

Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination*¹
about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

3 Austria

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Addendum on developments in May, June and July 2004

A Federation

The two bills presented by the federal government to parliament in November 2003 (see 3.2.1) have been amended and adopted by the parliament's first chamber (the '*Nationalrat*' [National Council]) on 26 May 2004, and the second chamber (the '*Bundesrat*' [Federal Council]) on 9 June 2004. The Acts have been published in the Federal Law Gazette ('*Bundesgesetzblatt*', *BGBI*) on 23 June 2004³ and entered into force on 1 July 2004. Parliament made the following amendments to the bills:

In both bills:

- Time-limit for sexual and gender-related harassment extended to one year while it remains six months for harassment related to the other grounds (Art. 15 & 29 *GIBG*; Art. 20 *B-GBG*).
- Publication of the opinions of the Equal Treatment Commission on the internet (Art. 11 par. 3 *GBK/GAW-G*; Art. 23a *B-GBG*).
- New wording of the regulations on the burden of proof (without changing the deficient substance of the provision) (Art. 26 par. 12 *GIBG*; Art. 20a *B-GBG*).⁴

In the private employment bill only:

- Obligation for the Courts to supply reasons for departing from the opinion of the Equal Treatment Commission (Art. 61 *GIBG*).
- Minimum amount for compensation payments in cases where the victim would have been promoted, if no discrimination had occurred, raised to the difference in salary for three months (in the bill it was one month and it is still one month for recruitment discrimination; while it is three months for both kinds of discrimination in the public employment bill) (Art. 26 par. 1 & 5 *GBIG*). The maximum limits for compensation criticised in 3.5.4 remain unchanged in both bills.
- Third party intervention for one specific GO ('*Klageverband zur Durchsetzung der Rechte von Diskriminierungsopfern*' ['Plaintiff Association for the Enforcement of the Rights of Victims of Discrimination']) in the courts (all other NGOs excluded; and no legal standing in the courts under the public employment bill) (Art. 62 *GIBG*).

³ *BGBI* I 66/2004 (*GIBG*); *BGBI* I 65/2004 (*B-GBG*).

⁴ While the bills stated that a claim had to be rejected if, considering all circumstances, there is higher probability that discrimination did not occur, the final text says that a respondent has to prove that, considering all circumstances, it is probable that there was no discrimination. This change of wording, inserting the word 'prove', did not change the substance. A 'proof' just of a probability (that there was no discrimination) (still) is just an establishment of a probability and not proof (that there was no discrimination).

B States

In Vienna the draft bills (see 3.2.1 below) have been amended and turned into bills presented to parliament in June 2004. Vienna state parliament (Landtag) on 30 June 2004 passed the amendments to the Vienna Service Regulations Act (*WrDO*) and the Vienna Regulations for Contractual Employees (*WrVBO*) as well as the Vienna Antidiscrimination Act (*WrADG*) (see 3.2.1 below). Compared to the drafts the final text improved in areas as definition of discrimination, justification of discrimination and reversal of burden of proof. A provision has been inserted which guarantees the necessary (staff and financial) resources for the Ombudsperson. The scope of the Vienna Antidiscrimination Act (*'Wiener Antidiskriminierungsgesetz'*) (see 3.1.8, 3.2.1 and 3.2.7 below) has been extended as to include not only race and ethnic origin but also age, religion and belief and sexual orientation.

In Styria the draft bill (see 3.2.1 below) has been amended and turned into a bill presented to parliament in June 2004. Styria state parliament (Landtag) passed the Styria State Equal Treatment Act (*StmkL-GBG*) (see 3.2.1 below) on 6 July 2004.⁵ The final text uses the term sexual orientation (*sexuelle Orientierung*) instead of sexual alignment (*sexuelle Ausrichtung*), it did not take over the provision from the draft according to which one member of the Equal Treatment Commission in each sexual orientation case must be a sexual orientation discrimination expert appointed by the state government (see 3.5.6 below) and it established an upper limit for compensation in cases of non-recruitment and non-promotion if the victim of discrimination would not have been recruited or promoted in case no discrimination had occurred. On the other hand the final text explicitly prohibits (direct and indirect) discrimination 'by referring to marital or family status'.⁶

On 1 July 2004 the state parliament of Lower Austria passed an amendment to the Lower Austria Equal Treatment Act (*Niederösterreichisches Gleichbehandlungsgesetz, NÖGIBG*) implementing the Directive for employees of the state of Lower Austria and of local governments in Lower Austria.⁷ The NÖGIBG does not extend to areas beyond employment and it falls short of the Directive in various respects, as for instance it does not provide for compensation for non-pecuniary damage, does not include provisions on instruction to discrimination or to harassment, does not cover harassment by third persons (as clients), lacks provisions both on victimisation and on legal standing of NGOs, and it establishes an upper limit for compensation in cases of non-recruitment and non-promotion if the victim of discrimination would not have been recruited or promoted in case no discrimination had occurred. On the other hand it establishes an Equal Treatment Commission and an Equal Treatment Commissioner, both for all grounds, including sexual orientation. Conciliatory procedures before the Commission (different then in the federation and the other states are obligatory before accessing the courts.

⁵ See www.stmk.gv.at/land/ltpk/parlamentar%5Finitiativen/beschluesse/14/14%5F1527.pdf; for the bill see, www.stmk.gv.at/land/ltpk/parlamentar_initiativen/lt_geschaefsstuecke/14/14_1896_1_RV.pdf; for the report of the Committee for Constitution and Administration of the state parliament, see www.stmk.gv.at/land/ltpk/parlamentar_initiativen/lt_geschaefsstuecke/14/14_1896_2_SB.pdf.

⁶ Art. 5 par. 1 StmkL-GBG.

⁷ See www.noel.gv.at/service/politik/landtag/LandtagsvorlagenXVI/02/263/263.htm.

All of these state statutes are engaging courts in the enforcement of their provisions. Therefore these state statutes, before entering into force, require the consent of the federal government, which consent is presumed if the federal government does not veto within eight weeks (Art. 97 par. 2 Federal Constitution Act, B-VG).

Carinthia presented a draft bill in July.⁸ This draft covers also areas beyond employment and provies for an ombudsperson.

3.1 General legal situation

While Austria was the first country in the world to abolish its death penalty for homosexual relations,⁹ it later on became one of the most repressive states in Europe.

In 1787, Emperor Joseph II, in his new Penal Code,¹⁰ reduced the offence of 'carnal knowledge' of a person of the same sex (lumped together in the same provision with 'carnal knowledge' of an animal) from a felony¹¹ to a misdemeanor,¹² triable at the political authority rather than the criminal court. He also mitigated the sanction from decapitation and subsequent burning of the corpse¹³ to a maximum of just one month's imprisonment.¹⁴

Hopes that this reform would lead to complete decriminalisation of homosexuality – as happened in the course of the French Revolution in France and a number of other European states over the next decades¹⁵ – were rapidly dashed when Joseph II died in 1790. His successors not only refused to pursue his reforms, but instead even continuously stiffened the law, so that by the middle of the 19th century, homosexual relations (between men and between women) incurred punishment of 'severe dungeon' for six months to five years.¹⁶

This remained the state of the law long into the 20th century. Only as late as 1971 did Austria finally repeal its total ban on homosexuality.¹⁷ However, instead of introducing full equality of treatment in the criminal law – as many other European jurisdictions did – Austria enacted four new special offences for

⁸ Carinthia Antidiscrimination Act (*Kärntner Antidiskriminierungsgesetz, KADG*). A summary can be found at www.klagsverband.at/news.php?nr=5274.

⁹ Among those countries which ever had such a ban. Countries as China, Japan, Thailand and Korea never punished homosexual relations or did so only under the influence of western jurisdictions. Those bans were alien to their (legal) thinking; violations incurred rather lenient sentences (never was it a capital offence) and those bans in most cases have been lifted after some years (See Graupner, 1997a, Vol. 2, 324ff).

¹⁰ *Constitutio Criminalis Josephina* (CCJ). See Graupner, 1997a, Vol. 1, 133.

¹¹ Article (Paragraph) 74, *Constitutio Criminalis Theresiana* (CCT) 1768. See Graupner, 1997a, Vol. 1, 131; Graupner, 1997b, 270.

¹² Art. 71, 2nd Part, *Constitutio Criminalis Theresiana* 1787.

¹³ Art. 74, *Constitutio Criminalis Theresiana* 1768.

¹⁴ Arts. 10, 72 2nd Part, *Constitutio Criminalis Theresiana* 1787; in the case of causing public nuisance up to one month of hard labour, public whipping and deportation.

¹⁵ See Graupner, 1997c, 204ff.

¹⁶ Arts. 113ff, Criminal Code (*Strafgesetz, StG*) 1803 (felony punishable from 6 months to 1 year); Art. 129, *Strafgesetz* 1852 (felony punishable from 6 months to 5 years). See Graupner, n.2, at Vol. 1, 134, 137; Graupner, 1997b, n.4 at 271.

¹⁷ Criminal Law Amendment Act 1971.

homosexuals (two of them for gay men only).¹⁸ One of these special offences has been kept in force even up to the 21st century.

In addition to the traditional general minimum age limit for sexual relations of fourteen years,¹⁹ gay males have been bound by a second age limit of eighteen years (Art. 209 Criminal Code).²⁰ So while consensual heterosexual and lesbian relations with adolescents between fourteen and eighteen years of age were completely legal, consensual male homosexual relations with that age-group constituted a felony, liable to imprisonment of half a year minimum and up to five years maximum.²¹ Even within the last years of its existence about a dozen men have been jailed under this discriminatory statute each year;²² over one thousand have been convicted during the 31 years from its enactment in the year 1971 until its repeal in 2002.²³ Amnesty International adopted those persons as prisoners of conscience (being jailed on the basis of their sexual orientation).²⁴

Only after a verdict by the Constitutional Court holding Art. 209 unconstitutional²⁵ did the Austrian parliament decide to repeal the law.²⁶ The judgment of the Constitutional Court however has been issued only under the influence of the, then already awaited, conviction of Austria by the European Court of Human Rights;²⁷ and parliament in abolishing the law did not henceforth grant gay and bisexual male adolescents and their partners the same degree of sexual autonomy as their heterosexual and lesbian peers have been enjoying for decades.²⁸

¹⁸ Arts. 129, 130 ('Same-Sex Lewdness' with a person under eighteen; applied only to males), 500a (ban on 'Commercial Same-Sex Lewdness'; applied only to males and only to the prostitute), 517 ('Propagation of Same-Sex Lewdness and Lewdness with Animals'), 518 ('Associations Promoting Same-Sex Lewdness'), *Strafgesetz* (Criminal Law Act) (*StG*) 1852, which later became Arts. 209, 210, 220, 221, *Strafgesetzbuch* (Criminal Code) (*StGB*) 1975. Art. 210 was repealed in 1989, Arts. 220 and 221 in 1996. See Graupner 1997a, at Vol. 1, 141; Graupner, 1997b, at 272ff; Graupner, 1997c, at 209.

