



**COUNTRY STUDY: AUSTRIA**  
**THE IMPLEMENTATION OF**  
**COUNCIL DIRECTIVES**  
**43/2000/EC AND 78/2000/EC**

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## TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	iii
CHAPTER I. Introduction .....	1
I.1. Methodology.....	1
I.2 Introduction to the Issue .....	2
CHAPTER II. Implementation of Council directives 43/2000/EC and 78/2000/EC .....	4
II.1. Council directive 43/2000/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin .....	5
II.1.1 The preamble .....	5
II.1.2 Articles 1 – Purpose - and Article 2 – Concept of discrimination .....	5
II.1.3 Article 3 – The scope of the directive .....	6
II.1.4 Article 4 – Genuine and determining occupational requirements .....	7
II.1.5 Article 6 – Positive Action.....	8
II.1.6 Article 7 – Defence of rights .....	8
II.1.7 Article 8 – Burden of proof.....	11
II.1.8 Article 9 – Victimisation.....	11
II.1.9 Article 10 – Dissemination of information .....	11
II.1.10 Article 11 – Social dialogue .....	12
II.1.11 Article 12 – Dialogue with NGOs.....	12
II.1.12 Article 13 – Bodies for the promotion of equal treatment .....	14
II.1.13 Article 14 – Compliance.....	18
II.1.14 Article 15 – Sanctions .....	18
II.1.15 Article 16 – Implementation.....	18
II.2. Council directive 78/2000/EC establishing a general framework for equal treatment in employment and occupation .....	19
II.2.1 Article 1 – Purpose and Article 2 – Concept of Discrimination .....	19
II.2.2 Article 3 – Scope .....	19
II.2.3 Article 4 – Occupational Requirements .....	20
II.2.4 Article 5 – Reasonable accommodation for disabled persons .....	21
II.2.5 Article 6 – Justification of differences of treatment on grounds of age .....	21
II.2.6 Article 7 – Positive Action.....	22
II.2.7 Article 8 – Minimum requirements .....	22
II.2.8 Article 9 – Defence of rights .....	22
II.2.9 Article 10 – Burden of proof.....	25
II.2.10 Article 11 – Victimisation.....	25
II.2.11 Article 12 – Dissemination of Information .....	26
II.2.12 Article 13 – Social Dialogue .....	26
II.2.13 Article 14 – Dialogue with non-governmental organisations .....	26
II.2.14 Article 15 – Northern Ireland .....	26
II.2.15 Article 16 – Compliance.....	26
II.2.16 Article 17 – Sanctions .....	27
II.2.17 Article 18 – Implementation.....	27
II. 3. The Implementation of the Directive with regards to People with Disabilities .....	27
II.3.1. General Information.....	27
II.3.1.1 The principle of equal treatment in respect of people with disabilities .....	28
II.3.1.2 The exception from the principle of equal treatment when the discrimination is objectively justified.....	28

II.3.2.1 Financial claims upon violation of the principle of equal treatment for people with disabilities .....	29
II.3.2.2 Challenge of termination.....	29
II.3.3. Time limits .....	30
II.3.4. Burden of Proof.....	30
II.3.5. The Organization of the Arbitration Board and the Advocacy for People with Disabilities .....	30
II.3.6. Procedure.....	31
 CHAPTER III. Overview over jurisprudence on grounds of discrimination as put forth in Art 13 of the EC-Treaty.....	 32
 CHAPTER IV. General situation of discrimination .....	 34
IV.1. Racial or ethnic origin.....	35
IV.2. Religion or belief .....	37
IV.3. Disability.....	38
IV.4. Age.....	39
IV.5. Sexual Orientation .....	41
 CHAPTER V. Judicial Training in Austria .....	 42
V.1. Pre-service training .....	42
V.2 In-service training .....	43
 CHAPTER VI. Conclusions and Recommendations .....	 44
 BIBLIOGRAPHY .....	 45
 TABLE OF LAWS .....	 46
 TABLE OF CASES .....	 47

## LIST OF ABBREVIATIONS

ASGG	Arbeits- und Sozialgerichtssgesetz (Federal Act on Labor and Social Courts)
BEinstG	Behinderteneinstellungsgesetz (Federal Act on the Employment of people with disabilities)
BGStG	Behindertengleichstellungsgesetz (Federal Act on Equal Opportunities for people with disabilities)
CERD	International Convention on the Elimination of All Racial Discrimination)
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court on Human Rights
EEA	European Economic Area
EEC	European Economic Community
ETC	European Training and Research Centre for Human Rights and Democracy
EU	European Union
GA	General Assembly
GBK/GAWG	Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft (Federal Act on The Equal Treatment Commission and the Equal Treatment Advocacy)
GIBG	Bundesgesetz über die Gleichbehandlung (Federal Act on Equal Treatment)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OLG	Oberlandesgericht (Court of Appeals)
StGG	Staatsgrundgesetz (Basic Law on the General Rights of Nationals)
ZPO	Zivilprozessordnung (Civil Procedure Code)

## **CHAPTER I. Introduction**

### **I.1. Methodology**

The present study on the situation of anti-discrimination and equal treatment law in Austria is a part of a survey which serves as a prerequisite for the implementation of anti-discrimination training in the both the pre-service and in-service education of judges and prosecutors in Austria.

In the framework of the EU-project “*Development and Implementation of a Non-Discrimination Pre-Service and In-Service Training Programme for Judges and Prosecutors on the Basis of Human Rights Education*”, the European Training and Research Centre for Human Rights and Democracy cooperates closely with the legal defence bureau NEKI, Budapest/Hungary, the Centre for Environmental Public Advocacy CEPA, Slovakia and the MIROVNI Institute, Ljubljana, Slovenia and the respective national authorities responsible for the training curricula for future and sitting judges and prosecutors. In order to be able to carry out the trainings, e.g. to elaborate the curriculum and the material, the analysis of the situation of the training method and content of the training at that stage had to be carried out in the first instance. Moreover, the state of anti-discrimination legislation had to be analyzed. Here the implementation of the EC directives 43/2000/EC and 78/2000/EC was of utter importance, as they enlarge the prohibition of discrimination and increase the protection of people discriminated against on the grounds of ethnic origin, age, sexual orientation, religion or belief and disabilities. As the method of implementation varies from country to country, the system of the directives is mirrored in the analysis of the implementation; only through this step it was possible to compare the different kinds and degrees of implementation. This assessment of the state of national legislation on non-discrimination can be found after the introductory chapter in Chapter II.

Chapter III subsequently features an overview over jurisprudence on the grounds of discrimination as put forth in Article 13 of the EC-treaty. For Austria, more decisions were found than for the other countries, as it joined the European Union in 1995, almost 10 years prior to Hungary, Slovakia and Slovenia.<sup>1</sup>

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<sup>1</sup> On 1 May 2004, Hungary, Slovakia and Slovenia joined the European Union together with 7 other countries.

The general discrimination, again split up according to the grounds of discrimination, but this time those mentioned in the two directives, in Austria is analyzed in Chapter IV in order to transport the state of vulnerable groups at this moment.

Consequently, the judicial training was also examined with a focus on anti-discrimination training in Chapter V. The outcome and the conclusions and recommendations resulting from them are contained in Chapter VI.

## **I.2 Introduction to the Issue**

In the Austrian legal system anti-discrimination or equal treatment laws have been introduced in different ways. Most important to note for the purpose of this survey is the *acquis communautaire* which had to be implemented into Austrian law upon the accession to the European Community and the European Union on January 1<sup>st</sup>, 1995. Up to now, equal treatment and anti-discrimination as governed by community law can be found in the rules regulating the labour market for women in general, parents, foreigners and, for example, people with disabilities.

With the directives 43/2000/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, commonly known as the directive on anti-racism, and 78/2000/EC establishing a general framework for equal treatment in employment and occupation, it became necessary to amend the already existing laws on equal treatment in Austria. This meant reformulating old norms and introducing new ones. The principle of equal treatment is enshrined on different levels and to different extents in the Austrian legal order.

On the constitutional level, the principle of equality of all citizens dates back to the year 1867, when the *Staatsgrundgesetz*<sup>2</sup> was implemented. Its Article 2 contains a general clause on the equality of all citizens, and its Article 3 para 1 provides for equal accessibility of civil service posts for all citizens.<sup>3</sup> The principle of equality is also contained in the Austrian constitution, namely in Article 7 of the Constitution:

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<sup>2</sup> The *Staatsgrundgesetz* (Basic Law on the General Rights of Nationals) is the oldest constitutional law of Austria which is still in force.

<sup>3</sup> Art 3 para 1 *Staatsgrundgesetz* reads as follows: “Public Offices are equally accessible for all citizens” (note: this is not an official translation).

*“All Citizens are equal in front of the law. Privileges because of birth, gender, status, class or confession are barred.”<sup>4</sup>*

Equality in law now means that differentiations between men and women are only legitimate, if they can be objectively justified. This provides only for de-jure equality between women and men. The principle of de-facto equality only found its way into Austrian Constitutional law through the extension of the principle of equality in 1998.<sup>5</sup>

The first law on equal treatment for women and men dates back to 1979 and regulated the private sector of economy, in its original way only equality in pay. The law represents the implementation of several ILO-Conventions.<sup>6</sup> Until Austria entered the period of its accession to the European Economic Area and to the European Community/European Union, this equal treatment law existed as the only legislation on equal treatment. For this reason, Austria implemented the Federal Act on Equal Treatment in 1993 covering employees of the Federal state and persons, who receive vocational training or re-training by the Federal state.<sup>7</sup>

On the level of the nine provinces, equal treatment acts have also been implemented since 1997. Until the implementation phase for the Council directives 43/2000/EC and 78/2000/EC expired, Austrian equal treatment law was in conformity with European law.

On 26 May 2004, the Austrian parliament adopted government bill 307 with a few material changes. The equal treatment law as it can be found now in Austrian legislation, claims to be in conformity with EU-law.

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<sup>4</sup> Note: this is not an official translation.

<sup>5</sup> Ulrich, Silvia, Innerstaatliche Dimensionen, in: Neuhold B./Pirstner R./Ulrich S., Menschenrechte – Frauenrechte: Internationale, Europarechtliche und Innerstaatliche Dimension (2003), Studienverlag: Innsbruck, pp. 228.

<sup>6</sup> Ibid p. 251.

<sup>7</sup> Ibid p. 252.

## **CHAPTER II. Implementation of Council directives 43/2000/EC and 78/2000/EC**

Council directive 43/2000/EC should have been implemented until July 19<sup>th</sup>, 2003 according to Article 16 of the directive. Council directive 78/2000/EC should have been implemented by December 2<sup>nd</sup>, 2003. Until May 26<sup>th</sup>, 2004, the Austrian legislator did not achieve these goals, which made the two directives, according to the law of the European Community, directly applicable. The two directives were intended to be worked into the already existing Austrian equal treatment law, together with Council Directive 73/2002/EC which is to be implemented by October 5<sup>th</sup>, 2005.

