not ratified	N/A	Ratified collective complaints protocol?	N/A
International Covenant on Civil and Political Rights	10.12.1973	10.09.1978	Exclusion of Habsburg-Lorraine family. Different treatment of Austrian nationals and aliens.	Yes	No
Framework Convention	01.02.1995	31.03.1998	Limitation to “national minorities” as defined	N/A	No

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	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?
for the Protection of National Minorities			by Law on Ethnic Groups		
International Convention on Economic, Social and Cultural Rights	10.12.1973	10.09.1978	No	No	No
Convention on the Elimination of All Forms of Racial Discrimination	22.07.1969	09.05.1972	No	Yes	No
Convention on the Elimination of Discrimination Against Women	17.07.1980	30.04.1982	No	Yes	No
ILO Convention No. 111 on Discrimination	10.01.1973	10.01.1973	No	N/A	No
Convention on the Rights of the Child	26.08.1990	06.08.1992	No	N/A	No

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of Persons with Disabilities	30.03.2007	26.09.2008	No	Yes	No

ANNEX 3 PREVIOUS CASE-LAW

Name of the court
Date of decision
Name of the parties
Reference number (or place where the case is reported).
Address of the webpage (if the decision is available electronically)
Brief summary of the key points of law and of the actual facts (no more than several sentences).

A. Sexual orientation/ harassment

Name of the court: Landesgericht Salzburg
Date of decision: 14 July 2006
Name of the parties: withheld due to respect of privacy
Reference number: Nr. 18Cga120/05t
Address of the webpage: searchable database www.ris.bka.gv.at and a commentary (German) at http://www.klagsverband.at/fall/Falldoku_Ge-1.pdf
Brief summary: The court, acting as a labour tribunal of first instance ruled on a case of an openly homosexual truck driver who had been harassed by two employees of a cargo company.

The harassers are not direct colleagues of the victim but worked for the biggest client of the cargo company that employed him. The two respondents had been harassing the victim for a period of more than two years with intimidating verbal assaults. When they started to ask everybody whom they found talking to the victim, whether they were also gay, the truck driver became more and more isolated and decided to complain. The complaint was backed by his employer, who had intervened on behalf of the complainant, but to no permanent positive effect. So the driver decided to go to court. The Litigation Association of NGOs against Discrimination intervened in support of the claim.

The court found that this was a severe case of harassment on the basis of sexual orientation and also sexual harassment (under § 21/1/3 and § 7/1/3 Equal Treatment Act].

The victim was awarded compensation of 400 Euros from each harasser, which is the minimum amount set out by the Equal Treatment Act. The court nevertheless stated clearly that he would deserve much more than this.
It was a decision of the victim himself to go for the minimum only as he wanted a “decision on the principle”. There was no additional sanction.

B. Refusal to provide travel insurance to a person with a disability

Name of the court: BG HS Wien [District Court Commercial Cases, Vienna]
Date of decision: 16 October 2006

Name of the parties: withheld due to respect of privacy
Reference number: Nr. 001 C 133/08b-9
Address of the webpage: Report about the case [German] at: http://www.klagsverband.at/archives/870
Brief summary: The plaintiff is a man who is using a wheelchair and has had a travel insurance contract with an insurance company for many years. He is a passionate traveller and so far there have been no payments made to him by the company. When he expressed his wish to extend the duration of his insurance contract, this was refused by the insurance company with the explanation that given his disability, further insurance was not possible.

The attempt to settle the dispute before the Federal Social Service failed due to the reluctance of the respondent to acknowledge discrimination. So the plaintiff filed a claim with the ordinary court.

In the course of the proceedings, the respondent fully acknowledged direct discrimination on the ground of disability and agreed to pay the claimed amount of Euro 1.500,-- in compensation for immaterial damages and the cost of the proceedings (Euro 1.200,--).

So the court only had to accept the full acknowledgement and decide fully in favor of the plaintiff without examining the substance of the case. The decision is final.