¹⁹ Arts. 206, 207, *StGB* 1975.

²⁰ Art. 209, *StGB* 1975. For further information on that law and the year-long struggle for its repeal see www.paragraph209.at and www.RKLambda.at.

²¹ See Graupner, 1997a, at Vol. 1, 156ff; Graupner, 1997b, at 273ff; Graupner, 2002a.

²² Graupner, 1999, 2; Graupner, 2002a. European Court of Human Rights (ECtHR), 9 January 2003, *L. & V. vs. Austria* (para. 20); and *S.L. vs. Austria* (para. 14).

²³ Graupner, *ibid.*; Graupner, 1997b, at 273; Graupner, 2002a.

²⁴ Amnesty International, 2001, 420f; Amnesty International, 2002, 417f.

²⁵ *Verfassungsgerichtshof* (Constitutional Court) (*VfGH*) 21 June 2002, G 6/02.

²⁶ Criminal Law Amendment Act 2002 (*Bundesgesetzblatt* [Federal Law Gazette] [*BGBI*] I 134/2002), Art. I lit. 19b).

²⁷ The Constitutional Court in 1989 held that Art. 209 Criminal Code did not violate the rights to equality and to respect of private life. And as late as November 2001 (on formal grounds) it rejected an application to struck down Art. 209 Criminal Code (*Verfassungsgerichtshof* [Constitutional Court], 29 November 2001, G 190/01). Also the judgment of June 2002 has been based on the very narrow ground that Art. 209 was construed in a way that allowed for legal relationships (for instance between a 18 year old and a 16 year old) to turn into a criminal offence (here: when the older partner turned 19), what the Court considered unreasonable. The Court also in June 2002 did not express an opinion as to whether Art. 209 violated the rights to equality on the basis of the distinction between male homosexual conduct on the one hand and heterosexual and lesbian on the other or whether it violated the right to respect of private life. In January 2003 the European Court of Human Rights ruled that Art. 209 had violated Art. 14 in connection with Art. 8 of the European Convention of Human Rights (*L. & V. vs Austria*, 09 January 2003, appl. 39392/98, 39829/98; *S. L. vs. Austria*, 09 January 2003, appl. 45330/99).

²⁸ Heterosexual adolescents since 1787 and lesbian adolescents since 1971, See Graupner, 1997a, at Vol. 1, 126ff.

In spite of considerable criticism by experts, youth organisations and the public at large²⁹ it replaced the anti-gay offence by a new offence covering also lesbian and heterosexual adolescent sexual behaviour.³⁰ This new offence not only remarkably restricts sexual freedom of heterosexual and lesbian youth but it is also worded in such vague terms that the fear has been expressed it would be primarily and selectively used against uncommon relations of adolescents, as bi-national and bi-ethnic relations, those with a greater social or age difference and particularly same-sex relations.³¹ In fact the new law turned out exactly as what it was intended: a substitute for the anti-homosexual offence it replaced. All of the criminal proceedings instituted under the new offence in 2002 concerned male-male relations. There was not a single case of a heterosexual or lesbian relation being taken to the criminal courts under the new – apparently gender neutral – law.³² In the first half of 2003 still half of all court cases and all of the incarcerations under the new statute concerned male homosexual relations.³³ The European Parliament already has called on Austria to end this discrimination in enforcement.³⁴

But not only has the discrimination been prolonged under a new cover. No victim of the persecution under the anti-homosexual offences has been compensated.³⁵ Deletion of convictions from the criminal record has been refused, as has been refused deletion of the data from the various police data banks,³⁶ even in those cases where the conviction has been based on relations which do not fall under the new substitute-offence and which therefore would be completely legal today.^{37 38} Despite the repeal of the law prisoners have not

²⁹ *Kinder- und Jugendanwaltschaft Wien* 2002; Austria Press Agency (APA), 2 July 2002; Austria Press Agency (APA), 5 July 2002; Friedrich, 11 July 2002; Graupner, 29 July 2002; Sprenger, 25 July 2002; Gigler, 26 June 2002, Rainer, 2002; Asamer, 4 July 2002; Editor's Office, 5 July 2002; Editor's Office, 6 July 2002; Asamer, 6 July 2002; Brickner, 6/7 July 2002; Völker, 6/7 July 2002; Editor's Office, 11 July 2002a; Editor's Office, 11 July 2002b; Editor's Office, 12 July 2002; Editor's Office, 13 July 2002; Ebensperger & Murschetz, 2002; 155; Bertel & Schwaighofer, 2002, § 207b Rz 1ff; Ebensperger & Murschetz, 2003; See also www.paragraph209.at and www.RKLambda.at.

³⁰ Art. 207b Criminal Code contains three offences. *Paragraph 1* makes it an offence to engage in sexual contact with a persons under 16 which for certain reasons is not mature enough to understand the meaning of what is going on or to act in accordance with such understanding provided that the offender practices upon the person's lacking maturity and his own superiority based on age. *Paragraph 2* makes in an offence to engage in sexual contact with a person under 16 by practicing on a position of constraint. *Paragraph 3* makes it an offence to immediately induce a person against remuneration.

³¹ Graupner, 29 July 2002 ; *Manfred Burgstaller* in Editor's Office, 11 July 2002c.

³² Reply of *Minister of Justice Dr. Dieter Böhmdorfer* to a parliamentary inquiry (2003), AB XXII. GP.-NR 91/AB, 3 April 2003,

www.parlament.gv.at/portal/page?_pageid=908,140359&_dad=portal&_schema=PORTAL

³³ Reply of *Minister of Justice Dr. Dieter Böhmdorfer* to a parliamentary inquiry (2003), AB XXII. GP.-NR 660/AB, 02.09.2003

www.parlament.gv.at/portal/page?_pageid=908,142084&_dad=portal&_schema=PORTAL

³⁴ *European Parliament*, Resolution on the Fundamental Rights in the EU (2002), A5-0281/2003 04.09.2003 (para. 79), www.europarl.eu.int.

³⁵ Editor's Office, 2003; Reply of *Minister of Justice Dr. Dieter Böhmdorfer* to a parliamentary inquiry (2003), AB XXII. GP.-NR 91/AB, 03.04.2003; Austria Press Agency (APA), Editor's Office, 11 February 2003.

³⁶ Editor's Office, 2003.

³⁷ *Bundespolizeidirektion* Graz (Federal Police Agency, Department of Graz), 9 December 2002, 8 January 2003, GZ P-491/80 - (11).

³⁸ In reaction to intensive lobbying by human rights and lesbian gay associations in 2003 The Minister of Interior ordered the deletion of all data concerning Art. 209 from the national police computer databank 'EKIS' (Executive Order 10 April 2003, 8181/421-II/BK/1/03) and the destruction of all criminal identification data (fingerprints, pictures, genetic data etc.) of Art. 209-victims (Decree 12 August 2003, BGBl II 361/2003). The deletion of data contained in not computer based police databanks is still refused (see for

been released;³⁹ one of them had been kept in an institution for mentally abnormal offenders even until his death.⁴⁰

After the repeal of Art. 209 some Courts have started to mitigate sentences inflicted under the discriminatory offence which have not yet been executed. The Supreme Court declared this practice unlawful.⁴¹ The Supreme Court took this decision even after the judgments of European Court of Human Rights in the cases *L. & V. vs. Austria*⁴² and *S. L. vs. Austria*⁴³ declaring Art. 209 and the criminal persecution based on it as being in violation of the European Convention of Human Rights; as in general those judgments could not alter the described negative attitudes held in the Austrian justice system.⁴⁴

Against this background of continuing discrimination even in the criminal law, one would expect that not much has been achieved with regard to protection against sexual orientation discrimination by the civil law. This is indeed the case.⁴⁵

Protection against discrimination in general is poor in Austrian law. Even the Austrian parliament itself has held that

*'comparison with most Western European and Nordic states demonstrates that statutory anti-discrimination protection in employment in Austria remains far below the international standard',*⁴⁶

without however taking the consequences and changing the situation.⁴⁷

3.1.1 Constitutional protection against discrimination

Austrian constitutional law consists of several statutes, treaties and certain (constitutional) provisions in non-constitutional statutes. It enshrines various (legally enforceable) provisions protecting against discrimination.

The general *principle of equality* is enshrined in Art. 2 of the Basic Law of the State 1867 ('*Staatsgrundgesetz*', *StGG*) and in Art. 7 of the Federal Constitutional Act 1929 ('*Bundes-Verfassungsgesetz*', *B-VG*). Art. 2 *Staatsgrundgesetz* stipulates: 'All citizens are equal before the law'; Art. 7 *B-VG* also provides that all citizens are equal before the law and adds that privileges according to birth, sex, social standing, class and religion are excluded and that no one may be disadvantaged on the basis of his disability. The state is bound by the constitution and the fundamental rights enshrined therein in all its

example: *Datenschutzkommission*, DSK [Data Protection Commission], decision 02.09.2003, GZ K120.846/007-DSK/2003).

³⁹ In sharp contrast the *Hungarian Constitutional Court*, when it struck down the discriminatory age of consent there as being unconstitutional, ordered to review of all final convictions which have not yet been fully executed (Constitutional Court of Hungary, 3 September 2002, 1040/B/1993/23).

⁴⁰ Graupner, 2003, 27.

⁴¹ *Oberster Gerichtshof* (OGH) (Supreme Court), 19 February 2003, 13 Os 3/03; Editor's Office, 2003.

⁴² ECtHR, 9 January 2003 (appl. 39392/98, 39829/98).

⁴³ ECtHR, 9 January 2003 (appl. 45330/99).