The subsequently elaborated Government Bill 307 (of the Blg XXII GP)<sup>8</sup> had been assigned to the equal treatment caucus in parliament. Interestingly, the bill did not cover people with disabilities. Therefore an amendment to the existing law on the employment of people with disabilities as well as a new law governing the prohibition of discrimination against people with disabilities outside work and occupation still needs to be adopted<sup>9</sup>.

On May 26<sup>th</sup>, 2004 the Austrian parliament adopted Government Bill 307 with some changes and forwarded it to the Federal Council, where it was adopted on June 9<sup>th</sup>, 2004. It entered into force on 1 July 2004.

Subsequently, the nine provinces of Austria, are also obliged to either amend their already existing laws or to pass new equal treatment laws. As of 9 December 2004, only Styria, Lower Austria and Vienna have done so.

Styria passed its Equal Treatment Act on 1 July 2004, which entered into force on 1 November 2004.<sup>10</sup> Lower Austria amended its old law to be in conformity with the obligations of both council directives.<sup>11</sup> Vienna has passed an amendment to its equal treatment act<sup>12</sup> and a separate Anti-Discrimination Act, handling the implementation of Council directive 43/2000/EC.<sup>13</sup>

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<sup>8</sup> „Bundesgesetz, mit dem ein Bundesgesetz über die Gleichbehandlung (Gleichbehandlungsgesetz - GIBG) erlassen und das Bundesgesetz über die Gleichbehandlung von Frau und Mann im Arbeitsleben (Gleichbehandlungsgesetz) geändert werden“, BGBl I 66/2004, 23 June 2004.

<sup>9</sup> Bundesgesetz, mit dem ein Bundesgesetz über die Gleichstellung von Menschen mit Behinderungen (Behindertengleichstellungsgesetz – BGStG) und ein Bundesgesetz über die Schlichtungsstelle beim BMSG und die Behindertenanwaltschaft (Schlichtungsstellengesetz – SchlStG) erlassen sowie das BEinstG geändert wird - Ministerialentwurf vom 8.4.2004, 151/ME NR XXII GP.

<sup>10</sup> Styrian Equal Treatment Act, LGBl 2004/66, 28 October 2004.

<sup>11</sup> Lower Austrian Equal Treatment Act, LGBl 2004/65, 17 September 2004.

<sup>12</sup> Vienna Equal Treatment Act, LGBl 2004/15, 26 April 2004

<sup>13</sup> Vienna Anti-Discrimination Act, LGBl 2004/35, 8 September 2004.

## **II.1. Council directive 43/2000/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**

### **II.1.1 The preamble**

### **II.1.2 Articles 1 – Purpose - and Article 2 – Concept of discrimination**

Those two articles lay down the purpose of the directive, Article 1, and the concept of discrimination, Article 2. Where the first Article clearly states what aim the directive and the implementing legislation should achieve, Article 2 sets the frame of what discrimination is and what constitutes harassment.

The implementing legislation in Austria is split up, therefore, the whole directive 43/2000/EC is also implemented in different places of the law. The second and the third part contain the norms governing equal treatment irrespective of racial or ethnic origin. The law omits the terminology of “racial origin”, and refers only to ethnic origin. The definition of discrimination can therefore be found in two different places in the implementing legislation, but the wording is exactly the same.

When it comes to equal treatment in work and occupation irrespective of ethnic origin, the definition of discrimination, harassment and exceptions can be found in the second part of the law §§ 19 (definitions) and 21 (harassment) GIBG. The wording of the definitions of direct and indirect discrimination is almost identical to those in the part concerning equal treatment outside of work and occupation in § 32 of GIBG. The only difference is that the first one concerning equal treatment in work and occupation deals with more than one ground of discrimination, namely ethnic origin, religion or belief, age and sexual orientation.

Concerning harassment, the definitions in §§ 21 (2) and 34 GIBG again almost word by word translate the wording of the directive into Austrian law. However, § 21 (1) GIBG also states who can be a perpetrator of harassment and what conduct may constitute harassment. For the employer, direct harassment in § 21 (1) 1 GIBG, and the failure of stopping a third party from harassing an employee in § 21 (1) 2 GIBG, constitute harassment. Third parties can also harass, in relation to an employment and outside of such according to § 21 (1) 3 and 4 GIBG.

In § 34 GIBG, no such distinction can be found. This arises out of the fact that the third part, in which § 34 GIBG is situated, deals with equal treatment outside of work and occupation.

### **II.1.3 Article 3 – The scope of the directive**

The scope of the directive can be split in two parts, work-related issues and others. This is exactly what the Austrian legislator has done, when he drafted the second and the third part of the implementing legislation. Article 3 (1) (a) to (d) can be found in §§ 16, 17 (1) and 18 GIBG. § 16 GIBG determines the field of application of the law. However, it has to be read together with §§ 17 and 18 GIBG, which deal with the details of the principle of equal treatment in work and occupation, as for example working conditions, as demanded in Article 3 of the directive, are only mentioned there and not in the field of application.

According to § 1 Abs 3 GIBG, section I of the GlbG is not only applicable for the relationship between employers and employees based on a labour contract, but also for forms of cooperation, that are literally no labour contract and, however, result for the weaker party of the contract in a similar, dependent economic situation. Therefore, all kinds of discrimination on the grounds of the contractor's sex and his or her marital status are banned also for so-called irregular employments.

This is also true for discrimination on the grounds of race or ethnic origin according to § 16 GlbG, as far as the discriminatory act is related to work and employment.

Due to constitutional reasons the GlbG is not applicable for employment in the public sector according to § 2 Abs 2 GlbG (see also § 16 (2) GIBG). This is true for civil servants as well as for the other executives, the so-called "Vertragsbedienstete"<sup>14</sup>. For these groups of employees, special legislation ought to exist. For federal civil servants, the relevant law is the Bundes – GleichbehandlungsG (B-GBIG BGBl 100/1993, idF BGBl I 65/2004), for civil servants of the provinces the respective law of the province. For civil servants and executives employed at communal level further special legislation is required. For constitutional reasons<sup>15</sup> special legislation is required for employees in the agricultural sector, as well. The legal situation for employees in the public sector and in agriculture is

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<sup>14</sup> Vertragsbedienstete are employees in the public sector, who only have a contract, but no fix employment.

<sup>15</sup> Article 12, number 6 of the Austrian Constitution.

therefore quite complex, so that it is difficult for the parties involved to assert the rights arising from the EC-directives.

Article 3 (1) (a) is implemented through § 17 (1) number 1 (access to employment) GIBG, § 18 number 3 (access to self-employment) GIBG, § 17 (1) number 5 (professional hierarchy, including promotion) GIBG. Article 3 (1) (b) equals § 17 (1) number 4 and § 18 number 1 (access to all types and levels of vocational guidance, vocational training, advanced vocational training and retraining) GIBG .

§ 17 (1) number 2, number 6 and number 7 GIBG contain employment and working conditions, including dismissal and pay, as put forth in Article 3 (1) (c) of the directive. Additionally, § 17 (1) number 3 GIBG contains the prohibition of discrimination when it comes to voluntary social services which do not constitute pay.

Last but not least, the membership of and involvement in an organisation of workers or employers as demanded in Article 3 (1) (d) can be found in § 18 number 2 GIBG.

For the third part, the scope of the directive was implemented in § 30 (1) GIBG. Opposite to what was said about the first four numbers in Article 3 and their split implementation, Article 3 (1) (e) to (g) of the directive have been implemented word by word and can be found in § 30 (1) number 1 to 4 GIBG. Equally, the principle of equal treatment is then set forth in § 31 GIBG, again showing a translation and implementation word by word.

Article 3 (2), difference of treatment based on nationality, is implemented in § 17 (2) GIBG and § 31 (2) GIBG.

#### **II.1.4 Article 4 – Genuine and determining occupational requirements**

As long as a characteristic related to ethnic origin constitutes a genuine and determining occupational requirement and as long as the objective is legitimate and the requirement is proportionate, a difference of treatment does not constitute discrimination. The Austrian legislator has implemented this principle of Article 4 of the directive in § 20 (1) GIBG. Attention has to be given to the fact that § 20 GIBG regards, again, the grounds of ethnic origin, religion or belief, age and sexual orientation.

### **II.1.5 Article 6 – Positive Action**

Positive action to compensate or prevent disadvantages linked to ethnic origin, colloquially called positive discrimination is not prohibited by the directive, rather contrary, it is permitted. In §§ 22 and 33 GIBG of the implementing legislation, positive actions are also provided for and do not constitute discrimination.

### **II.1.6 Article 7 – Defence of rights**

According to Article 7 (1) the member states have to ensure that appropriate proceedings, either judicial or administrative, are available for all persons who consider their right to equal treatment violated. The implementing legislation offers two possibilities, but the first one in § 24 GIBG, entitled criminal sanctions, only applies when § 23 GIBG, the imperative of gender-neutral job-posting, has been violated. Employer and placement officers, who violate this imperative, face an administrative criminal proceeding and a fine of up to €360. An employer, who for the first time is in violation, only receives a warning. § 26 GIBG then offers various proceedings depending on how the discrimination expressed itself.

Was the employment contract not settled, because § 17 (1) number 1 GIBG, the prohibition of discrimination in accessing employment, was violated, the applicant for the post is entitled to compensation for the property loss and damages compensating the sustained personal impairment according to § 26(1) GIBG. This may amount up to one-month's-salary, if the applicant would have gotten the post, would the selection have been non-discriminatory or up to €500,00 if the employer can prove that the only loss was that the consideration of the application had been denied.

According to § 26 (2) GIBG, an employee who does not receive equal pay for equal work in violation of § 17 (1) number 2 GIBG, she or he is entitled to the difference in pay and to damages compensating the sustained personal impairment.

In § 26 (3) GIBG, the law provides for compensation should a voluntary social service have been denied in a discriminatory manner, as this would be a violation of § 17 (1) number 3 GIBG. The employee is entitled to the respective social service or the compensation for the loss in property and to damages compensating the sustained personal impairment.

Should an employee not have been allowed to participate in training and retraining as provided for in § 17 (1) number 4 GIBG, she or he is entitled to participate or to compensation for the property loss and damages compensating the sustained personal impairment according to § 26 (4) GIBG.

Has the employee not been considered for promotion in violation of § 17 (1) number 5 GIBG, she or he is entitled to compensation for the property loss and damages compensating the sustained personal impairment from the employer according to § 26 (5) GIBG. The compensation of the property loss is either the difference in pay for three months for the position to which the employee would have been promoted if the choice had been non-discriminatory, or up to €500,00, where the employer can prove that the only loss was that the consideration of the application had been denied.

As working conditions have to be the same for all employees, a discriminatory denial of or difference in such conditions constitute a violation of § 17(1) number 6 GIBG. The employee, according to § 26 (6) GIBG, is entitled to the same working conditions as all other employees in similar positions or to a compensation of the property loss and damages for the sustained personal impairment.

Has the employer dismissed the employee because of a reason mentioned in § 17 GIBG or because of the, not obviously unjustified, assertion of claims arising out of the law on equal treatment, before the time or has the employer ended the employment before the time, this dismissal or layoff can be challenged in front of a court according to § 26 (7) GIBG.