C. Ethnic origin discrimination – access to goods and services – harassment

Name of the court: LG for ZRS Wien
Date of decision: 30 March 2007
Name of the parties: Hayet B. vs. Ferdinand S.; intervention by Litigation Association of NGOs against Discrimination
Reference number: Nr. 35R68/07w; 35R104/07i
Address of the webpage: searchable database www.ris.bka.gv.at ; commentary (German) on http://www.klagsverband.at/fall/gericht2.pdf
Brief summary: The Court of appeal ruled in a case of a woman of Tunisian origin who had been physically kicked out of a fashion store with the words “we do not sell to foreigners” in Vienna. The court held that this constituted discrimination and harassment on the ground of ethnic affiliation and awarded 800,- Euros (vs. 400,-- Euros in the first instance) in compensation for immaterial damages. It stated that it was irrelevant whether the plaintiff was in fact a foreigner or an Austrian citizen of Tunisian origin.

D. Disability discrimination – reasonable accommodation

Name of the court: Administrative High Court (Verwaltungsgerichtshof)
Date of decision: 17 December 2007
Name of the parties: K. vs. Österreichische Post AG
Reference number: Nr. 2006/12/0223

Address of the webpage: searchable database www.ris.bka.gv.at
Brief summary: In this ruling the court held that the duty to reasonable accommodation does not comprise the duty to "empty" suitable posts which are held by able bodied civil servants in order to avoid disadvantages, including dismissal of a disabled person who has become unable to serve on his post. The court stated that such a dismissal of an able bodied person would constitute discrimination on the ground of disability.

Here "redeployment" was an issue - where an individual employee became disabled and could not continue to perform his existing job, but alternative suitable positions were already held by other (able bodied) employees.

E. Age discrimination –ECJ preliminary ruling C 88/08

Name of the court: European Court of Justice
Date of decision: Austrian Supreme Court: 07 February 2008; ECJ: 18 June 2009
Name of the parties: David Hütter vs. Technische Universität Graz [Graz University of Technology]
Reference number: Nr. 9ObA34/07a; ECJ C 88/08;
Address of the webpage: searchable database www.ris.bka.gv.at; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0088:EN:HTML
Brief summary:
Question to the ECJ:

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

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

"Articles 1, 2 and 6 of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded.

Even if aims of that kind must, in principle, be considered to justify objectively and reasonably, within the context of national law, as provided in the first subparagraph of Article 6(1) of Directive 2000/78, a difference in treatment on the ground of age prescribed by Member States, such legislation cannot, however, be regarded as appropriate for achieving those aims within the meaning of that provision. The criterion of the age at which the vocational experience was acquired does not appear appropriate for achieving the aim of not treating general education less favourably than vocational education, as that criterion applies irrespective of the type of education pursued. As regards the aim of promoting integration into the labour market of young people who have pursued a vocational education, such national legislation, since it does not take into account people's age at the time of their recruitment, is not appropriate for the purposes of promoting the entry into the labour market of a category of workers defined by their youth."

F. Age discrimination – equal pay – apprentice

Name of the court: Supreme Court (Oberster Gerichtshof)
Date of decision: 07 February 2008
Name of the parties: Melanie O. vs. Johann H.
Reference number: Nr. 9ObA76/07b
Address of the webpage: searchable database www.ris.bka.gv.at;
Brief summary: The Supreme Court found no age discrimination in the case brought by a 17 year old apprentice against her employer because of an unequal pay regulation in § 1a of the Act on the Employment of Children and Youth which demands for a different basic salary and calculation of overtime hours for apprentices below and above the age of 18.

The court held that the differential treatment is not based "only on the ground of age" but on the completely different potential of the two groups. This different potential is created by the Act on the Employment of Children and Youth itself which has the basic aims to protect youth workers and therefore limits the ways the younger workers can be deployed. The court states that – referring to Art. 6 of Directive 2000/78/EC – this difference is objectively justified by legitimate aims of educational policy and necessary protection of youth.