⁴⁴ For significant examples of such negative attitudes see Reply of *Minister of Justice Dr. Dieter Böhmdorfer* to a parliamentary inquiry (2003), AB XXII. GP.-NR 91/AB, 3 April 2003; Reply of *Minister of Justice Dr. Dieter Böhmdorfer* to a parliamentary inquiry (2003), AB XXII. GP.-NR 89/AB, 3 April 2003.

⁴⁵ For details see Graupner, 2002b.

⁴⁶ AB 1411 *BlgNR* 17. GP (1990) (Report of the Justice Committee on the 2nd amendment to the Equal Treatment Act).

⁴⁷ But see the Addendum at the start of this Chapter.

activities, also when it acts as an employer (for both categories of its employees: civil servants and employees out of contract).

According to the Constitutional Act *BGBI* (Federal Law Gazette) 1964/59, the European Convention of Human Rights (ECHR) and its protocols are forming part of the Austrian constitution. Art. 14 ECHR therefore is not only binding international law but also Austrian domestic constitutional law. This includes Art. 46 of the Convention establishing the binding force of judgements of the European Court of Human rights.

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

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

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

None of the provisions in the federal constitution and in the various state constitutions explicitly mention sexual orientation. Only in the explanatory notes to the Upper Austria State Constitution Amendment Act 2001 did the parliament of the state of Upper Austria hold that the equality-clause of the *Constitution of Upper Austria* (Art. 9 par. 4)⁴⁸ would outlaw also discrimination on the basis of sexual orientation.⁴⁹

Constitutionally protected fundamental rights are directed towards the state, be it as a holder of its official power or as a holder of civil rights.⁵⁰ They are not directly applicable to relations between individuals. Interpretation of general clauses in civil law (e.g. on 'innate rights' or on 'good morals') nevertheless has to consider the values enshrined in the constitutional rights ('indirect horizontal application of fundamental rights').⁵¹ This way the constitutionally protected rights gain significance also for employment discrimination in the private sector.

Art. 879 of the General Civil Code (*'Allgemeines Bürgerliches Gesetzbuch', ABGB*) stipulates that contracts going against good morals are null and void. Austrian labour courts have used this provision to elaborate the *principle of equal treatment* in labour law.⁵²

⁴⁸ Art. 9 par. 4 Constitution of Upper Austria: 'The state of Upper Austria commits itself to equal treatment and equalization of all human beings in the sense of fundamental rights, i.e. to the prohibition of all discrimination in the sense of the European Convention of Human Rights. ... Existing inequalities are to be put aside. Measures for the promotion of factual equality and equalization are admissible and to be set'.

⁴⁹ AB 914/2000 GP XXV (Report of the Constitution Committee, p. 5).

⁵⁰ For instance the state can employ out of his official power (civil servants based upon public law) or as a holder of civil rights (employees on the basis of private law; for instance in running a business).

⁵¹ Walter & Mayer, 1996, Rz 1330ff; Öhlinger, 1995, 258; Adamovich & Funk, 1985, 374ff; Krejci, 2000, 138 (Rz 80); Aicher, 2000, 68f (Rz 30ff).

⁵² For details see Schwarz & Löschnigg, 1999, at 406ff; Spielbüchler & Floretta, 1984, at 174ff; Tomandl, 1984, at 172ff.

This principle prohibits to disadvantage one employee or individual employees to other employees in a comparable situation, if this disadvantage is arbitrary or based on non-objective grounds. The protection is limited to one worker or a clear minority of employees in respect to a majority of employees enjoying a better treatment. Objectively not justified preferential treatment of one employee – or a minority of employees – over a majority is admissible.⁵³

The principle only covers facts occurring at the same time; the treatment of predecessors or successors in employment is irrelevant. Differentiations according to time do not fall under the obligation to equal treatment. So an employer is for instance free to grant a certain treatment only to persons employed (or qualifying for the treatment) after a certain date or before a certain date; even if this decision is arbitrary.

The principle, as far as it binds employers, normally is confined to employees within the same workshop (*'Betrieb'*). Just under exceptional circumstances an employee or a group of employees can claim that they are disadvantaged in respect to employees in another workshop (*'Betrieb'*) of the same employer.

The principle of equal treatment covers collective agreements, workshop agreements, individual labour contracts and factual treatment of employees. But it is confined to actual employees and does not cover recruitment and access to employment.

It does also not preclude employers from terminating a contract with an employee but not with others who gave rise to the same grounds on which the termination is based. So an employer for instance can dismiss an employee for regularly not showing up for work while not dismissing ten other employees neglecting their duties in the same way.

Such a termination however could violate good morals on other (not equality) grounds, as being based on revenge or on the belonging to a minority. It has been argued that this way a termination based upon sexual orientation is null and void,⁵⁴ but there is no such case-law.

Also the *general personality right* (§ 16 *ABGB*)⁵⁵ has been used by the courts to protect employees against discrimination. In 1988 the Supreme Court acknowledged the general personality right to engage in a non-marital partnership and on that basis declared null and void the prohibition to a janitor (enshrined in the labour contract) to take a cohabitant into his official residence.⁵⁶ The Supreme Court, in establishing that general personality right, referred to certain statutory provisions treating married and non-married partners on the same footing. Since those provisions cover only opposite-sex couples, it is not clear whether the general personality right acknowledged by the Supreme Court includes also the right to engage into a same-sex partnership.

⁵³ The principle should therefore better be called prohibition of disadvantage and not principle of equal treatment.

⁵⁴ Krejci, 2000, at 138 (Rz 80).

⁵⁵ Art. 16 *ABGB*: 'Each human being has innate, evident already by reason, and therefore has to be seen as a person'; See Josef Aicher, 2000, at 61 (Rz 24).

⁵⁶ *Oberster Gerichtshof*, 30 November 1988, 9 Ob A 262/88.

Given the clear case-law of the European Court of Human Rights rejecting discrimination on the basis of sexual orientation as serious as discrimination on the basis of sex, race, colour and religion and requiring particularly serious reasons for distinctions based upon sexual orientation (see 3.1.2), the horizontal effect of constitutional rights (by using the general clauses of private law), i.e. through the labour law principle of equal treatment, could in principle be a tool to tackle some forms of sexual orientation discrimination in the private sector under Austrian law.

This protection, from a number of angles, substantially falls short of the protection required by the Directive; i.e. as regards the scope of the protection, a clear concept of indirect discrimination, reversal of burden of proof, collective action, and (effective, proportionate and deterring) sanctions.

The narrow concepts of horizontal effect of constitutional rights, the general clauses of private law and the labour law principle of equal treatment therefore can not serve as an effective implementation of the Directive.

3.1.2 *General principles and concepts of equality*⁵⁷

Art. 14 ECHR does not guarantee a general right to equal treatment; it provides protection only within the scope of the other rights enshrined in the Convention and its protocols. This protection however does not require the violation of another right. Also a measure which on itself is compatible with another article of the Convention is incompatible with *Art. 14 ECHR* when it discriminates. In a way *Art. 14* forms an integral part of each provision of the Convention which guarantees certain rights and freedoms. The listing of categories in *Art. 14* is not exhaustive. Each personal characteristic allowing to distinguish persons or groups of persons from each other can be subsumed under 'other status'; 'sexual orientation' is such a characteristic.

Criterion for the compatibility of a differentiation with *Art. 14* is the existence of a 'reasonable and objective justification'. A certain distinction fulfils this criterion, if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This test has to be established on the basis of the requirements of a democratic society. States have a certain margin of appreciation which however shrinks with growing consensus among the national jurisdictions. Legal trends towards reducing certain discriminations lead to more severe scrutiny.

In that sense, in the case-law of the European Court of Human Rights, the following motives for differentiation's to the prejudice of certain social groups have been rejected:

- Protection and promotion of the traditional family⁵⁸
- Protection and tranquillity of a certain social group⁵⁹

⁵⁷ For details see Graupner, 1997a, at 100ff; and ECtHR, 24 July 2003, *Karner vs. Austria*, appl. 40016/98 (para. 37ff).

⁵⁸ ECtHR, 13 June 1979, *Marckx vs. Belgium*, appl. 6833/74 (para. 40, 48); European Commission of Human Rights, *Inze vs. Austria*, report 4 March 1986, appl. 8695/79 (para. 93f).

⁵⁹ European Commission of Human Rights, *Abdulaziz et. al. vs. UK*, report 12 May 1983, appl. 9214/80, 9473/81, 9474/81 (« racial tranquillity »).

- Public or traditional opinion or dominating opinion within a certain group of the population⁶⁰

Legal differentiations have to be based upon factual inequalities of sufficient weight, which form general characteristics of the groups treated unequally. Such differentiations moreover are admissible only if they fulfil the aim they are pursuing and if this aim can not be fulfilled in another way (*'ultima ratio'*).

Discrimination on the basis of sexual orientation has been rejected by the European Court of Human Rights as serious as discrimination on the basis of race, colour, religion and sex. In the case of distinctions based upon sex or sexual orientation the margin of appreciation is narrow; the Court requires particularly serious reasons for such distinctions to be justified. Predisposed bias on the part of a heterosexual majority against a homosexual minority cannot amount to sufficient justification for interferences with the rights of homo- and bisexual women and men, any more than similar negative attitudes towards those of a different race, origin or colour.⁶¹

Normally for a distinctive measure, to pass the test of proportionality under Art. 14, it suffices that the measure is in principle suited for realising the (legitimate) aim sought. If a measure however involves a difference in treatment based upon sex or sexual orientation it must also be shown that this distinction is *necessary* to realise the aim.⁶²

The protection provided by *Art. 2 Staatsgrundgesetz* and *Art. 7 B-VG* is both narrower and wider than the protection provided by Art. 14 ECHR. It is narrower in that its protection is limited to citizens, and it is wider as it guarantees equal treatment in all areas of the law. The Constitutional Court in its case-law evolved from a mere test of arbitrariness in earlier times to a strict test of reasonableness these days. Legal differentiations, on any ground (also therefore on sexual orientation⁶³), are only admissible if based upon corresponding relevant differences in real life. It depends on the subject in question whether a certain factual difference can be considered relevant. Factual inequalities may only serve as a basis for inequalities in the law if there is an intrinsic relation to the nature of the subject in question. Differences between rich and poor will be relevant for taxation law but will be irrelevant for election law. The legislature may rely on the normal case and disregard individual hardship; but it has to take into account abnormal constellations which take place not just exceptionally. A differentiation is admissible only if it is suited and necessary to fulfil a legitimate aim.