According to § 26 (8) GIBG, every employee, whose right to take part in training and retraining according to § 18 number 1 GIBG has been violated, is entitled to either take part in the training, or to compensation for the property loss and damages for the sustained personal impairment.

Has the employee been denied the right to participate in or be a member of an organisation of workers or employers as put down in § 18 number 2 GIBG, she or he may participate in and be a member of such organisation and may consume the services of such organisation, or she or he is entitled to compensation of the property loss and damages for the sustained personal impairment (§ 26 (9)) GIBG. When the access to self-employment (§ 18 number 3 GIBG) has been barred for a person on a discriminatory basis, she or he is entitled to compensation for the property loss and damages for the sustained personal impairment as put down in § 26 (10) GIBG.

In the case of harassment in § 21 GIBG, the person is entitled to compensation for the loss. In the case, the loss is not only monetary, the person also has the right to damages for the sustained personal impairment of at least €400,00 according to § 26 (11) GIBG.

For violations of §§ 30 and 31 GIBG, § 35 GIBG provides for legal sanctions. A person who suffered a violation of § 31 GIBG, the principle of equal treatment irrespective of ethnic origin outside of work, is entitled to compensation of the property loss and to damages for sustained personal impairment according to § 35 (1) GIBG.

In § 35 (2) GIBG, the harassed person is entitled to compensation for the sustained loss. As a violation of the prohibition of harassment of § 34 GIBG, this also leads to the right of the victim to damages for the sustained personal impairment of at least €400,00, if the loss has not only been monetary.

Article 7 (2) of the directive provides for the possibility of associations, organisations or other legal entities with a legitimate interest in ensuring the proper application of the directive, to engage, either on behalf or in support of a complainant, with her or his approval, in any proceeding. In Austria, only the “Klageverband zur Durchsetzung der Rechte von Diskriminierungsopfern”<sup>16</sup> has been granted the possible position of an intervener according to §§ 17 to 19 of the Code of Civil Procedure, provided for that the victim gives her or his consent. This can be found in a general, concluding provision in § 62 GIBG.

Article 7 (3) of the directive allows the national legislator to implement time limits as existing in national law also in regards to actions concerning principle of equal treatment. For the actions and proceedings put forth in the second part of the Austrian implementing law, § 29 (1) GIBG provides for a set of time limits:

<b>Legal Basis of the claim</b>	<b>Time limit</b>
§ 26 (1) and (5) GIBG	6 months from the denial of the application or the promotion
§ 26 (11) GIBG	Assertion before a court within 6 months
§ 26 (7), § 27 GIBG	Challenge before court within 14 days after notification by mail

<sup>16</sup> This „Klageverband zur Durchsetzung der Rechte von Diskriminierungsopfern“ is an association of institutions and organisations with a special interest in the implementation of anti-discrimination laws, <http://www.zara.or.at/03.html#y>

§ 26 (2), (3), (4), (6), (8), (9), (10) GIBG	Three-year period of limitation according to §1486 ABGB, as long as for those claim collective agreement settled after 1 July 2004 do not provide for something different
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§ 29 (2) and (3) GIBG subsequently set forth the conditions under which such time limits may be halted for a certain period of time and under which conditions this halt then stops and the time limit continues to be counted down.

### **II.1.7 Article 8 – Burden of proof**

Article 8 (1) of the directive introduces the burden of proof on the respondent/or the defendant. The Austrian legislator has put down this burden of proof in § 26 (12) GIBG in the second part of the implementing law and in § 35 (2) GIBG in the third part, according to which the burden of proof lies upon the defendant. She or he has to prove that it is, after a weighing of all circumstances, likely that others than those reasons proposed by the proponent led to the decision made or that there is a legitimate justification of the non-application of equal treatment.

During a proceeding based on §21 GIBG or § 34 GIBG, the defendant has to prove that, after a weighing of all circumstances, it is likely that the fact accredited by her or him, corresponds the truth.

### **II.1.8 Article 9 – Victimisation**

As Article 9 of the directive puts the obligation upon the member states to prevent any adverse treatment or consequence probably resulting out of the assertion of claims based on the principle of equal treatment legislation, the Austrian legislator has provided for a prohibition of disadvantages for the person concerned (§ 27 GIBG and § 36 GIBG), but also for those employees who served as witnesses, informants for or supporters of the plaintiff (§ 27 GIBG).

### **II.1.9 Article 10 – Dissemination of information**

The obligation to make the principle of equal treatment, the possible remedies and the possible supporters known to those who might profit from it, mostly the employees, is put on the Austrian legislator in Article 10 of the directive. According to § 60 GIBG every

employer has to make the text easily accessible for all employees, or make it easily available to all employees via electronic means, which means a source of information and the machinery to read such source. Nevertheless, the Act is unknown to the majority of people.

### **II.1.10 Article 11 – Social dialogue**

The obligation to promote social dialogue between the two sides of industry can be fulfilled in accordance with national traditions and rules. In Austria, there is no legal implication in the new equal treatment legislation, but a long-standing tradition of social partnership. This partnership consists, on the federal level, of the following four components:

- The Federal Association of Unions
- The Austrian Chamber of Commerce
- The Presidential Conference of the Chambers of Agriculture and Forestry
- The Federal Chamber of Employees

These four engage in a dialogue with each other and with the government. Together with the government, they shape the landscape of economy, social and labour law in Austria. There are no legal provisions governing this process, rather it is based on voluntariness and has grown over the years.<sup>17</sup>

### **II.1.11 Article 12 – Dialogue with NGOs**

Member states are asked to engage in a dialogue with non-governmental organisations which have a legitimate interest in contributing to the fight against discrimination on the ground of ethnic origin according to Article 12. The lack of such dialogue has been a major point of criticism in the expert opinion delivered by various institutions and organisations.<sup>18</sup>

Nevertheless, NGOs can play a role. Due to the split system of legal protection, courts and the commission of equal treatment, the dialogue with NGOs has to be also examined from the procedural view.

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<sup>17</sup> Additional information on this entity can be accessed on <http://www.sozialpartner.at>

<sup>18</sup> See “Stellungnahme von der UNHCR-Vertretung in Österreich zu dem Ministerialentwurf betreffend ein Bundesgesetz über die Gleichbehandlung“ (Gleichbehandlungsgesetz - GIBG), 35/SN-70/ME(XXII.GP), 8 September 2003, [http://www.parlinkom.gv.at/portal/page?\\_pageid=908,199479&\\_dad=portal&\\_schema=PORTAL](http://www.parlinkom.gv.at/portal/page?_pageid=908,199479&_dad=portal&_schema=PORTAL)

The competent court for claims based on discriminatory acts in the field of work and occupation is the Labour and Social Court. Before this court, representation by barristers is not obligatory. In addition, § 40 Abs 2 Z 4 ASGG offers the possibility to be represented at Court by „any other suitable person“. The chairman of the jury has to decide whether the person is suitable or not. At the Labour and Social Court, it is therefore possible to be represented by a suitable member of any NGO in the first instance proceeding.

However, some organisations, above all trade unions and the federal Chamber for Employees (Arbeiterkammer, in short: AK), are considered to be better qualified. The plaintiff can be represented by members of trade unions and AK-members also in the second instance, while this is not possible for members of NGOs.

Still, there may be an advantage for the plaintiff represented by a „non-qualified“ (§ 40 Abs 2 ASGG) member of a NGO: While the representation by „qualified“ persons, such as members of Trade Unions and of the chamber of employees hinders to bring in alterations at the second instance procedure, this is not true for cases of non-qualified representation. In such cases it is therefore possible to base the claim on new facts in the second instance procedure.

For claims based on a discriminatory act because of race or ethnic origin outside of work and occupation the competence of the courts depends on the kind of discrimination. For discriminations in the context of accommodation the district Court is competent. As long as the limit of € 4.000 is not exceeded, the representation at Court by barristers is not obligatory. Therefore it would be possible to be represented at Court in the first instance procedure by any member of an NGO, according to § 26 ZPO in relation with § 27 and § 29 ZPO.

For claims for compensation resulting from discriminatory acts without any context to work and occupation or accommodation, the competence of the Courts depends above all on the sum to be demanded. As long as the limit of €4.000,-- is not exceeded, the previous remarks are also true for the procedures. Therefore, in the first instance procedure a representation by an NGO member is possible.

If the limit of €4.000 is exceeded, the representation by barristers is obligatory. It would be possible to be additionally represented by a member of an NGO; however, this will not be very useful in most of the cases.

For the appeal and the second instance procedure the representation by barristers is obligatory.

Finally there is the possibility for NGO – members to get involved as an expert witness. This depends on the parties of the procedure. A witness in a civil court procedure is only interrogated by the judges, if one of the parties involved suggests to do so and if the judge deems it to be helpful for her or his decision.

Nevertheless, the implementation of the EC directives is not satisfactory for NGOs, above all because their role is not defined at all and they are not entitled to bring in actions in cases of discrimination on their own, or for a greater number of victims of discrimination. § 12 GBK/GAW-G provides for the possibility for NGOs to represent a person in front of the commission for equal treatment. Moreover, an association of various NGO, the “Klageverband zur Durchsetzung der Rechte von Diskriminierungsopfern” has been entitled to intervene in Court proceedings, provided for that the victim gives his or her consent.

### **II.1.12 Article 13 – Bodies for the promotion of equal treatment**

Article 13 of the directive demands the establishment of an independent body or bodies for the promotion of equal treatment of all persons irrespective of ethnic origin and sets forth in (2) what the minimum powers of such a body should be.

Here the Austrian legislator has changed already existing laws to comply with these obligations. It issued an amending law and changed the old federal act on equal treatment of men and women into the “Federal Act on The Equal Treatment Commission and the Equal Treatment Advocacy”.<sup>19</sup> According to its § 1 (2), the commission, which is situated in the Federal Ministry for Health and Women (§ 1 (1) GBK/GAWG), consists of three senates with different fields of responsibility. While Senate I deals with matter of equal

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<sup>19</sup> Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft – GBK/GAW-Gesetz, BGBl I 66/2004, 23 June 2004.

treatment of women and men in work and occupation, Senate II is responsible for matter of equal treatment irrespective of ethnic origin, religion or belief, age and sexual orientation in work and occupation and Senate III deals with equal treatment irrespective of ethnic origin outside of work. This tripartite breakdown of competence goes fully hand in hand with the three parts of the new Federal Act on Equal Treatment.

Therefore, Senate II and III are the most important for matters of ethnic origin, ostensibly, as in the case that ethnic origin falls together with the aspect of equal treatment of men and women, Senate I is competent according to § 1 (4) GBK/GAWG.

The Senates consist of members from the following entities: Federal Chancellery, Federal Ministry for Economy and Labour, Federal Ministry for Health and Women, Federal Ministry for Legal Affairs, State Secretariat, Federal Ministry for Education, Science and Culture, Federal Ministry for Social Security, Generations and Protection of Consumers, Federal Chamber of Commerce, Federal Chamber of Employees, Federal Association of Austrian Industry, Federal Association of Unions. Naturally, the composition varies depending on what the competence of the relevant senate is.