G. Supreme Court decision on interpretation of burden of proof regulation in discrimination cases

Name of the court: Supreme Court (Oberster Gerichtshof)
Date of decision: 09 July 2008
Name of the parties: Anna R. vs. G.
Reference number: Nr.: 9ObA177/07f
Address of the webpage: searchable database
http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20080709_OGH0002_009OBA00177_07F0000_000

Brief summary: The Supreme Court adjudicated the appeal [Revision] in a case of a woman who had claimed that she had been discriminated against by a potential employer, who had accepted her application, interviewed her and then offered the job to a younger male candidate. The Equal Treatment Commission had found this to be discrimination on the grounds of gender and age, because it was not satisfied with the defendants explanations. Nevertheless, the courts of first and second instance both found no discrimination, ruling that the plaintiff had not been able to establish facts from which it may be presumed that there has been discrimination.

The Supreme Court came to the same conclusion and addressed several important issues regarding the question of the burden of proof:

a) Interpretation of national norms in line with the Directive:
The Court clearly states that the Austrian provisions on the burden of proof have to be understood as being in line with the Directive (in this case 2000/78/EC) meaning that: In case the establishment of discriminatory infringements is successful – it is for the respondent to prove that he or she did not discriminate.
b) What is a successful establishment of facts [Glaubhaftmachung]?

The Court clearly says: “Establishing facts is generally successful in case the judge is convinced of the plausibility of certain facts. The national and European regulations on the burden of proof are not providing a guideline for the courts to assess evidence in favor of any of the parties.”

“The establishment of prohibited motives is only possible by way of circumstantial evidence [Indizienbeweis] – a process facilitated by the lowered burden of proof. Whether or not certain facts are qualified to establish the causality of certain prohibited (discriminatory) motives, can only be judged by assessing the individual overall situation.”

The decision also implies very clearly that the mere fact that the successful candidate for a job is of a different age or gender does not trigger the reversal of the burden of proof. Plaintiffs will need more evidence in order to establish their case. They will need some evidence for a discriminatory motive in order to have the benefit of a shift of the burden of proof.

H. Health Insurance Fund: Age discrimination by refusal of contracting with a 55-year old medical doctor

Name of the court: Supreme Court (Oberster Gerichtshof)
Date of decision: 18. July 2011
Name of the parties: Dr. H. L. vs. Oberösterreichische Gebietskrankenkasse.
Reference number: Nr.: 60b246/10k
Address of the webpage: searchable database

http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20110718_OGH0002_0060OB00246_10K0000_000
Brief summary: The Supreme Court decided on an appeal by the Upper Austrian Health Insurance Fund who had not concluded a contract with the plaintiff - a medical doctor in general practice -, giving the reason that he was already 55 years old. This represented a general practice explicitly written down in a framework-contract called "Directive for the selection of contracted doctors" which had been agreed on by the Upper Austrian Chamber of Medical Doctors and the Upper Austrian Health Insurance Fund.

The reasoning of the Health Insurance Fund was that "candidates of such senior age" have to produce above-average revenues to refinance the necessary investments. They also argued that it was to be assumed that those doctors would artificially increase the quantity of their work and at the same time decrease the quality thereof. The fund furthermore feared that older doctors would be "less open to investment and not willing to attend measures of in-service-training".
The Supreme Court found that this was a clear-cut case of age discrimination (referring to both – the EU-Charter of Fundamental Rights and § 17 of the Austrian Equal Treatment Act) and ruled that the concerns expressed by the respondent were in no way sufficient to allow for an exception to the general prohibition of discrimination on the ground of age.

I. Public Broadcasting Corporation: Commercial production of DVD without subtitles indirectly discriminates against deaf persons

Name of the court: Viennese Commercial Court (Handelsgericht Wien)
Date of decision: 8.September 2011
Name of the parties: Lukas H. vs.ORF
Reference number: Nr.: 60R93/10x
Address of the webpage: http://www.klagsverband.at/dev/wp-content/uploads/2008/06/hg-wien-60r93_10x.pdf
Brief summary: The Austrian Broadcasting Corporation (ORF) had been sued by the deaf plaintiff, who had bought a DVD produced and sold by ORF, which was not accessible to him as there were no subtitles. The Court – acting as a court of appeal – clearly upheld the first instance courts finding of indirect discrimination according to § 5/2 Federal Disability Equality Act and ruled that the compensation for immaterial damages was to be increased from € 700,-- to € 1.000,-- (as the plaintiff had demanded).