In applying those criteria the legislature enjoys a margin of appreciation. This margin narrows with growing seriousness of the interference connected with the inequality in question. Scrutiny has to be particularly strict if this interference concerns other fundamental rights. Regulations which concern the position of a minority within other social groups call for a very differentiating judgement. The burden of proof for compliance with those requirements rests with the state if it

⁶⁰ European Commission of Human Rights, *Inze vs. Austria*, report 4 March 1986, appl. 8695/79 (para. 87f); ECtHR, 28 October 1987, *Inze vs. Austria*, appl. 8695/79 (para. 44).

⁶¹ ECtHR, 9 January 2002, *L. & V. vs. Austria*, appl. 39392/98, 39829/98 (para. 45, 52); *S.L. vs. Austria*, appl. 45330/99 (para. 37, 44); ECtHR, 24 July 2003, *Karner vs. Austria*, appl. 40016/98 (para. 37).

⁶² ECtHR, 24 July 2003, *Karner vs. Austria*, appl. 40016/98 (para. 41).

⁶³ *Verfassungsgerichtshof* (Constitutional Court) (*VfGH*), 3 October 1989 (G 227/88, 2/89).

decides to depart from the principle of equality. Laws have to meet the principle of equality not only at the time of their enactment but at any time and inequalities which go against legal trends require particularly serious justification.

The right to equal treatment binds not only the legislature but also the executive (administration and judiciary). Executive state acts violate the right to equality if they are based upon a norm violating the right, if the executive wrongfully interprets a norm in a way violating the right and if the executive acts arbitrarily. The Constitutional Court for instance considers it as arbitrary if the executive disadvantages someone on unreasonable grounds.

The Constitutional Court ruled that sexual orientation is implicitly protected by the constitutional right to equality.⁶⁴ And while upholding the ban of same-sex marriages the Court indicated that (some) privileges of marriage might be unreasonable, and therefore unconstitutional.⁶⁵

3.1.3 Division of legislative powers relating to discrimination in employment

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

Legislation in respect of employees of the nine states and of local authorities (regional public employment) rests exclusively with those states alone (Art. 21 *B-VG*); with the notable exceptions of teachers at public compulsory schools (Art. 14 par. 2 *B-VG*) and of teachers at certain agricultural schools and educators at certain agricultural students' hostels (Art. 14a par. 2 lit. e and Art. 14 a par. 3 lit. b *B-VG*). As an exception to the exception states however keep legislative power in respect to regulation of agencies that are superior (in employment affairs) to those teachers and educators (Art. 14 par. 4 lit. a *B-VG*, Art. 14a par. 3 lit. b *B-VG*).

Legislative power regarding self-employment, education/training and workers/employers/occupational organisations is divided between the states and the federation; the states hold legislative power, for instance, in areas such as *kindergartens* and juvenile educational institutions, hospitals, nursing homes, ambulance services, funeral-services, fire-brigades and chambers⁶⁶ of agricultural workers/employers (Art. 10 – 15 *B-VG*).

Legislative power in the federation lies with the federal parliament, the National Council (*'Nationalrat'*, Art. 24ff *B-VG*), in the States with the state parliaments,

⁶⁴ *Verfassungsgerichtshof* (Constitutional Court) (*VfGH*), 3 October 1989 (G 227/88, 2/89).

⁶⁵ *Verfassungsgerichtshof* (Constitutional Court) (*VfGH*), 12 December 2003 (B 777/03).

⁶⁶ Chambers are public law entities established by statute and involving compulsory membership of all workers/employers in the respective field.

State Diet ('*Landtag*', Art. 95ff *B-VG*). The executive is just empowered to issue decrees implementing the statutory regulations (Art. 18 *B-VG*).⁶⁷

3.1.4 Basic structure of employment law⁶⁸

I. Private Sector

A. Types of Labour Contracts

Labour contracts under Austrian law fall into two broad categories: *contracts of work* ('*Werkvertrag*') and *contracts of employment* ('*Dienstvertrag*').

A contract of work obliges an entrepreneur (for instance a mechanic) to a certain work, a certain result (for instance the repair of a car). Remuneration depends upon the (quality of the) result.

A contract of employment on the other side obliges one party (the employee) to services, for a (definite or indefinite) period of time, in personal dependency from the other party of the contract (the employer). Remuneration here depends on the time the services are furnished.

A contract of employment is determined by time, a contract of work by result.

B. Labour Constitution

The Labour Constitution Act ('*Arbeitsverfassungsgesetz*', *ArbVG*) establishes a system of collective law-making in the area of labour law. This *collective law-making* is available for almost all types of private sector employment.⁶⁹

a. Workshop Agreements⁷⁰

The tool of collective law-making on the level of the individual enterprise are *workshop agreements* ('*Betriebsvereinbarungen*'). Workshop agreements are written agreements between an individual entrepreneur (employer) on the one side and the works council ('*Betriebsrat*') on the other.⁷¹ Workshop agreements are admissible only in certain areas,⁷² i.e. working hours, company vacancies, conduct of workers, disciplinary regulations, use of company facilities (as for instance a factory canteen), questionnaires for staff, controlling measures. Workshop agreements are directly binding for all employees employed in the respective enterprise;⁷³

Provisions in a labour contract deviating from a workshop agreement are admissible only if (a) they are more favourable for the employee than the

⁶⁷ Decrees of emergency by the Federal President ('*Bundespräsident*', Art. 60ff *B-VG*) or by the State Governments ('*Landesregierungen*', Art. 101 *B-VG*), which have statutory power, are excluded in the area of labour law (Art. 18 par. 5, 97 par. 4 *B-VG*).

⁶⁸ For details see: Schwarz & Löschnigg, 1999; Spielbüchler & Floretta, 1984; Tomandl, 1984.

⁶⁹ Excluded are e.g. agricultural and forest workers whose employment is regulated not by federal but by state-law (§ 1 (2) *Arbeitsverfassungsgesetz*).

⁷⁰ §§ 29-32, 96, 97 *Arbeitsverfassungsgesetz*.

⁷¹ Works councils have to be elected in all workshops with at least five employees over the age of 18 years which are not certain close relatives of the employer (§ 40 *Arbeitsverfassungsgesetz*). In workshops with at least five employees under the age of 18 years youth worker's councils have to be elected (§§ 125ff *Arbeitsverfassungsgesetz*). In workshops with less than five employees therefore no workshop agreements can be concluded. Also agricultural and forest workshops, railway companies and private households are exempted (§ 33 *Arbeitsverfassungsgesetz*).

⁷² §§ 96f *Arbeitsverfassungsgesetz*.

⁷³ § 31 *Arbeitsverfassungsgesetz*.

regulation in the workshop agreement; or (b) they concern areas not regulated by the workshop agreement.

So called 'workshop agreements' in areas which can not be regulated by workshop agreements are frequent. Such agreements are however not workshop agreements in the sense of labour constitution and lack their specific legal effects, i.e. the binding force on all (also future) employees. Such, so called '*free workshop agreements*' ('*freie Betriebsvereinbarungen*') become part of the individual labour contracts if the employer discloses such an agreement and the employee (expressly or implicitly) accepts it.⁷⁴

*b. Collective Agreements*⁷⁵

The main and classic tool of collective (labour-) law-making are *collective agreements* ('*Kollektivverträge*'). Collective agreements are written agreements between corporations on the side of employers on the one hand and corporations on the side of employees on the other.⁷⁶ Collective agreements are mainly regulating the mutual rights and obligations of employers and employees. Those regulations are directly binding not only on the corporations which enter into the contract but for all their members, and – on the employee's side – also for all non-members which are employed in the business of a member of the respective employers corporation (outsider-effect, '*Außenseiterwirkung*').⁷⁷ Formal requirements and obligations to employ or prohibitions to employ can not be the object of collective agreements.

Provisions deviating from the collective agreement are admissible only if (a) the collective agreement does not exclude them and (b) they are more favourable for the employee than the regulation in the collective agreement; or (c) they concern areas not regulated by the collective agreement.

c. Statutes

Statutes (and decrees implementing them) in the area of labour law can be absolutely compulsive, relatively compulsive or dispositive. Absolutely compulsive statutory regulations do not allow for any deviation by (individual and/or collective) contract. Relatively compulsory statutory regulation allow for deviations only which are more favourable for the employee. And dispositive statutes for all kinds of deviations, they are relevant when there is no regulation by (individual or collective) contract.

d. Hierarchy of Legal Sources

The system of labour constitution presented above establishes the following hierarchy of legal sources in the area of labour law:

- constitutional statutes
- compulsive (simple) statutes

⁷⁴ Different than real workshop agreements an employer therefore can exclude such free workshop agreements for (all or certain) future employees by (upon recruitment) declaring that he does not want to be bound by the agreement. See Schwarz & Löschnigg, 1999, at 135ff.

⁷⁵ §§ 2-17 *Arbeitsverfassungsgesetz*.

⁷⁶ Those corporations can be statutory representations of interest as for instance the Chamber of Commerce, the Bar Associations, the Chamber of Labour, or voluntary organizations as the trade unions or the Association of Industrialists. See Schwarz & Löschnigg, 1999, at 86ff.

⁷⁷ § 12 *Arbeitsverfassungsgesetz*.

- compulsive decrees
- collective agreements
- workshop agreements
- individual labour contracts
- dispositive (simple) statutes
- dispositive decrees
- orders by the employer

II. Public Sector

Employment with the state can be set up by contract or by a sovereign act out of its official power.

Employees of the state employed on the basis of a (private-law) contract are called *employees out of contract* ('*Vertragsbedienstete*'), employees employed on the basis of public law are called *civil servants* ('*Beamte*').

Both categories of employment are governed by statutes.⁷⁸ No collective agreements or workshop agreements are available.

3.1.5 Provisions on sexual orientation discrimination in employment or occupation

Until 1 July 2004 in Austrian law there were no provisions on sexual orientation discrimination in employment and occupation. See also the Addendum at the start of this Chapter.

3.1.6 Important case law precedents on sexual orientation discrimination in employment or occupation

There is no Austrian case law on sexual orientation discrimination in employment or occupation.