Senate I consists of the following members (§ 2 (2) GBK/GAWG):

<b>Number</b>	<b>Entity</b>
2	Federal Chamber of Commerce
2	Federal Chamber of Employees
2	Federal Association of Austrian Industry
2	Federal Association of Unions
1	Federal Chancellery
1	Federal Ministry for Health and Women
1	Federal Ministry for Economy and Labour

According to § 2 (3) GBK/GAWG, Senate II consists of the following members:

<b>Number</b>	<b>Entity</b>
2	Federal Chamber of Commerce
2	Federal Chamber of Employees
2	Federal Association of Austrian Industry
2	Federal Association of Unions

1	Federal Chancellery
1	Federal Ministry for Economy and Labour

The third senate consists of the following members (§ 2 (4) GBK/GAWG):

Number	Entity
2	Federal Chamber of Commerce
2	Federal Chamber of Employees
1	Federal Chancellery
1	State Secretariat
1	Federal Ministry for Legal Affairs
1	Federal Ministry for Social Security, Generations and Protection of Consumers
1	Federal Ministry for Economy and Labour

The second body which definitely falls under Article 13 of the directive, is the advocacy for equal treatment, situated in the Federal Ministry for Health and Women according to §3 GBK/GAWG. Concerning matters of ethnic origin, it has to be noted that there will also be an advocate for equal treatment in work and occupation irrespective of, among others, ethnic origin (§3 (2) number 2 GBK/GAWG) and an advocate for equal treatment irrespective of ethnic origin outside of work and occupation (§3 (2) number 3 GBK/GAWG).<sup>20</sup>

Concerning the competences of these bodies, Article 13 (2) of the directive demands that the following competences are included in those put forth in the implementing legislation:

- providing independent assistance to victims of discrimination in pursuing their complaints about discrimination (Art. 13 (2) number 1);
- conducting independent surveys concerning discrimination (Art. 13 (2) number 2);
- publishing independent reports and making recommendations on any issue relating to such discrimination (Art. 13 (2) number 3).

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<sup>20</sup> Moreover, the advocate for equal treatment irrespective of ethnic origin in employment and occupation will also be responsible for equal treatment irrespective of religion or belief, age and sexual orientation in employment and occupation.

The advocacy for equal treatment has its competences put forth in § 3 (4) and (5) GBK/GAWG. According to these two sub-paragraphs, the advocacy has the competence to advise and support people who feel discriminated against in the sense of the GIBG, and the advocacy may hold office hours and office days in the nine provinces for this reason. It can conduct independent surveys on the issue and publish independent reports. Furthermore, the advocacy can deliver recommendations on discrimination matters. This shows that the minimum demands of Article 13 of the directive have been met. Both the advocate for equal treatment irrespective, among others, of ethnic origin in work and occupation and the advocate for equal treatment irrespective of ethnic origin outside of work and occupation, work autonomously and independently according to § 5 (1) and § 6 (1) GBK/GAWG.

For the commission, the situation is slightly different as the tasks of the commission also differ from those of the advocacy. According to § 8 GBK/GAWG, the senates have to deal with all aspects and questions concerning their responsibility as put forth in § 1 GBK/GAWG. Their possibilities range from the compilation of advisory opinions (§ 11 GBK/GAWG) to the examination of individual cases (§ 12 (1) GBK/GAWG).

The senate also has the duty to publish legally-binding judgements concerning violations of the principle of equal treatment, but made anonymous, on the homepage of the Federal Ministry for Health and Women according to § 12 (6) GBK/GAWG.

Generally, it has to be stated that again the expert opinion system proved to be able to show major faults in bills and laws as the advocacy for equal treatment is independent according to the law, but this independence is not effective, as the GBK/GAWG is only a simple law, and not a constitutional law which would be the only possibility to grant full independence of such a body. In comparison, the independence of the public advocacy (“Volksanwaltschaft”) is granted in Art 148a (4) of the Austrian Constitution and of the independent federal asylum senate in Art 129c (3) of the Austrian Constitution. The Independent Administrative Senates, especially their members, are independent according to Art 129b of the Austrian Constitution.<sup>21</sup> Besides these legislative issues, the fact that the Commission is situated with the Federal Ministry for Health and Women raises concerns about its independence.

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<sup>21</sup> In the new Styrian Equal Treatment Act, this has been resolved by introducing the independence as a constitutional paragraph in § 44. The Act was published on 28 October 2004 and entered into force on 1 November 2004.

Moreover, according to § 40 GIBG the nine provinces are also obliged to create or name an instance on the level of the provinces, which complies with Art 13 of the directive, and is able to promote the full implementation of the principle of non-discrimination on the ground of ethnic origin put forth in part III of the Federal Equal Treatment Act. So far, only Vienna, which has passed its individual Anti-Discrimination-Act, is working on the creation of such an institution.<sup>22</sup>

### **II.1.13 Article 14 – Compliance**

The Austrian state is obliged to abolish any laws, regulations and administrative provisions contrary to the principle of equal treatment according to Article 14 of the directive. It also has to take measures to declare null or void any provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making and non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations. This is also put forth in Article 14. The Austrian parliament has adopted the GIBG, the Federal Act on Equal Treatment in order to implement Council Directive 43/2000/EC.

### **II.1.14 Article 15 – Sanctions**

Apart from the norms regulating the principle of equal treatment which have to be implemented, there is also the necessity of introducing proper sanctions should those norms be violated according to Article 15 of the directive. As mentioned above, sanctions have been introduced. The questions whether they are effective, proportionate and dissuasive will only be answered after the first cases have been heard and decided. The Austrian State was definitely in breach of its obligation to report these sanctions to the European Commission by 19 July 2003, as the implementing legislation has only been adopted on 26 May 2004.

### **II.1.15 Article 16 – Implementation**

The directive should have been implemented into Austrian Law by 19 July 2003, but this was not the case. The implementing legislation was only adopted on 26 May 2004 by the Austrian Parliament, and on 9 June 2004 by the Federal Council. It entered into force on 1

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<sup>22</sup> [http://www.wif.wien.at/gleichstellungs\\_site/gleichstellung\\_pages/](http://www.wif.wien.at/gleichstellungs_site/gleichstellung_pages/)

July 2004. Therefore, the directive should be considered directly applicable between 20 July 2003 and 30 June 2004 as the obligation to implement the otherwise indirect directive into Austrian law has not been fulfilled on time by the Austrian legislation.

## **II.2. Council directive 78/2000/EC establishing a general framework for equal treatment in employment and occupation**

Council directive 78/2000/EC deals with a general framework for equal treatment in employment and occupation and was implemented into Austrian law together with Council directive 43/2000/EC in the Federal Act on Equal Treatment, the “Gleichbehandlungsgesetz” (GIBG). Nevertheless, it has to be noted that persons with disabilities have been completely left out of this legislation and will be taken care of in a separate act.

The relevant part of the GIBG is the second part. It has to be kept in mind that this part also covers equal treatment irrespective of ethnic origin in employment and occupation.

### **II.2.1 Article 1 – Purpose and Article 2 – Concept of Discrimination**

Similar to the provision in Article 1 of Council Directive 43/2000/EC, Article 1 of this directive defines the purpose which is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in occupation and employment. The Austrian Federal Act on Equal Treatment regulates these matters in its second part, §§ 16 to 29 GIBG.

Article 2 of the directive consequently describes the concepts of discrimination. It has been implemented in § 19 GIBG, which features an almost word by word translation of the directive’s wording. Again the instruction to discriminate also constitutes discrimination according to § 19(3) GIBG, as demanded by Article 2 (4) of the directive.

§ 21 GIBG subsequently contains the definition of harassment on the grounds of religion or belief, age and sexual orientation.

### **II.2.2 Article 3 – Scope**

Article 3 (1) (a) to (d) cover the scope of the directive and have been implemented in §§ 16, 17 (1) and 18 GIBG. §16 GIBG, covering the application field of the Act, has to be

read together with §§ 17 and 18 GIBG, which deal with the details of the principle of equal treatment in employment and occupation.

As mentioned above, employment relationships are not covered by that law. These are those in agriculture and forestry, employment by a province, a town or an association of towns, and employment by the federal state of Austria according to § 16 (2) GIBG.

Article 3 (1) (a) is implemented through § 17 (1) number 1 (access to employment) GIBG, § 18 number 3 (access to self-employment) GIBG, § 17 (1) number 5 (professional hierarchy, including promotion) GIBG. Article 3 (1) (b) equals §17 (1) number 4 and § 18 number 1 (access to all types and levels of vocational guidance, vocational training, advanced vocational training and retraining) GIBG .

§ 17 (1) number 2, number 6 and number 7 GIBG contain employment and working conditions, including dismissal and pay, as put forth in Article 3 (1) (c) of the directive. Additionally, § 17 (1) number 3 GIBG contains the prohibition of discrimination when it comes to voluntary social services which do not constitute pay.

Lastly, the membership of and involvement in an organisation of workers or employers as demanded in Article 3 (1) (d) can be found in § 18 number 2 GIBG.

The directive states in its Article 3 (2) that differences in treatment because of nationality do not stand against the directive. Moreover, the directive also does not apply to payments of any kind made by state schemes. These two fields were also considered in the implementing Federal Act on Equal Treatment. Thirdly, Article 3 (4) states that the directive in respect to covering discrimination on the grounds of disability and age, does not apply to armed forces. This is mirrored in the exemption of employer-employee relationship with the Federal State in § 16 (2) GIBG.

### **II.2.3 Article 4 – Occupational Requirements**

If a characteristic, on which a decision is based, is a genuine and determining occupational requirement, and if the objective is legitimate and the requirement is proportionate, unequal treatment is permitted according to Article 4 of the directive. This norm is implemented in § 20 (1) GIBG.

Furthermore, specific rules concerning religion or belief and age can also be found.

According to § 20 (2) GIBG, a discrimination on the grounds of religion or belief cannot be claimed if the ethos of the employer, may it be churches or other public or private organisations, requires a certain religion or belief as a genuine, legitimate and justifiable occupational requirement.

#### **II.2.4 Article 5 – Reasonable accommodation for disabled persons**

This article is not contained in the Federal Act on Equal Treatment as the principle of equal treatment in respect of people with disabilities is not covered by this Act as there will be a separate Federal Act<sup>23</sup> on all subjects concerned.<sup>24</sup>

#### **II.2.5 Article 6 – Justification of differences of treatment on grounds of age**

In § 20 (3), a similar provision as in § 20 (2) GIBG, as mentioned above, can be found concerning possible discrimination on the ground of age. Unequal treatment has to be objective and adequate, justified by a legitimate aim, and it has to be adequate and necessary for the achievement of this goal. The three possible settings, as mentioned in the directive under Article 6 (1) a, b and c, have been transposed word by word:

- 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 (§ 20 (4) number 1 GIBG);
- the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment (§ 20 (4) number 2 GIBG);
- 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 the retirement (§20 (4) number 3 GIBG).