3.1.7 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation

I. Public Sector

The state itself is bound by the constitution and the fundamental rights enshrined therein in all its activities; also when it acts as an employer. Thereby it makes no difference whether the state avails itself of his official power or of the remedies of private law.⁷⁹ The state as an employer is bound by the fundamental constitutional rights, including the right to equal treatment, for both categories of its employees: civil servants and employees out of contract.

⁷⁸ For employees out of contract the main statute is the Act on Employees out of Contract ('*Vertragsbedienstetengesetz*', *VBG*); for civil servants it is the Act on the Employment Law of Civil Servants ('*Beamten-Dienstrechtsgesetz*', *BDG*).

⁷⁹ See Walter & Mayer, 1996, at Rz 1333; Öhlinger, 1995, at 256; Adamovich & Funk, 1985, at 374ff.

The Federal Act on Equal Treatment of Woman and Man and the Promotion of Women in the Area of the Federation (Federation Equal Treatment Act, '*Bundes-Gleichbehandlungsgesetz*', *B-GBG*) (and its counterparts in the nine states) is restricted to measures against gender-discrimination and can therefore not be used against sexual orientation discrimination.⁸⁰

As the provision on sexual harassment in this act does not refer to gender but to 'conduct belonging to the sexual sphere',⁸¹ this provision could theoretically be used against harassment on the basis of sexual orientation or behaviour.⁸² There is however no such case-law.

II. Private Sector

The Act on Equal Treatment of Woman and Man in Working Life (Equal Treatment Act, '*Gleichbehandlungsgesetz*', *GIBG*) is restricted to measures against gender-discrimination and can therefore not be used against sexual orientation discrimination.⁸³

As the provision on sexual harassment in this act does not refer to gender but to 'conduct belonging to the sexual sphere',⁸⁴ this provision could theoretically be used against harassment on the basis of sexual orientation or behaviour.⁸⁵ There is however no such case-law.

III. Administrative Penal Law

Austrian administrative penal law protects social groups characterised by their 'race', ethnicity, nationality, religion and (since 1997) disability against disadvantage⁸⁶ (Art. IX par. 1 lit. 3 Introductory Act to the Administrative Procedures Acts 1925; '*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*' 1925, *EGVG*).

Since 'disadvantage' is not in any way restricted to certain fields, also disadvantage in employment and occupation is theoretically covered. But no such cases are known. Homosexual and bisexual persons are not protected anyway.

⁸⁰ See European Court of Justice, 17 February 1998, *Lisa Grant vs. Southwest-Trains Ltd.* (Case C-249/96) (1998) ECR I-621.

⁸¹ The act stipulates that it is sexual harassment, 'if conduct belonging to the sexual sphere takes place which impairs human dignity, which for the person affected is unwanted, inappropriate or offensive and which either (1) creates an intimidating, hostile or humiliating atmosphere, or (2) if the fact that the person affected rejects or tolerates a conduct belonging to the sexual sphere by a representative of the employer, or a colleague, expressly or implicitly, serves as the basis for a decision with detrimental consequences for this person's access to vocational training, employment, further employment, promotion or payment or as the basis for any other detrimental decision in concerning the employment relation' (Art. 7 par. 2 *B-GBG*).

⁸² See European Commission, '*Code of Practice on Sexual Harassment at the Workplace*' (1991), Rec. 92/C27/04, OJ C27/6.

⁸³ European Court of Justice, 17 February 1998, *Lisa Grant vs. Southwest-Trains Ltd.* (Case C-249/96) (1998) ECR I-621.

⁸⁴ The act stipulates that it is sexual harassment, 'if conduct belonging to the sexual sphere takes place which impairs human dignity, which for the person affected is unwanted, inappropriate or offensive and which either (1) creates an intimidating, hostile or humiliating atmosphere, or (2) if the fact that the person affected rejects or tolerates a conduct belonging to the sexual sphere by the employer, a superior or a colleague, expressly or implicitly, serves as the basis for a decision with detrimental consequences for this person's access to vocational training, employment, further employment, promotion or payment or as the basis for any other detrimental decision in concerning the employment relation' (Art. 2 par. 1b *GIBG*).

⁸⁵ See European Commission, '*Code of Practice on Sexual Harassment at the Workplace*' (1991), Rec. 92/C27/04, OJ C27/6.

⁸⁶ Until 1997 the offence covered only public disadvantage. Since 1997 also non-public disadvantage is an offence (*Bundesgesetzblatt* I 1997/63).

See also the Addendum at the start of this Chapter.

3.1.8 Provisions on sexual orientation discrimination in other fields than employment and occupation

There are only two provisions in Austrian law covering sexual orientation discrimination.

The *Decree of Guidelines* (*‘Richtlinienverordnung’, RLV*)⁸⁷, establishing a code of conduct for police-officers, prohibits members of the police forces, in executing their duties, to do anything that could be perceived as discrimination on the basis of (inter alia) sexual orientation (Art. 5 par. 1). Only one case is known under this provision enacted in 1993. A police-officer in searching a car for drugs, when finding erotic gay photo books, remarked to the driver whether he had considered to undergo medical treatment. The Independent Administrative Board of Vienna (*‘Unabhängiger Verwaltungssenat Wien’, UVS-Wien*) in 1997 declared this remark unlawful on the basis of being most seriously discriminatory.⁸⁸ No other case is known.

In the state of Vienna the *Youth Protection Act 2002* (*‘Jugendschutzgesetz 2002’*) makes it an (administrative law) offence to make accessible to persons under 18 years material whose content discriminates against persons on the basis of (inter alia) their sexual orientation (Art. 10 par. 1 lit. 2).

In addition the *Data Protection Act 2000* (*‘Datenschutzgesetz 2000’*) classifies data concerning the ‘sexual life’ of persons as ‘sensitive’ and therefore ‘particularly worthy of protection’. As a result those data enjoy heightened confidence and security (§ 4 lit. 2).

Austrian law enshrines a lot more of anti-discrimination provisions; but those regulations provide no protection against discrimination on the basis of sexual orientation.

- Art. 283 of the Criminal Code 1975 (*‘Strafgesetzbuch’, StGB*) protects ethnic, national and religious groups protection from *incitement to hatred*. Homosexual and bisexual persons are not protected.
- The Criminal Code enshrines certain measures against (racist, xenophobic and religious) *hate crimes* (as aggravation of punishment, Art. 33 lit. 5⁸⁹; and proceedings ex officio, Art. 117 par. 3 *StGB*).⁹⁰ Homosexual and bisexual persons are not protected.
- Austrian administrative penal law protects social groups characterised by their ‘race’, ethnicity, nationality, religion and (since 1997) disability against *disadvantage*⁹¹ and against *exclusion* from publicly accessible places or from consummation of publicly offered services (Art. IX par. 1 lit. 3 Introductory Act to the Administrative Procedures Acts 1925 ;

⁸⁷ This decree by the Minister of Interior is based upon § 31 of the Police Security Act (*‘Sicherheitspolizeigesetz’, SPG*).

⁸⁸ UVS Wien 8 October 1997, UVS-02/26/61/95; Graupner, 1997c.

⁸⁹ As amended 1996 (*Bundesgesetzblatt* 1996/762) (only racist and xenophobic hate crimes).

⁹⁰ As amended 1987 (*Bundesgesetzblatt* 1987/605).

⁹¹ Until 1997 the offence covered only public disadvantage. Since 1997 also non-public disadvantage is an offence (*Bundesgesetzblatt* I 1997/63).

'Einführungsgesetz zu den Verwaltungsverfahrensgesetzen' 1925, EGVG). Homosexual and bisexual persons are not protected.

- If the holder of a *commercial license* in his business⁹² seriously discriminates on the basis of 'race', colour, national or ethnic origin, religion or disability the authority has to withdraw the license for his business (Art. 87 par. 1 lit. 3, par. 2 Industrial Code, 'Gewerbeordnung', GewO)⁹³. Homosexual and bisexual persons are not protected.
- The *Act on Austrian Broadcasting* ('Gesetz über den österreichischen Rundfunk', 'ORF-Gesetz', ORF-G) bans programmes which incite to hate on the basis of sex, age, disability, religion and nationality (§ 10 par. 2) and advertising which contains discrimination on the same grounds (Art. 14 par. 1 lit. 2). Homosexual and bisexual persons are not protected.⁹⁴

The drafts for implementation legislation in the States of Upper Austria and Styria extend the prohibition of sexual orientation discrimination to areas beyond employment, i.e. to all actions by organs of the state, local authorities and confederations of local authorities and (in Upper Austria) also to actions of (state legislation regulated) self-governing bodies.⁹⁵ Actions by private individuals are not covered. So also under these drafts harassment for example in hospitals or in the delivery of ambulance or funeral services (for legislative competencies of the states see 3.1.3. above) done by private sector employees and private individuals is not prohibited. Only the Vienna draft for an anti-discrimination act (Vienna Antidiscrimination Act (*WrADG*)) would cover all discrimination, irrespective of the perpetrator, in (some) areas coming within the state's legislative competency;⁹⁶ but this draft covers solely discrimination on the ground of race and ethnic origin.⁹⁷

3.2 The prohibition of discrimination required by the Directive

3.2.1 Instrument(s) used to implement the Directive

See also the Addendum at the start of this Chapter.

The private employment bill⁹⁸ introduces a new '*Gleichbehandlungsgesetz*', *GIBG* (Equal Treatment Act) and amends the current '*Gleichbehandlungsgesetz*', *GIBG* (Equal Treatment Act) which is renamed into '*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*', *GBK/GAW-G* (Federal Act on the Equal Treatment Commission and the Equal Treatment Agency). The public

⁹² It is not clear whether 'in his business' also covers treatment of employees.

⁹³ This provision has been enacted in 1997 (*Bundesgesetzblatt I* 1997/63).

⁹⁴ In 2001, obviously to include the grounds included in Art. 13 EC, the categories disability, religion and age have been included (*Bundesgesetzblatt I* 2001/83). The only category of Art. 13 EC which has been left out is sexual orientation.

⁹⁵ Art. 33 Styria State Equal Treatment Act (*StmkL-GBG*); Art. 1 Upper Austria Antidiscrimination Act (*OöADG*).

⁹⁶ Art. 1 Vienna Antidiscrimination Act (*WrADG*).

⁹⁷ Art. 1 Vienna Antidiscrimination Act (*WrADG*). See also the Addendum at the start of this Chapter.

⁹⁸ The bill on private employment also implements Directive 2000/43/EC regarding areas other than employment (within the proposed *GIBG*).

employment bill amends the '*Bundes-Gleichbehandlungsgesetz*', *B-GBG* (Federal Equal Treatment Act) covering federal public employment and students at universities

The new, *GIBG* (Equal Treatment Act) will also contain legislation of principles in respect to agricultural workers (Art. 41-58 *GIBG*; proscribing essentially the same regime as for other private sector employees) (see 3.1.3 above). The *B-GBG* (Federal Equal Treatment Act) will also apply to those state employed teachers and educators which come under federal legislative competency (see 3.1.3 above) (Art. 41 *B-GBG*); but, since the states hold legislative power in respect to regulation of agencies that are superior (in employment affairs) to those teachers and educators (see 3.1.3 above), the provisions of the *B-GBG* on the Ombudspersons and the Equal Treatment Commission do not apply (Art. 41 *B-GBG*) to those teachers and educators.

Three of the nine Austrian states⁹⁹ have presented draft bills to implement the Directive in their areas of competency: Upper Austria¹⁰⁰, Vienna¹⁰¹ and Styria¹⁰². The drafts in Upper Austria and in Styria prohibit discrimination on the basis of sexual orientation also in areas beyond employment, but none of the drafts also cover employment of agricultural workers.

For the purpose of this chapter those bills and drafts are cited as follows:

Federation:

Equal Treatment Act (private employment) (*GIBG*)

Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (private employment) (*GBK/GAW-G*)

Federal Equal Treatment Act (public employment and students at universities) (*B-GBG*)

Upper Austria:

Upper Austria Antidiscrimination Act (*OöADG*)

⁹⁹ But see the Addendum at the start of this Chapter.

¹⁰⁰ '*Begutachtungsentwurf betreffend das Landesgesetz über das Verbot der Diskriminierung auf Grund der rassischen oder ethnischen Herkunft, der Religion, der Weltanschauung, einer Beeinträchtigung, des Alters oder der sexuellen Ausrichtung*' (Oö. Antidiskriminierungsgesetz) [Consultation Draft regarding State Act on Prohibition of Discrimination on the Basis of race and ethnic Origin, Religion, belief, handicap, age or sexual orientation, Upper Austria Antidiscrimination Act] (Consultation period until 10 April 2004), see: www.ooe.gv.at/recht/begutachtung/LG_antidiskriminierungsgesetz.pdf.

¹⁰¹ '*Entwurf für ein Gesetz, mit dem die Dienstordnung 1994 (18. Novelle zur Dienstordnung 1994), die Vertragsbedienstetenordnung 1995 (18. Novelle zur Vertragsbedienstetenordnung 1995) und das Wiener Verwaltungssenat-Dienstrechtsgesetz 1995 (6. Novelle zum Wiener Verwaltungssenat-Dienstrechtsgesetz 1995) geändert werden (Antidiskriminierungsnovelle)*' [Draft for an Act amending the Service Regulations (18th Amendment to Service Regulations 1994), the Regulations for Employees out of Contract (18th Amendment to the Regulations for Employees out of Contract 1995) and the Vienna Administrative Tribunal-Staff Regulations Act 1995 (6th Amendment to the Vienna Administrative Tribunal Staff Regulations Act 1995, Antidiscrimination Amendment Act)] (Consultation period until 21 April 2004): '*Entwurf für ein Gesetz zur Bekämpfung von Diskriminierung auf Grund der Rasse oder ethnischen Herkunft (Wiener Antidiskriminierungsgesetz)*' [Draft for an Act to Combat Discrimination on the Basis of race or ethnic origin, Vienna Anti-Discrimination Act] (Consultation period until 28 April 2004).

¹⁰² '*Entwurf eines Gesetzes über die Gleichbehandlung im Bereich des Landes, der Gemeinden und Gemeindeverbände, Landes-Gleichbehandlungsgesetz*' [Draft of an Act on Equal Treatment in the Area of the State, the Local Authorities and Confederations of Local Authorities, State Equal Treatment Act], GZ A5-10.05-1/04-66 (Consultation period until 14 May 2004).

Vienna:

Vienna Service Regulations Act (*WrDO*)

Vienna Regulations for Contractual Employees (*WrVBO*)

Vienna Antidiscrimination Act (*WrADG*)

Styria:

Styria State Equal Treatment Act (*StmkL-GBG*).

3.2.2 *Concept of sexual orientation (art. 1 Directive)*

The federal bills are using the literal translation of the English term sexual orientation: '*sexuelle Orientierung*' (Art. 11 *GIBG*; Art. 13 *B-GBG*). The state drafts instead are using the German wording of the Directive which is '*sexuelle Ausrichtung*' ('sexual alignment').¹⁰³ None of the bills/drafts are defining 'sexual orientation'. The explanatory notes to the federal bills and to the Styrian draft say that the term has to be interpreted extensively and that generally it is understood as 'heterosexual, homosexual and bisexual'. The Upper Austrian and the Vienna drafts are silent on that matter.

3.2.3 *Direct discrimination (art. 2(2)(a) Directive)*

The federal bills and the drafts in Upper Austria and Styria are prohibiting direct discrimination by repeating the wording of the Directive.¹⁰⁴ The Vienna draft uses different wording than the Directive. It defines direct discrimination as, without reasonable justification, disadvantaging a person in a comparable situation compared to another person with a different sexual orientation.¹⁰⁵ This definition seems to be out of line with the Directive. The Directive does not allow exceptions for 'reasonably justified' direct discrimination and it does not provide that the favourably treated other is of a different sexual orientation.

3.2.4 *Indirect discrimination (art. 2(2)(b) Directive)*

The federal bills and the drafts in Upper Austria are prohibiting indirect discrimination by repeating the wording of the Directive.¹⁰⁶ The Vienna draft uses different wording than the Directive. It accepts as indirect discrimination, if (by their content) neutral regulations, criteria or measures, without reasonable justification, in fact substantially more frequently do or could negatively affect members of a certain sexual orientation than persons of a different orientation.¹⁰⁷ This definition seems to be out of line with the Directive.

¹⁰³ Art. 1 Upper Austria Antidiscrimination Act (*OöADG*); Art. 18a Vienna Service Regulations Act (*WrDO*); 4a Vienna Regulations for Contractual Employees (*WrVBO*); Art. 1 Styria State Equal Treatment Act (*SStmkL-GBG*).

¹⁰⁴ Art. 13 par. 1 Equal Treatment Act (*GIBG*); Art. 13a par. 1 Federal Equal Treatment Act (*B-GBG*); Art. 3 lit. 1 Upper Austria Antidiscrimination Act (*OöADG*); Art. 4 par. 1 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁰⁵ Art. 18a par. 2 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 2 Vienna Regulations for Contractual Employees (*WrVBO*).

¹⁰⁶ Art. 13 par. 2 Equal Treatment Act (*GIBG*); Art. 13a par. 2 Federal Equal Treatment Act (*B-GBG*); Art. 3 lit. 2 Upper Austria Antidiscrimination Act (*OöADG*); Art. 4 par. 2 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁰⁷ Art. 18a par. 2 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 2 Vienna Regulations for Contractual Employees (*WrVBO*).

'Apparently neutral' seems to be wider than 'neutral by content'. The Directive does not require that the favourably treated 'other persons' are of a different sexual orientation, and it does not contain the restrictions that the disadvantage be 'substantially more frequent'. Finally 'reasonable justification' (without more) is much more lenient than the Directive which specifically requires a legitimate aim and appropriate and necessary means.

3.2.5 *Prohibition and concept of harassment (art. 2(3) Directive)*

The federal bills and the state drafts in Upper Austria and Styria are prohibiting harassment by, in essence, repeating the wording of the Directive.¹⁰⁸

The federal bills however are falling short of the Directive insofar as they restrict the prohibition of harassment to the (successful) violation of dignity and the creation of a certain environment and do not cover (unsuccessful) conduct *with (only) the purpose* of violating dignity and creating the specific environment.

The Vienna draft lets a violation of dignity suffice and does not require the (potential) creation of an intimidating, hostile, degrading, humiliating or offensive environment; it also however restricts the prohibition to (successful) violation and does not cover (unsuccessful) conduct *with (only) the purpose* of violating dignity.¹⁰⁹

Harassment is everywhere, save Upper Austria, expressly deemed to be a form of discrimination.¹¹⁰

3.2.6 *Instruction to discriminate (art. 2(4) Directive)*

An instruction to discriminate is deemed as discrimination in all of the bills and drafts.¹¹¹

An instruction to harassment is deemed to be discrimination only in the federal bills and in the drafts of Upper Austria and Styria.¹¹²

3.2.7 *Material scope of applicability of the prohibition (art. 3 Directive)*

The federal bills and the drafts of Vienna and Styria are covering all discrimination 'in connection with employment'.¹¹³ The Upper Austria draft

¹⁰⁸ Art. 15 par. 2 Equal Treatment Act (*GIBG*); Art. 16 par. 2 Federal Equal Treatment Act (*B-GBG*); Art. 3 lit. 3 Upper Austria Antidiscrimination Act (*OöADG*); Art. 4 par. 3 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁰⁹ Art. 18a par. 3 lit. 2 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 3 lit. 2 Vienna Regulations for Contractual Employees (*WrVBO*).

¹¹⁰ Art. 15 par. 3 Equal Treatment Act (*GIBG*); Art. 16 par. 3 Federal Equal Treatment Act (*B-GBG*); Art. 18a par. 3 lit. 2 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 3 lit. 2 Vienna Regulations for Contractual Employees (*WrVBO*); Art. 4 par. 3 Styria State Equal Treatment Act (*StmkL-GBG*).

¹¹¹ Art. 13 par. 3 Equal Treatment Act (*GIBG*); Art. 13a par. 3 Federal Equal Treatment Act (*B-GBG*); Art. 18a par. 3 lit. 1 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 3 lit. 1 Vienna Regulations for Contractual Employees (*WrVBO*); Art. 6 par. 2 Upper Austria Antidiscrimination Act (*OöADG*); Art. 4 par. 4 Styria State Equal Treatment Act (*StmkL-GBG*).

¹¹² Art. 15 par. 3 Equal Treatment Act (*GIBG*); Art. 16 par. 3 Federal Equal Treatment Act (*B-GBG*); Art. 6 par. 2 Upper Austria Antidiscrimination Act (*OöADG*); Art. 4 par. 4 Styria State Equal Treatment Act (*StmkL-GBG*).