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<sup>23</sup> „Bundesgesetz, mit dem ein Bundesgesetz über die Gleichstellung von Menschen mit Behinderungen (Bundes-Behindertengleichstellungsgesetz – BGStG) erlassen wird und das Behinderteneinstellungsgesetz, Behinderteneinstellungsgesetz, das Bundesbehindertengesetz, das Bundessozialamtsgesetz, das Gleichbehandlungsgesetz, das Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft sowie das Bundesgleichbehandlungsgesetz geändert werden“, 182/ME XXII. GP, 2 August 2004 (note: this is the code for a ministerial bill concerning a Federal Act on the Equal Treatment of People with Disabilities)

<sup>24</sup> See II.3

Article 6 (2) of the directive concerning the exception from the principle of equal treatment when it comes to entry requirements for occupational social security schemes can also be found in § 20 (5) GIBG. The translation again is very closely oriented at the original text of the directive.

### **II.2.6 Article 7 – Positive Action**

Positive action is provided for in § 22 GIBG. Interestingly, only Article 7 (1) of the directive has been implemented here. This can be explained by the fact, that again Article 7 (2) of the directive refers to people with disabilities who are not covered by the Federal Act on Equal Treatment.<sup>25</sup>

### **II.2.7 Article 8 – Minimum requirements**

Austria, as all other member states, is obliged by this article to ensure that the minimum requirements put forth by the directive are met and, most importantly, that if the Austrian standard has been higher before, the higher standard has to be maintained. The minimum requirement for people with disabilities as demanded for by the directive has so far not found its realization in Austrian law (see II.3).

### **II.2.8 Article 9 – Defence of rights**

Article 9 of the directive asks for proper measures to ensure the availability of judicial and administrative procedures for the enforcement of obligations under the directive as the respective part of the Federal Act covers discrimination on the grounds of religion or belief, age or sexual orientation as well as ethnic origin. Therefore, the same norms of the second part apply to the implementation of Article 9 of the directive.

§ 24 GIBG, entitled criminal sanctions, only applies when § 23 GIBG, the imperative of gender-neutral job-posting, has been violated. Employer and placement officers, who violate this imperative, face an administrative criminal proceeding and a fine of up to €360. An employer, who for the first time is in violation, only receives a warning.

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<sup>25</sup> See II.3

§ 26 GIBG then offers various proceedings depending on how the discrimination expressed itself. In the case the employment contract was not settled, because § 17 (1) number 1 GIBG, the prohibition of discrimination in accessing employment, was violated, the applicant for the post is entitled to compensation for the property loss and damages compensating the sustained personal impairment according to § 26(1) GIBG. This may amount up to one-month's-salary, if the applicant would have gotten the post, would the selection have been non-discriminatory or up to €500,00 if the employer can prove that the only loss was that the consideration of the application had been denied.

According to § 26 (2) GIBG, an employee who does not receive equal pay for equal work in violation of § 17 (1) number 2 GIBG, is entitled to the difference in pay and to damages compensating the sustained personal impairment.

In § 26 (3) GIBG, the law provides for compensation, should a voluntary social service have been denied in a discriminatory manner, as this would be a violation of § 17 (1) number 3 GIBG. The employee is entitled to the respective social service or the compensation for the loss in property and to damages compensating the sustained personal impairment.

Should an employee not have been allowed to participate in training and retraining as provided for in § 17 (1) number 4 GIBG, she or he is entitled to participate or to compensation for the property loss and damages compensating the sustained personal impairment according to § 26 (4) GIBG.

Has the employee not been considered for promotion in violation of § 17 (1) number 5 GIBG, she or he is entitled to compensation of the property loss and damages compensating the sustained personal impairment from the employer according to § 26 (5) GIBG. The compensation of the property loss is either the difference in pay for three months for the position to which the employee would have been promoted if the choice had been non-discriminatory, or up to €500,00, where the employer can prove that the only loss was that the consideration of the application had been denied.

As working conditions have to be the same for all employees, a discriminatory denial or difference in such conditions constitute a violation of § 17(1) number 6 GIBG. The employee, according to § 26 (6) GIBG, is entitled to the same working conditions as all

other employees in similar positions or to a compensation of the property loss and damages for the sustained personal impairment.

Has the employer dismissed the employee because of a reason mentioned in § 17 GIBG or because of the, not obviously unjustified, assertion of claims arising out of the law on equal treatment, before the time or has the employer ended the employment before the time, this dismissal or layoff can be challenged in front of a court according to § 26 (7) GIBG.

According to § 26 (8) GIBG, every employee, whose right to take part in training and retraining according to § 18 number 1 GIBG has been violated, is entitled to either take part in the training or to compensation for the property loss and damages for the sustained personal impairment.

Has the employee been denied the right to participate in or be a member of an organisation of workers or employers as put down in § 18 number 2 GIBG, she or he may participate in and be a member of such organisation and may consume the services of such organisation, or she or he is entitled to compensation of the property loss and damages for the sustained personal impairment (§ 26 (9)) GIBG. When the access to self-employment (§ 18 number 3 GIBG) has been barred for a person on a discriminatory basis, she or he is entitled to compensation for the property loss and damages for the sustained personal impairment as put down in § 26 (10) GIBG.

In the case of harassment in § 21 GIBG, the person is entitled to compensation for the loss. In the case, the loss is not only monetary, the person also has the right to damages for the sustained personal impairment of at least €400,00 according to § 26 (11) GIBG.

When it comes to Article 9 (2) of the directive, the demand for associations and organisation to start or support proceedings on behalf of a person, with her or his consent, § 62 GIBG applies as mentioned above. The only association to enjoy this right is the “Klageverband zur Durchsetzung der Rechte von Diskriminierungsopfern”, a group of advocacy groups for people affected by discrimination.

The time limits are also the same as mentioned above under II.1.6. and can be found in § 29 (1) GIBG:

Legal Basis of the claim	Time limit
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§ 26 (1) and (5) GIBG	6 months from the denial of the application or the promotion
§ 26 (11) GIBG	Assertion before a court within 6 months
§ 26 (7), §27 GIBG	Challenge before court within 14 days after notification by mail
§ 26 (2), (3), (4), (6), (8), (9), (10) GIBG	Three-year period of limitation according to §1486 ABGB, as long as for those claim collective agreement settled after 1 July 2004 do not provide for something different

§ 29 (2) and (3) GIBG subsequently set forth the conditions under which such time limits may be halted for a certain period of time and under which conditions this halt then ends and the time limit continues to run.

### **II.2.9 Article 10 – Burden of proof**

Article 10 of the directive introduces the burden of proof on the respondent/or the defendant. The Austrian legislator has put down this burden of proof in § 26 (12) GIBG according to which the burden of proof lies upon the defendant. She or he has to prove that it is, after a weighing of all circumstances, likely that others than those reasons proposed by the proponent led to the decision made or that there is a legitimate justification of the non-application of equal treatment.

During a proceeding based on § 21 GIBG, it is upon the defendant to prove that, after a weighing of all circumstances, it is likely that the fact accredited by her or him, corresponds the truth. This provision on the burden of proof has been heavily criticised in the expert opinion surveys.<sup>26</sup>

### **II.2.10 Article 11 – Victimisation**

Article 11 of the directive obliges the member states to prevent any adverse treatment or consequence probably resulting out of the assertion of claims based on the principle of equal treatment legislation. § 27 GIBG therefore contains a prohibition of disadvantages

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<sup>26</sup> The expert opinion of the Ludwig Boltzmann Institute of Human Rights in Vienna states that „according to the Federal Equal Treatment Act the defendant only has to prove the likeliness, whereas the directive demands that the defendant carries the full burden of proof. (See Ludwig Boltzmann Institute for Human Rights, “Entwurf eines Bundesgesetzes über die Gleichbehandlung“, 57/SN-70/ME (XXII. GP), 14 September 2003, [http://www.parlinkom.gv.at/portal/page?\\_pageid=908,199545&\\_dad=portal&\\_schema=PORTAL](http://www.parlinkom.gv.at/portal/page?_pageid=908,199545&_dad=portal&_schema=PORTAL)

for the person concerned, but also for employees or persons who served as witnesses, informants for or supporters of the plaintiff.

#### **II.2.11 Article 12 – Dissemination of Information**

Article 12 of the directive contains the obligation to make the principle of equal treatment, the possible remedies and the possible supporters known to those who might profit from it, mostly the employees. Every employer has to make the text easily accessible for all employees, or make it easily available to all employees via electronic means, which means a source of information and the machinery to read such source according to § 60 GIBG. Nevertheless, as mentioned under II.1.9, the directive is not very known among the public.

#### **II.2.12 Article 13 – Social Dialogue**

As mentioned in II.1.10, the social dialogue in Austria has a long-standing tradition (see above).

#### **II.2.13 Article 14 – Dialogue with non-governmental organisations**

Except for the possibility of the “Klageverband” to start or join proceeding, no rule concerning the dialogue with non-governmental organisations as demanded by Article 14 can be found in the Federal Act.<sup>27</sup>

#### **II.2.14 Article 15 – Northern Ireland**

This article only applies to the special situation in Northern Ireland and is therefore not of relevance for Austria’s implementing legislation.

#### **II.2.15 Article 16 – Compliance**

The demand for compliance with the directive and its purpose has insofar been met as, finally, the Federal Act and the amending legislation have been adopted and have entered into force. Nevertheless, the implementation was not comprehensive as the rules protecting people with disabilities were not contained in the Act of 1 July 2004.

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<sup>27</sup> For the possibilities of representation by NGOs at Courts and at the Commission, see above II.1.11.

### **II.2.16 Article 17 – Sanctions**

Sanctions, as demanded by Article 17, have been introduced by the Federal Act, as mentioned above. But, as the Act has only been adopted on 26 May 2004 by the parliament and on 9 June 2004 by the Federal Council, the obligation to report by 2 December 2003 was not fulfilled.

### **II.2.17 Article 18 – Implementation**

This directive should have been implemented by 2 December 2003, which was not the case. Instead, as mentioned in the previous two subheadings, the implementation was only finished partly and also not before June 2004. For the time between 2 December and 1 July 2004, the date of the entry-into-force of the Federal Act and the amending legislation, the directive therefore should be considered to be directly applicable to cases of discrimination as covered by the directive in Austria for the time period between those two dates.

## **II. 3. The Implementation of the Directive with regards to People with Disabilities**

### **II.3.1. General Information**

As a consequence of World War II, several laws to improve the integration of people with disabilities were adopted. For historical reasons, separate administrative bodies according to § 12 of the Federal Act on the Employment of People with disabilities<sup>28</sup>, the boards for disabled people<sup>29</sup> are dealing with questions such as who is granted a specially protected position as a recognised disabled person, which kind of subsidies are given to the person or/and her or his employer and under which conditions an employer is allowed to terminate an employment of a person with recognised status of disability. Therefore, the legislator planned to separate the issues of discrimination on grounds of disabilities from the other grounds of discrimination covered by the EC-directives.

The bill 182/ME NR XXII GP is meant to implement the directive on anti-racism as well as the directive establishing a general framework for equal treatment in employment and occupation and the directive on equal treatment by means of three laws.

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<sup>28</sup> Behinderteneinstellungsgesetz (BEinstG), BGBl 22/1970, last amended by BGBl I 71/2003

<sup>29</sup> Board for disabled people, situated at the respective Federal Social Bureau.

The law to guarantee equality for people with disabilities<sup>30</sup> aims at all aspects of life except employment and occupation. The law on an arbitration board<sup>31</sup> provides for the necessary administrative institutions, above all the arbitration board and an advocate for people with disabilities. As far as employment and occupation are concerned the directives will be implemented by amending the already existing law on the employment of people with disabilities<sup>32</sup>.

### **II.3.1.1 The principle of equal treatment in respect of people with disabilities**

Both, direct and indirect discrimination are forbidden in § 8 BGStG as well as in § 7 BEinstG in its new text as far as occupation and employment are concerned.

Nobody may be directly or indirectly discriminated on the ground of his or her disability.

In the field of occupation and employment a demonstrative list of possible acts of discriminatory character has been adopted, including the access to employment, questions of payment, voluntary social services not constituting a form of payment, continuing education and questions of career opportunities and the termination of employment and occupation, the access to vocational training or the membership to organisations, the members of which are members of a certain profession and the access to self-occupation.

### **II.3.1.2 The exception from the principle of equal treatment when the discrimination is objectively justified**

Exceptions from the principle of equal treatment are only accepted if they can be justified by legitimate purposes and if the means to reach the purpose are necessary and adequate (Article 4 of Council Directive 78/2000/EC). An indirect discrimination may be acceptable, if eliminating the circumstances causing the disadvantage caused disproportional financial burdens (§ 9 Abs 4 BGStG, § 7a BEinstG).

If the arbitration board for the equal treatment of people with disabilities finds that those disproportional financial burdens have to be faced, it has to verify according to § 9 (5) BGStG, if a relevant and reasonable improvement of the situation of the person is

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<sup>30</sup> Behindertengleichstellungsgesetz (BGStG), Federal Act on Equality for People with Disabilities

<sup>31</sup> Schlichtungsstellengesetz (SchlStG), Federal Act on the Arbitration Board.

<sup>32</sup> Behinderteneinstellungsgesetz (BEinstG), BGBl 22/1970, last amended by BGBl I 71/2003.

achievable in a different way. This applies, above all, to the context of achieving a situation free of barriers.

With respect to employment and occupation a disadvantage is not to be considered discriminatory, if it is due to genuine and determining occupational requirements.

### **II.3.2.1 Financial claims upon violation of the principle of equal treatment for people with disabilities**

The victim of discrimination is entitled to be paid the arising financial loss as well as a compensation for the personal impairment. The minimum compensation sum to be awarded for harassments is €400 (§ 12 BGSStG).

In the field of occupation and employment the financial claims are similar to those granted because of discriminations on grounds of sex, sexual orientation, sexual harassment, religion, ethnic origin, age.

If a person with disabilities is denied access to an employment, the would-be employer has to pay the financial loss as well as a compensation for the sustained personal impairment. If the victim of discrimination would have been employed, if the employer had not been discriminating her or him, she or he has to be awarded a minimum sum that equals one month's payment. If the would-be employer can prove, however, that the only harm the victim suffers is, that her or his application has not even been taken into consideration, the maximum sum to be granted is €5.000,--.

In all the other possible cases of discrimination, the financial claims correspond to the rights that have been neglected. If for example the discrimination is a lower payment, the victim is according to § 7d BEinstG entitled to be paid the difference.

### **II.3.2.2 Challenge of termination**

If the termination of a labour contract or a dismissal is discriminatory on grounds of the victim's disabilities, it is possible to challenge the termination. However, the competent body is no longer the court, as it has been until now, but the arbitration board. A

discriminatory act of termination does not terminate the labour relationship, so the victim's claim aims at a declaratory decision that the labour contract is still in force.

### **II.3.3. Time limits**

The time limit to bring in a law suit for claims on grounds of discrimination of people with disabilities is three years. The decision is taken by an administrative body, the arbitration board for people with disabilities (§ 13 BGStG; § 7d BEinstG). There is no possibility to bring in appeal against this decision; however, the parties of the administrative procedure can bring a case to court within a period of 6 weeks after the decision of the arbitration board has been served by post.

As far as certain claims out of discrimination in occupation and employment are concerned, the time limits in § 7d BEinstG are planned to be much shorter:

Discrimination in access to employment and career opportunities:	6 months
Termination or dismissal:	6 weeks

### **II.3.4. Burden of Proof**

As the competent authority for the financial claims of a person with disabilities is an administrative body, the authority has to search for the relevant facts ex officio. According to § 17 BGStG certain facts only have to be presented as credible.

### **II.3.5. The Organization of the Arbitration Board and the Advocacy for People with Disabilities**

The new arbitration board for the equal treatment of people with disabilities is to be hosted by the Austrian Federal Ministry for Social Issues and Generations (§ 1 SchlStG). It will be competent to take decision in all matters rising from the BGStG as well as in those resulting from § 7 BEinstG.

It is intended to have several senates with the task of finding ways to bring an end to discrimination by means of mediation, making use of possible financial aids and

reconciliation of interests. The members of the senates are independent and free of any instructions.

The Advocacy for People with Disabilities consisting of three advocates is intended to become the centre of information with respect to all matters of discrimination. It will have to deal with single cases as well as with general matters of discrimination and can initiate independent surveys, release reports and recommendations.

To enable the new institutions to reach their aims, the accused persons and their representatives and employees have to render the necessary information.

### **II.3.6. Procedure**

As mentioned above, the claims of a victim of discrimination on grounds of disabilities may not immediately be filed at court. Instead of this, the competent body is the Board of Arbitration, an administrative body.

The parties of the administrative procedure at the Board of Arbitration cannot appeal against its decision; however, they can bring a file to the court within a period of 6 weeks after the board's decision has been delivered. The decision of the Board of Arbitration is not binding for the Court. The parties of the court procedure have all the legal remedies that are commonly open to parties.

Contrary to the situation in procedures on the other grounds of discrimination dealt with in the EC-directives, the administrative procedure is binding for the parties. If a person is, for example, discriminated on grounds of his or her sex, she can go to the Commission of equal Treatment, but he or she is not obliged to do so and can therefore immediately bring in a file at court.

**CHAPTER III. Overview over jurisprudence on grounds of discrimination as put forth in Art 13 of the EC-Treaty**

Decisions	Date	Content	Legal Basis
Advisory Opinion by the Commission on Equal Treatment	22.06.1995	Indirect Discrimination in the ground of Gender	§ 2 Abs 1 Z 2 GlbG
EUCJ responding to a request for a preliminary ruling	14.9.1999 RS C 249/97 Gruber	EU Conformity of reduction of dismissal pay due to exit during maternity	Art 119 EGV; § 23 a Abs 3 AngG
Verdict LG Wels (Preliminary Ruling initiated by Appellate Court Linz); subsequently EUCJ	4.2.1998 18 Cga 79/97a  27.1.2000 RS C 190/98 Graf	Equal Treatment of EU-foreigners, Freedom, EU-Conformity of Stoppage of dismissal pay at termination by the employee	Art 48 EGV (39 EGV), § 23 Abs 7 AngG
Supreme Court	23.4.2003 9 ObA 256/02 s	Direct Discrimination on the grounds of gender at the access to occupational pension	Art 141 EC-Treaty
Constitutional Court  EUCJ	2.3.2001 W I-14/99 8.5.2003 RS C 171/01 Group of Voters	Exemption of Turkish employee from the passive right to vote in a plenary meeting is contradictory to EC-Law	§ 21 AKG, Art 10 ARB 1/80 (AA with Turkey)
Supreme Court	23.4.2003 9 Ob A 223/02p	Dismissal of an older employee, missing social adverseness when claim to pension of 80% of the gross income is legitimate	§105 Abs 3 ArbVG
Supreme Court	8.8.2002 8 Ob A 277/01w	Admissibility of a framework labor contract „on call“ in regard to EC-Law	Art 141 EGV, Parttime-Directive + Equal-pay-Directive
Supreme Court	8.5.2002	Different pay when the same collective agreement applies	§ 2 Abs 1 GlbG
Administrational Court	13.9.2001 EU 2001/0013 = 99/12/0198	Adequate Legal Protection in staffing procedure, if only a complaint to the administrative court is admissible?	Art 6 of the directive 76/207/EEC
Supreme Court	30.01.2001 1 Ob 80/00x	Inadmissibility of plan for the advancement of women without a savings clause; Government Liability only when the lack of the savings clause is causal	§§ 41, 43 B-GBG; Dir. 76/207/EEC

Constitutional Court	4.10.2000 G 71/00	No objective Justification for the exemption of men from the receipt of part time aid or company at according to GSVG; unobjective differentiation on the grounds of gender	§ 102 Abs 5 GSVG, Principle of Equality
Supreme Court	26.4.2000 9 Ob A 59/00t	Claims from illegal occupation of foreigners – BUAG – Fiction of a legal employment relationship	§ 29 Abs 2 AuslBG
Appellate Court Vienna	6.12.1999 7 Ra 312/99y	Damage Claims for sexual harassment against the superior	(§ 2 Abs 1b Z 2, § 2a Abs 7 GlbG idF vor BGBl I 1998/44
EUCJ	26.06.2001 RS C 381/99 – Brunnhofer	Being classified into the same group of collective agreements is not evidence that the employees do the same work - pay discrimination	Art 119 EGV, RL 75/117/EWG, § 2 Abs 1 GlbG
Administrational Court	26.2.2002, 99/11/0250	Requirements for a retrospective agreement to a termination of the employment of a person with disabilities	§ 8 Abs 2 BehEinstG
Appellate Court Vienna	19.8.1998 7 Ra 152/98 v	Compliance with religious rules of mourning are a reason for hindrance from work	§ 8 Abs 3 AngG, Collective Agreement for Trade
Supreme Court	27.3.1996 9 Ob A 18/96 v	Exercise of religious duties do not constitute a reason for dismissal, when they are compatible with the requirements of the company: Islamic Prayer Ritual	§ 8 ARG, § 8 Abs 3 AngG, § 1154 b ABGB, § 82 lit f GewO

## **CHAPTER IV. General situation of discrimination**

For a long time, discrimination in Austria was, per definition, restricted to the usual suspects, people with disability, people with a different nationality and women. Up to now, hardly any official, statistical data is available on the target groups of the both directives when it comes to the issues covered by the scope of the directives. For this reason, the following compilation on the general situation of discrimination is mostly based on figures and data available from the lobbies of the target groups identified.