¹¹³ Art. 11 par. 1 Equal Treatment Act (*GIBG*); Art. 13 par. 1 Federal Equal Treatment Act (*B-GBG*); Art. 18a par. 1 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 1 Vienna Regulations for Contractual Employees (*WrVBO*); Art. 6 par. 1 Styria State Equal Treatment Act (*StmkL-GBG*).

covers all 'measures' by organs of the state, (confederations) of local authorities and of (by state legislation regulated) self-governing bodies.¹¹⁴ In addition to those general clauses all of the bills/drafts are enumerating certain examples of areas covered, thereby literally taking over most of the items listed in Art. 3(1) of the Directive.

The federal private employment bill also prohibits discrimination in access to vocational guidance, vocational training, advanced vocational training and retraining outside of employment (Art. 12 lit. 1 *GIBG*), and discrimination concerning membership and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Art. 12 lit. 2 *GIBG*).

The Upper Austria and the Styria draft cover all 'measures' by organs of the state and (confederations) of local authorities¹¹⁵ self-governing bodies.¹¹⁶ So self-employment, vocational guidance and (re)training (outside of employment) and membership/involvement in workers/employers and occupational organisations seem to be also adequately covered; despite the fact that in Upper Austria the (non-exhaustive) exemplary listing in addition to the general clause is enumerating access to self-employment only.

The *GIBG*, to be introduced by the federal private employment bill, covers only access to self-employment¹¹⁷, and the Vienna draft does not mention self-employment, vocational guidance and (re)training (outside of employment) and membership/involvement in workers/employers and occupational organisations; those areas (but for self-employment again only: access to) are covered by the Vienna Antidiscrimination Act (*WrADG*), which does not prohibit sexual orientation discrimination (see 3.1.8 and 3.2.1 above).

While the Directive also covers compulsory work and voluntary work (see paragraph 2.2.7), none of the Austrian drafts/bills cover such areas as compulsory military service, compulsory military replacement service, (compulsory) work of prisoners and voluntary non-occupational (honorary) work.

According to the division of legislative power it is up to the states to regulate employment of agricultural workers (the federation can proscribe principles for such legislation, see 3.1.3 above). None of the nine states, so far, had adopted legislation or presented drafts or bills for legislation in this area.¹¹⁸

3.2.8 *Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition'*

Only the federal bills seem to meet the requirements of the Directive regarding personal scope of applicability. They, as the Directive, do not restrict discrimination to certain (groups) of perpetrators (Art. 11 & 13 *GIBG*; Art. 13 & 13a *B-GBG*). In the case of harassment they expressly include harassment by

¹¹⁴ Art. 1 par. 1 Upper Austria Antidiscrimination Act (*OöADG*).

¹¹⁵ Art. 33 Styria State Equal Treatment Act (*StmkL-GBG*); Art. 1 par. 1 Upper Austria Antidiscrimination Act (*OöADG*).

¹¹⁶ Art. 1 par. 1 Upper Austria Antidiscrimination Act (*OöADG*).

¹¹⁷ Art. 1 par. 1 lit. 4 & Art. 12 lit. 3 Equal Treatment Act (*GIBG*).

¹¹⁸ But see the Addendum at the start of this Chapter.

third persons (different from the employer) (Art. 15 par. 1 lit. 2 & 3 *GIBG*; Art. 16 lit. 3 *B-GBG*), also outside of employment (Art. 15 par. 1 lit. 4 *GIBG*).

The state drafts are falling short of the Directive in this respect.

The Styria draft covers all discrimination in employment not specifying certain (groups of) perpetrators¹¹⁹ and expressly include harassment by third persons (different from the employer);¹²⁰ but outside employment discrimination is covered only when committed by organs of the state and (confederations) of local authorities.¹²¹

The Upper Austria draft covers only discrimination committed by organs of the state, (confederations) of local authorities and self-governing bodies;¹²² thereby for instance excluding job agencies.

The Vienna draft is the most restrictive in regard to personal scope. It covers only discrimination inflicted by Vienna state employees,¹²³ thereby not only excluding conduct by third persons (as job agencies) but also by state organs (as members of government or the parliament).

The Upper Austria and Vienna drafts furthermore restrict also the personal application regarding instruction to discrimination. Upper Austria instruction is deemed discrimination only if such instruction comes from a superior¹²⁴ and in Vienna only if a(nother) Vienna state employee is instructed.¹²⁵

3.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

3.3.1 Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour

The explanatory notes to the ministerial draft for a federal private employment bill said:

'Not covered by the prohibition of discrimination is furthermore sexual behaviour which has to be distinguished from sexual orientation' (p. 10).

This statement has not been taken over into the bill. And neither the federal public employment draft/bill nor the state drafts ever contained such a comment.

The federal bills, in their explanatory notes, explicitly establish that the principle of equal treatment applies regardless whether a person's sexual orientation, on

¹¹⁹ Art. 2, 4 & 6 Styria State Equal Treatment Act (*StmkL-GBG*).

¹²⁰ Art. 11 Styria State Equal Treatment Act (*StmkL-GBG*).

¹²¹ Art. 33 Styria State Equal Treatment Act (*StmkL-GBG*).

¹²² Art. 1 par. 1, Art. 3, Art. 8ff Upper Austria Antidiscrimination Act (*OöADG*).

¹²³ Art. 18a par. 1 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 1 Vienna Regulations for Contractual Employees (*WrVBO*).

¹²⁴ Art. 6 par. 2 Upper Austria Antidiscrimination Act (*OöADG*).

¹²⁵ Art. 18a par. 3 lit. 1 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 3 lit. 1 Vienna Regulations for Contractual Employees (*WrVBO*),

which discrimination is based, is actual or (just) assumed (private employment bill: p. 15; public employment bill: p. 11).

3.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*

There is nothing in the bills/drafts to conclude that such discrimination would not be covered. The explanatory notes to the federal bills, in regard to religion/belief, expressly state that the wearing of religious symbols or dress (as turbans) is covered, because from the dress membership in a certain religion can be concluded, respectively the dress be understood as expression of a certain religion (private employment bill: p. 15; public employment bill: 11). So also expression of sexual orientation seems to be covered.

3.3.3 *Discrimination between same-sex partners and different-sex partners*

The federal bills, in their explanatory notes, expressly establish that unequal treatment of unmarried same-sex partners versus unmarried opposite-sex partners is prohibited.¹²⁶

The explanatory notes to the federal bills, on the other hand, explicitly allow for privileges accorded to married couples. The notes thereby refer to recital 22 (which is not taken over into the operative part of the bills); and they do not restrict the concept of marriage to opposite-sex marriage.¹²⁷ So unequal treatment between married opposite-sex couples and married same-sex couples, recognised by Austrian law¹²⁸, should, in any way, be prohibited.

There is nothing on registered partners in the texts or the explanatory notes. Given the general, unrestricted, prohibition of sexual orientation discrimination in the bills, (direct and indirect) unequal treatment of same-sex registered partners versus opposite-sex registered partners should be covered.

The state drafts are silent on those matters, but there is nothing to conclude that they intend to be more restrictive than the federal bills. The Styrian draft prohibits the discriminatory use of 'family status' as a criteria for recruitment.¹²⁹

3.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual individuals/heterosexual, events or organisations*

Given the general, unrestricted, prohibition of (direct and indirect) sexual orientation discrimination in the bills/drafts such discrimination should be covered. There is nothing to conclude, neither in the texts nor in the explanatory notes, that it would not be covered. I.e. as the federal bills in the explanatory

¹²⁶ Private employment bill: p. 15; public employment bill: p. 11.

¹²⁷ Private employment bill: p. 15; public employment bill: p. 11.

¹²⁸ Austrian International Private law, for the requirements of marriage, refers to the personal statute of each of the partners. If according to the home jurisdiction of each partner difference in sex is no requirement for marriage, their same-sex marriage would be recognized by Austria (Art. 17, *Bundesgesetz über das Internationale Privatrecht, IPR-G* [Federal Act on International Private Law]). The only way to deny recognition would be to invoke ordre public (Art. 6 *IPR-G*), but that seems i.e. inapt in respect to other member-(sister-)states of the European Union.

¹²⁹ Art. 8 Styria State Equal Treatment Act (*StmkL-GBG*).

notes explicitly state that the term 'sexual orientation' should be interpreted extensively.¹³⁰

3.3.5 *Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals*

Given the general, unrestricted, prohibition of (direct and indirect) sexual orientation discrimination in the bills/drafts such discrimination should be covered. There is nothing to conclude, neither in the texts nor in the explanatory notes, that it would not be covered. Even more so as the federal bills, in the explanatory notes, explicitly state that the term 'sexual orientation' should be interpreted extensively.¹³¹

3.3.6 *Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about sexual orientation*

Since disadvantageous treatment on the basis of sexual orientation is prohibited, discrimination on the basis of a person's answer to a question about sexual orientation should be covered.

This seems not to be distinctive from discrimination on the basis of a woman's answer to a question about pregnancy or family status which has been held to be covered, because disadvantageous treatment on the basis of pregnancy and family status is prohibited.¹³²

3.3.7 *Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent*

Given the general, unrestricted, prohibition of (direct and indirect) sexual orientation discrimination in the bills/drafts such discrimination should be covered. There is nothing to conclude, neither in the texts nor in the explanatory notes, that it would not be covered. I.e. as the federal bills explicitly state that the term 'sexual orientation' should be interpreted extensively.¹³³

3.3.8 *Harassment*

Harassment related to sexual orientation is covered as discrimination (see 3.2.5 above).

¹³⁰ Private employment bill: p. 15; public employment bill: p. 11.

¹³¹ Private employment bill: p. 15; public employment bill: p. 11.

¹³² Smutny & Mayr, 2001, at 210ff.

¹³³ Private employment bill: p. 15; public employment bill: p. 11.

3.4 Exceptions to the prohibition of discrimination

3.4.1 *Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)*

The Vienna draft allows for every kind of 'reasonable justification' to (direct and indirect) discrimination and therefore falls short of the Directive.¹³⁴

3.4.2 *Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)*

No provisions.

3.4.3 *Social security and similar payments (art. 3(3) Directive)*

No provisions.