Austria is bound by obligations of international and European nature. In 1969, Austria signed the International Convention on the Elimination of All Forms Racial Discrimination, which was adopted by the UN-General Assembly in 1965<sup>33</sup>. It was ratified on 9 May 1972 and entered into force on 8 June 1972.<sup>34</sup>

Next in line are the both International Covenants on Civil and Political Rights (ICCPR)<sup>35</sup> and on Economic, Social and Cultural Rights (ICESCR)<sup>36</sup>. Austria signed both covenants on 10 December 1973. Both covenants were ratified on 10 September 1978 and entered into force on 10 December 1978, the 30<sup>th</sup> anniversary of the adoption of the Universal Declaration of Human Rights.<sup>37</sup>

On the European level, the protection of human rights and thus the prohibition of discrimination was first and foremost coined by the Council of Europe and its European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which entered into force on 3 September 1953.<sup>38</sup> Austria signed the Convention on 13 December 1957 and ratified it on 3 September 1958. It entered into force the same day.<sup>39</sup> In 1964, the ECHR was granted constitutional status in Austria.<sup>40</sup>

Protocol N°12 to the ECHR which deals with a general prohibition of discrimination was signed by Austria on 4 November 2000, but has not entered into force yet. Austria has not ratified it either.<sup>41</sup>

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<sup>33</sup> <http://www.ohchr.org/english/countries/ratification/index.htm>

<sup>34</sup> International Convention on the Elimination of All Forms of Racial Discrimination, BGBl 377/1972.

<sup>35</sup> International Covenant on Civil and Political Rights, BGBl 591/1978.

<sup>36</sup> International Covenant on Economic, Social and Cultural Rights, BGBl 590/1978.

<sup>37</sup> General Assembly resolution 217 A (III) of 10 December 1948.

<sup>38</sup> <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>

<sup>39</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, BGBl 210/1958.

<sup>40</sup> BVG BGBl 59/1964.

<sup>41</sup> <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=177&CM=8&DF=13/12/04&CL=ENG>

Besides these international obligations, Austria has introduced on the national level laws which determine the obligation to equal treatment and non-discrimination more or less since the 1960s. The Federal Act on the Employment of People with Disabilities dates, in its original version back to 1969, and the first Federal Act concerning the Equal Treatment of Women and Men in Work on the Private Sector<sup>42</sup> was adopted in 1979. Since 1993, the Federal Act on Equal Treatment for employees of the federal state is in force. It was amended by BGBl I 65/2004 in order to be in compliance with European Union Law.<sup>43</sup>

Austria looks back on a very diverse history during which it also once build the multinational Habsburg-monarchy. Today, although only 8 million people live on the territory, it features a wide spectrum on backgrounds, both ethnically and religiously. The census of 2001 collected the newest numbers. At the time of the census in 2001, 8.032.926 people lived in Austria, of whom 7.322.000 were also born here. The main church was the roman-catholic church with 5.915.421 members.<sup>44</sup>

This chapter deals with the situation of the groups whose right to non-discriminatory treatment was put forth in the directives on the territory of Austria.

#### **IV.1. Racial or ethnic origin**

In Austria, most data concerning discrimination on the basis of ethnic origin is made available by the representatives of those groups.

According to §1(2) of the Volksgruppengesetz (Federal Act on Ethnic Groups), recognized ethnic groups are those Austrian citizens, who live on Austrian territory, have their own folklore and do not have German as their mother tongue. The Act does not state which groups do fulfil these criteria. Instead this has to be examined on a case-by-case basis.

At the moment, six autochthonous ethnic groups are recognized in Austria: the Croats in Burgenland, the Slovenes in Carinthia, the Czechs and the Slovaks in Vienna, the Hungarians in Burgenland and Vienna and the Roma, who predominantly live in Burgenland.<sup>45</sup>

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<sup>42</sup> BGBl 108/1979, this law was the basis for the amendments used for the implementation of both directives 43/2000/EC and 78/2000/EC.

<sup>43</sup> This information can either be accessed through <http://www.ris.bka.gv.at>, the legal information system of the Federal Chancellery, or through <http://www.bmgf.gv.at/cms/site/themen.htm?channel=CH0266>, the website of the Federal Ministry on Health and Women and its topically related sub-pages.

<sup>44</sup> For more details on religious diversity in Austria please see IV.2.

<sup>45</sup> <http://www.austria.gv.at/DesktopDefault.aspx?TabID=3514&Alias=BKA>

The numbers of people differs according to the source of them, in all the cases, the official numbers are smaller than the self-assessment of the groups.<sup>46</sup> It has to be stated that the official census does not identify the numbers of the members of ethnic groups, the numbers can only be derived from the numbers of people speaking different languages in their daily life. This policy in itself is already problematic.

Another point for consideration is the question of schooling in the respective mother tongues, several acts build the basis for a system, that provides more or less primary education in the mother tongues. Nevertheless, it was only in 2000 that the Austrian Constitutional Court had to deal with an issue of language in schools when education in Slovenian was not provided for in the fourth grade of primary schools in Carinthia.<sup>47</sup>

In 2001, the question of bilingual city limits in Carinthia also lead to a decision of the Austrian Constitutional Court, which declared the requirement of at least 25% of a town's population being member of an ethnic group unconstitutional as violating Art 7 (3) of the Treaty of Vienna.<sup>48</sup> An enormous discussion, fuelled by comments of groups not in favour of having bilingual limits, developed around this decision, including criticism of the constitutional court by politicians which has been received as a threat to the separation of powers. This phenomenon continues.<sup>49</sup>

Besides the recognized ethnic groups, whose members are not explicitly counted by any census, new minorities now live in Austria as well. Their initial origin can be found in the call for "Gastarbeiter", the guest-workers in the post-WW II era. The first generation often commuted back home. Especially, the following generation then stayed in Austria or were even born here, but this does not mean they necessarily hold the Austrian citizenship. According to §§ 7 and 7a of the Federal Act on Citizenship, the principle of *ius sanguinis*<sup>50</sup> prevails in Austria, meaning children always get the citizenship which is held by their parents, no matter where they themselves are born<sup>51</sup>. In case, they hold the Austrian

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<sup>46</sup> <http://www.initiative.minderheiten.at/Service/volksgruppen.htm>

<sup>47</sup> G 2-4/00-7(9 March 2000), <http://www.austria.gv.at/2004/4/15/vfghmsgktn.pdf>

<sup>48</sup> G 213/01-18, V 62, 63/01-18 (13 December 2001), <http://www.vfgh.gv.at/volltext.html>

<sup>49</sup> "Derzeitiger Zustand gesetzeswidrig"-Zweisprachige Ortstafeln: VfGH-Präsident Korinek widerspricht Kärntens FP-Obmann Strutz: Verpflichtung zur Aufstellung ist gegeben, Der Standard, 8 November 2004, <http://derstandard.at/?url=/?id=1803389>

<sup>50</sup> The opposite principle is the *ius soli* principle, which determines the right to the citizenship based on the territory on which a person is or was born.

<sup>51</sup> Nationaler Kontaktpunkt Österreich im Europäischen Migrationsnetzwerk, Der Einfluss von Immigration auf die österreichischen Gesellschaft, Wien (2004), p. 6.

citizenship, those people would now classically fall under the protection of the new law prohibiting discrimination on the ground of ethnic origin. A large number of migrant group members does not, however, carry Austrian citizenship, for reasons which do not necessarily lie with the individual person, but with the system to obtain citizen status. Those people now are not covered by the directives which explicitly state that any obligation put forward by them do not interfere with already existing or different treatment of third-state nationals (see Articles 3 (2)). However, the obligation of equality before the law in and the demand to treat equals equally could serve as the closure for this loophole.

#### **IV.2. Religion or belief**

Insofar religion is concerned, Austria is a predominantly catholic country with 5.917.274 people being members of catholic churches.<sup>52</sup> Besides this group, several other churches and religious groups do form the religious landscape in Austria:

<b>Church or Group</b>	<b>Number of members</b>
<b>Eastern Churches</b>	179.472
<b>Protestant Churches</b>	376.150
<b>Other Christian churches</b>	69.227
<b>Non-Christian faith</b>	366.878

Within the group of non-Christian faith groups, the Islamic community forms the biggest with 338.988 members, followed by the Buddhists, who count 10.402 members according to the census of 2001. The Jewish Community is relatively small with 8.140 members.<sup>53</sup>

Different religions do play a role in daily life, especially in schools. In Vienna where there is a higher percentage of non-Christian faith among school children, religious events during the year cause difficulties especially for Muslim pupils. They often feel discriminated against during the Ramadan, when they have strict eating rules or during Christmas time, when they should participate in Christmas celebrations at schools.<sup>54</sup> In Austria, there is, like in many other countries, an ongoing discussion about wearing religious signs in school and about the cross in the classroom, but there are no regulations

<sup>52</sup> Census 2001, [http://www.statistik.gv.at/gz/vz\\_religion.shtml](http://www.statistik.gv.at/gz/vz_religion.shtml) (9 December 2004).

<sup>53</sup> Ibid.

<sup>54</sup> See Plott Gerhard, Nimmervoll Nina, Kopftuch an den Schulen - Pro und Kontra 25.9.03, <http://diestandard.at/?url=?id=1429939> 6.

about it yet.<sup>55</sup> Generally, the strict interpretation of Article 14 of the *Staatsgrundgesetz*, granting full freedom of religion and belief, should serve as a proper argument<sup>56</sup>, nevertheless, headscarves, crosses or turbans do repeatedly pose as reasons for heated discussions, not only concerning schools, but also concerning employment. The Vienna Fund for Integration states some examples, which exemplify repeatedly occurring discrimination against people demanding their religious freedom.<sup>57</sup> The situation of Muslim women in the labour market is difficult. There are still prejudices concerning women wearing a headscarf which makes it more difficult finding an employment. But this problem appears also among men, who, for example, when wearing a turban, do not get employed as bus drivers with the argument that in emergency situations people would not recognise the driver's authority.<sup>58</sup>

Among the various churches and religions groups represented in Austria, Islam often has to serve as the main area of concern when it comes to human rights. Additionally, the public opinion often pictures Islam as a violent and fundamental religion, especially after the attacks of September 11<sup>th</sup>, 2001.

The fact that discrimination based on religion does not result in sufficient sanctions is often criticised by NGOs.<sup>59</sup>

### **IV.3. Disability**

In Austria discrimination based on disability can still be found in certain areas of daily life. Discrimination of people with disability occurs when an employee or applicant is treated differently on the basis of a handicap condition.

A critical point is that the "sign language" has not been recognised as an independent language which tends to result in the impossibility to use sign language in dealing with public authorities, in hospitals or educational institutions.

In public space, there is not enough done to help blind people to find their way around more easily and independently e.g. in train stations, supermarkets.

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<sup>55</sup> Ibid.

<sup>56</sup> Austrian Federal Press Service, Religions in Austria, Vienna (2004) p. 5.

<sup>57</sup> [http://www.wif.wien.at/gleichstellungs\\_site/gleichstellung\\_pages/gleichstellung3-0804.htm](http://www.wif.wien.at/gleichstellungs_site/gleichstellung_pages/gleichstellung3-0804.htm)

<sup>58</sup> Ibid.

<sup>59</sup> See Maier Stefan, Die allgemeine Situation von häufig diskriminierten Gruppen in Österreich, in: International Organisation for Migration (Hg.), Handbuch zur rechtlichen Bekämpfung von Diskriminierung (2003) 36-38.

Criticised is also the lack of accessibility for people using wheelchairs. Those people are very often confronted with constructional obstacles. At least every building which is “open” to the public should be accessible for handicapped people using wheelchairs and at least institutions receiving public funds should be accessible to everyone. Often this inaccessibility is explained with higher construction costs although studies show that the additional costs would be marginal.<sup>60</sup>

In January 2004, 33.179 people with disabilities were unemployed, compared to more than 40.000 in January 2000<sup>61</sup>. The Federal Law for the employment of people with disabilities foresees a quota system for the employment of disabled people in its § 1, but enterprises have the possibility to buy themselves out of the obligation with a certain amount of money according to § 9 of the Federal Law for the employment of people with disabilities.

Another point of discrimination is the prejudice that disabled people get sick more often than those who are not disabled, which might also influence the hiring of disabled people.<sup>62</sup>

#### **IV.4. Age**

Discrimination on the ground of age is of great importance in a society that becomes gradually older. Age affects everybody as it is a non-suggestible fact. The national census of 2001 brought the following results. 1.353.482 people under 15 lived in Austria, the age group between 16 and 59 formed the biggest one with 4.986.708 members. The groups of people over the age of 60 counted 1.692.736 members.<sup>63</sup>

Positive discrimination for a certain age group is always problematic. In case it is directed towards the enforced integration of people over 50 in the labour market, it means fewer jobs will be available for young people. Should there be an advancement of young people, more older people will be able to find adequate work.

The general employment rate in Austria is with 68,2 % (2002) quite high and also the women’s employment rate with 61,1 % (2002) fulfils already the Lisbon criteria. But the labour force participation rate of older people is still very low with only 28%.

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<sup>60</sup> Ibid pp. 36-38.

<sup>61</sup> <http://www.bizeps.or.at/news.php?nr=5555&suchhigh=Arbeitslos>

<sup>62</sup> Allgemeine Situation in Österreich, p. 35.

<sup>63</sup> [http://www.statistik.at/gz/vz\\_tab3.shtml](http://www.statistik.at/gz/vz_tab3.shtml)

The unemployment figures from November 2004, show the distribution of unemployed people in the various age groups.<sup>64</sup>

<b>Age group</b>	<b>Number in 11/04</b>	<b>Difference to 11/03 in numbers</b>	<b>Difference to 11/03 in percent</b>
<b>Up to 19</b>	10.228	-1.070	-9,5%
<b>20 to 24</b>	30.602	-619	-2%
<b>25 to 29</b>	28.820	+509	+1,8%
<b>30 to 34</b>	32.208	-749	-2,3%
<b>35 to 39</b>	36.515	+622	+1,7%
<b>40 to 44</b>	34.466	+1.707	+5,2%
<b>45 to 49</b>	27.880	+1.483	+5,6%
<b>50 to 54</b>	23.172	-1.224	-5,0%
<b>55 to 59</b>	17.868	-2.149	-10,7%
<b>60 and over</b>	4.967	+60	+1,2%

For reaching the goal of a higher employment rate of older workers, the government has passed measures to meet the challenge of a higher employment rate.<sup>65</sup> Nevertheless, the exclusion and discrimination of older workers creates a lot of problems especially because the group of workers over 45 will grow continuously in the following years.

Moreover, it must not be forgotten, that discrimination against young people is also a problem in this respect. Special programs to promote more places for apprentices in the economy have been launched such as the exchange of apprenticeships online offered by the Austrian Labour Market Service.<sup>66</sup>

For the future, measures concerning non-discrimination on the grounds of age will have to be taken seriously, especially in a society where people over 35 are considered old.<sup>67</sup>

<sup>64</sup> Homepage of the Austrian Labour Market Service,  
[http://212.31.81.83/cognos/cgi-bin/ppdscgi.exe?DC=R&E=%2Famb%2Famb\\_reports%2Fal500&DM=Datum%09Periode&FC=0%0920041101-20041130%091%09Periode&ZZ=X](http://212.31.81.83/cognos/cgi-bin/ppdscgi.exe?DC=R&E=%2Famb%2Famb_reports%2Fal500&DM=Datum%09Periode&FC=0%0920041101-20041130%091%09Periode&ZZ=X)

<sup>65</sup> Österreichische Bundesregierung, National Action Plan for Employment 2003, October 2003.

<sup>66</sup> <http://www.ams.or.at/lehrstellen/>

<sup>67</sup> A representative of the steel union in Germany expressed his concern that already 35 year-old computer-technician are considered to be too old. [www.sueddeutsche.de/jobkarriere/berufstudium/artikel/870/9861/](http://www.sueddeutsche.de/jobkarriere/berufstudium/artikel/870/9861/)

#### **IV.5. Sexual Orientation**

Sexual Orientation has long been considered to be a taboo in society. Nevertheless, not talking about it did not mean sexual orientation could not serve as a ground for discrimination.

In 2002, the constitutional court of Austria abolished the often as discriminating criticised § 209 StGB (criminal code) which dealt with the minimum age of homosexuals. According to § 209, male adolescents between 14 and 18 years were not allowed to have a homosexual relationship with men over 19.<sup>68</sup>

But there are still lots of provisions which include discrimination against same-sex couples. The new rent law e.g. enables a person that has lived together with the deceased partner for at least three years to take on the lease - this does not apply to same-sex couples. There are other examples like that homosexuals do not have the right to go on sick leave for the purpose of nursing the sick partner, discriminatory regulations can also be found in the inheritance law and the widow's pension regulations.

At the moment there is an ongoing discussion about the right to get married and also the recognition of married homosexuals from other countries.<sup>69</sup> In its decision B1512/03-6<sup>70</sup>, the Austrian Constitutional Court denied to extend the legal institute of marriage on same-sex relationships, resulting in the fact that also legal consequences attached to the institute of marriage such as a working permit or a residence permit do not apply to same-sex relations. This decision also cites an earlier one, dating back to 2003, when the Constitutional Court declared that the Prohibition of same-sex marriages was not unconstitutional.<sup>71</sup>

In the case of B1512/03-6, the plaintiffs argued for a deferral to the European Court of Justice. The Constitutional Court said it would not decide whether the administrative authorities had acted in compliance with community law or not, and it would also not decide on a deferral, as the ongoing discussion as cited by the plaintiffs did not indicate a procedure violating community law.<sup>72</sup>

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<sup>68</sup> Press release, G 6/02, 24 June 2002, <http://www.vfgh.gv.at/presse.html>.

<sup>69</sup> Allgemeine Situation in Österreich, p. 41.

<sup>70</sup> B 1512/03-6, 14 October 2004.

<sup>71</sup> B 777/03, 12 December 2003.

<sup>72</sup> B 1512/03-6, 14 October 2004.

## **CHAPTER V. Judicial Training in Austria**

As far as judicial training in Austria is concerned, it has to be said that both the pre-service and the in-service training is the same for both judges and prosecutors. The pre-service training is exactly the same, obligatory and continues for 4 years. The in-service training is offered on a voluntary basis, continuously throughout the year.

### **V.1. Pre-service training**

Future judges and prosecutors are picked from those graduates of Austrian Law schools who started their nine-month-long court internship with their application to be regarded as possible candidates for transfer into judicial training.<sup>73</sup> After a successfully passed written exam on criminal and civil procedure law, an exam by a psychologist and an oral exam, the relevant candidates enter a phase of three-year training (originally, four years of training are envisioned by the Act on the employment relationship of judges and future judges, but the court internship is counted into that, so that an actual training phase of approximately 3 years is the result).<sup>74</sup> Both future judges and prosecutors have to pass an exam at the end of their training in order to enter into judicial service. All of them start as judges, as there exists the requirement according to §26 RDG<sup>75</sup>, that prosecutors have to have worked for at least one year as judges. The curriculum of the pre-service training and the practical training lies within the responsibility of the president of the OLG<sup>76</sup>, in the district of which the candidate is to be trained, and is supervised by the Federal Ministry of Justice.

Concerning the existence of anti-discrimination training in the curriculum for the pre-service training, the OLG Graz has taken a pioneer role with its cooperation with the European Training and Research Centre for Human Rights and Democracy in Graz, with which it organizes yearly, obligatory seminars for its judge trainees on the topic of anti-discrimination, intercultural competence and practical issues of those aspects.

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<sup>73</sup> Bundesministerium für Justiz, Die Organisation der Rechtsberufe in Österreich, (2002), [http://www.justiz.gv.at/broschueren/download/rechtsberufe\\_09\\_2002.pdf](http://www.justiz.gv.at/broschueren/download/rechtsberufe_09_2002.pdf)

<sup>74</sup> Ibid. p.18.

<sup>75</sup> RDG is the abbreviation for Richterdienstgesetz, the Act governing the regulation of the service of judges.

<sup>76</sup> OLG is the abbreviation for Oberlandesgericht, which translates into Court of Appeals.

## **V.2 In-service training**

The advanced and continuing training of judges and prosecutors in Austria is managed and organized by the Austrian Ministry of Justice in Vienna, the four Court of Appeals and the Association of judges, which provide all judges and prosecutors in Austria with a broad variety of course possibilities throughout the year. External contractors do only offer seminars, which are also organized by the three entities mentioned above.

For the session 2003/2004, two seminars should be mentioned in this regard. The first one was a fixed seminar which took place in April 2004 and dealt with “Equal Treatment in the Judiciary”. The second event was a series of seminars over 4 days on the combat of discrimination, which eventually did take place as one-day seminars on 16 November 2004, 30 November 2004 and on 2 December 2004.<sup>77</sup>

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<sup>77</sup> Bundesministerium für Justiz, Fortbildung für Richterinnen und Richter, Staatsanwältinnen und Staatsanwälte – Programm 2003/2004, JMZ 109.00/50-III 3/03 (2003) Bundesministerium für Justiz: Wien, S. 107 und S. 156.

## **CHAPTER VI. Conclusions**

In conclusion it has to be stated that the implementation of both directives is definitely hampered. Racism and discrimination are phenomena of today's societies, and to combat them they have to be named. However, racial origin, as mentioned in the directives, is not common anymore, people rather speak about ethnic origin. Nevertheless, racism and xenophobia should be named explicitly and therefore any legislation combating them should be called by its name. Rather in Austria on the federal level, there is a law on equal treatment. Only Vienna, on the provincial level, has succeeded in naming their implementing legislation "Anti-Discrimination-Act", a clear sign that the authorities recognize the existence of discrimination and take measures to combat it.

Moreover, on 20 December 2004, the European Union issued a press release on the start of an infringement procedure against Austria, Germany, Finland, Greece and Luxembourg, initiated by EC-Commissioner Vladimir Spidla.<sup>78</sup> It deals with the implementation of Council Directive 78/2000/EV behind schedule. Whether the extent of implementation was satisfying will be the next step undertaken by the commission.

The implementation of the Council Directives 43/2000/EC and 78/2000/EC definitely can be regarded as problematic, especially as they have only been implemented partially. If one examines this consequently, the result can be found that, among those discriminated against, the partial implementation leads to discrimination when it comes to protection from and legal remedies for discrimination – a situation which definitely will have to be considered when cases will be brought to court which took place between the implementation dated imposed by the directives and the actual date of implementation.

To measure the efficiency of the new legislation, it is also necessary to elaborate new statistical means in order to gather information on the various groups discriminated against on the grounds put forward in the new legislation.

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<sup>78</sup> EC-Press Release, IP-04-1512.

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