3.4.4 *Occupational requirements (art. 4(1) Directive)*

The federal bills and the Upper Austria and Styria drafts are repeating the wording of the Directive.¹³⁵

The Vienna draft allows for every kind of 'reasonable justification' to (direct and indirect) discrimination and therefore falls short of the Directive.¹³⁶

3.4.5 *Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)*

No provisions exempting from protection against sexual orientation discrimination.

3.4.6 *Positive action (art. 7(1) Directive)*

Only the federal private employment bill (Art. 16 *GIBG*) and the draft of Upper Austria allow for such an exception.¹³⁷

3.5 Remedies and enforcement

3.5.1 *Basic structure of enforcement of employment law*¹³⁸

Civil servants have to enforce their employment rights through public law remedies in administrative procedures. The final decision of the administrative authorities can always be challenged at the Constitutional Court

¹³⁴ Art. 18a par. 2 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 2 Vienna Regulations for Contractual Employees (*WrVBO*).

¹³⁵ Art. 14 par. 1 Equal Treatment Act (*GIBG*); Art. 13b par. 1 Federal Equal Treatment Act (*B-GBG*); Art. 2 par. 3 Upper Austria Antidiscrimination Act (*OöADG*); Art. 7 par. 1 Styria State Equal Treatment Act (*StmkL-GBG*).

¹³⁶ Art. 18a par. 2 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 2 Vienna Regulations for Contractual Employees (*WrVBO*).

¹³⁷ Art. 2 par. 2 Upper Austria Antidiscrimination Act (*OöADG*).

¹³⁸ For details see Schwarz & Löschnigg, 1999, at 997ff.

(*Verfassungsgerichtshof*, VfGH) and/or the Administrative High Court (*Verwaltungsgerichtshof*, VwGH).

Private sector employees (and state employees out of contract) have to enforce their employment rights in the courts. In employment cases the courts sit in special panels including lay-judges of which half have to be taken from the group of employers and half from the group of employees.¹³⁹ The same is true for disputes out of labour constitution (see 3.14); e.g. works councils' actions of avoidance of termination of individual labour contracts (notice to quit, dismissals).

The special panels are deciding also two sets of special *declaratory proceedings*.

On the workshop level works councils and employers can mutually sue each other for declaration of existence or non-existence of certain legal relationships, positions or rights. With such a *collective declaratory action*¹⁴⁰ legal issues of law can be solved without the individual employee carrying the risks of a lawsuit. Such an action however can only be brought if at least three employees in the workshop are affected by the declaration sought.

On a supra-workshop level employers' and employees' corporations eligible for collective bargaining – one against the other - can also apply to the Supreme Court for the declaration of the existence or non-existence of certain legal relationships, positions or rights which concern facts independent from individual employees characterised by their names. The *collective declaratory petition*¹⁴¹ has to address a certain issue of labour law which is relevant for at least three employers or employees.

The decisions in both special declaratory proceedings effect *res iudicata* only between the parties to the specific proceedings and not for the employers and employees not taking part in them. It seems however highly unlikely (i.e. in the case of collective declaratory petition before the Supreme Court) that the Courts will come to different conclusions in follow-up cases concerning individual employers or employees.¹⁴²

Disputes over (the conclusion, amendment or termination of) workshop agreements are decided by the *conciliatory agencies*¹⁴³ established at the seat of the courts dealing with labour law cases. The conciliatory agencies are sitting in panels of a presiding (professional) judge and four assessors composed on a par (two nominated by the employer, two by the works council). If the agency does not succeed in consensual settlement of the case it has to take a decision. This decision then has the force of a workshop agreement. No appeal lies against it.

¹³⁹ In the first instance the panel consists of one professional judge and two lay-judges; in the appeal courts and (in most cases) also in the Supreme Court the panel consists of three professional judges and two lay-judges. In Vienna a special Labour and Social Court (*'Arbeits- und Sozialgericht'*) has been established which serves as first instance court for all Vienna labour law cases (Act on Labour and Social Judiciary, *'Arbeits- und Sozialgerichtsgesetz'*, ASGG, § 10ff).

¹⁴⁰ § 54 (1) ASGG.

¹⁴¹ § 54 (2) *'Arbeits- und Sozialgerichtsgesetz'* (ASGG).

¹⁴² Schwarz & Löschnigg, 1999, at 1006.

¹⁴³ §§ 144-146 *Arbeitsverfassungsgesetz*.

Regulations on protection of labour (as on working time and industrial safety) are supervised by labour inspectors (*'Arbeitsinspektoren'*) and enforced by administrative authorities in administrative penal proceedings.¹⁴⁴

3.5.2 Specific and/or general enforcement bodies

The bills/drafts establish specialised bodies in addition to the courts and administrative authorities (3.5.1 above). All of those bodies cover all grounds of discrimination (save disability; and in Vienna: without gender), including sexual orientation.¹⁴⁵

All of the bills/drafts establish Ombudspersons given the tasks and competencies mentioned in Art. 13 of Directive 2000/43 (promotion of equal treatment; independent assistance to victims of discrimination; conducting independent surveys; publishing independent reports and making recommendations on any issue relating to discrimination)¹⁴⁶ (Art. 5 *GBK/GAW-G: Gleichbehandlungsanwalt / -anwältin*, Equal Treatment Ombudsperson; one for the whole private sector; Art. 26 *B-GBG: Gleichbehandlungsbeauftragte*, Equal Treatment Commissioners; three to seven in each ministry and similar entities).¹⁴⁷

The effectiveness of the Ombudspersons in Vienna and Styria seems to be jeopardised by the fact that these Ombudspersons have to exercise their functions part-time only in addition to their ordinary service-duties¹⁴⁸; the Styrian draft explicitly states that the function has to be exercised with as little adverse effects to the ordinary service duties as possible.¹⁴⁹ Only the Upper Austria draft states that the Ombudsperson should be given the necessary personnel.¹⁵⁰

The federal bills and the Styrian draft establish also Equal Treatment Commissions.¹⁵¹ The effectiveness of these Commissions seems to be jeopardised by the fact that its members have to exercise their function pro bono.

Independence shall be secured by excluding civil servants (the members of the Equal Treatment Commissions and the various Ombudspersons) from binding governmental directions. According to the Austrian constitution such an exclusion from directions however has to be established by constitutional

¹⁴⁴ See i.e. Act on the Protection of Employees (*'ArbeitnehmerInnenschutzgesetz', AschG*); Working Time Act (*'Arbeitszeitgesetz', AZG*).

¹⁴⁵ See also the Addendum at the start of this Chapter.

¹⁴⁶ Save disability; and in Vienna: without gender.

¹⁴⁷ Art. 67i Vienna Service Regulations Act (*WrDO*) & Art. 54i Vienna Regulations for Contractual Employees (*WrVBO*) [*Antidiskriminierungsstelle*, Antidiscrimination Unit; one person]; Art. 13 Upper Austria Antidiscrimination Act (*OöADG*) [*Antidiskriminierungsstelle*, Antidiscrimination Unit; one person]; Art. 44 Styria State Equal Treatment Act (*StmkL-GBG*) [*Gleichbehandlungsbeauftragte*, Equal Treatment Commissioners]; one person for the capital Graz and one for all other local authorities and the state of Styria.

¹⁴⁸ Art. 6 Vienna Antidiscrimination Act (*WrADG*), Art. 67i Vienna Service Regulations Act (*WrDO*), Art. 54i Vienna Regulations for Contractual Employees (*WrVBO*); Art. 44 & 47 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁴⁹ Art. 47 par. 2 & 4 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁵⁰ Art. 13 par. 1 Upper Austria Antidiscrimination Act (*OöADG*).

¹⁵¹ Art. 1ff Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (*GBK/GAW-G*), members appointed by ministers and social partners; Art. 22ff Federal Equal Treatment Act *B-GBG*, members appointed by ministers and social partners; Art. 37 Styria State Equal Treatment Act (*StmkL-GBG*), members appointed by the state government and by social partners.

legislation. The Upper Austria and the Styria drafts do contain such constitutional statutory provisions¹⁵², but the Vienna draft and the federal private employment bill are exempting their Ombudspersons just by simple (non-constitutional) statutory provisions.¹⁵³ Furthermore there is no provision on exemption from directions in the federal bills for the members of their Equal Treatment Commissions and also none in the federal public employment bill for the Ombudspersons. The bills are stating that the existing constitutional provisions for the current Equal Treatment Commissions (Ombudspersons) on gender discrimination¹⁵⁴ would also exclude the (members of the) upcoming Equal Treatment Commissions (Ombudspersons) from directions; but the simple legislature cannot extend a constitutional law to areas for which the constitutional legislature did not enact them, as the experts heard by the federal parliament on 18 March, 2004, pointed out. These constitutional problems and the fact that the enforcement bodies are construed as government agencies with the majority of its members appointed by members of the government (which for public employees even is the employer), could weaken the effectiveness of these bodies.

The federal public employment bill excludes from the scope of the Equal Treatment Commission and the Ombudspersons all federal public employees working outside government agencies; as for instance teachers sent to teach in private (denominational) schools or at schools abroad (Art. 1 par. 3 *B-GBG*). The reason for this exception is not clear.

Since the states hold legislative power in respect to regulation of agencies that are superior (in employment affairs) to those state employed teachers and state employed educators which come under federal legislative competency (see 3.1.3 above), the provisions of the *B-GBG* on the Ombudspersons and the Equal Treatment Commission do not apply (Art. 41 *B-GBG*) to those teachers and educators. It would be up to each of the nine states to establish such bodies for them. Only the Upper Austria draft does so: its Ombudsperson is also competent for those employees;¹⁵⁵ the Styrian draft excludes them from the scope of the Equal Treatment Commission and the Ombudspersons¹⁵⁶ and the Vienna draft does the same for its Ombudsperson (Art. 1 *DO*; Art. 1 *VBO*).¹⁵⁷

¹⁵² Art. 13 par. 4 Upper Austria Antidiscrimination Act (*OöADG*); Art. 47 par. 1 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁵³ Art. 67i Vienna Service Regulations Act (*WrDO*); Art. 54i Vienna Regulations for Contractual Employees (*WrVBO*); Art. 6 par. 1 Vienna Antidiscrimination Act (*WrADG*); Art. 4 par. 1, Art. 5 par. 1, Art. 6 par. 1 Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (*GBK/GAW-G*).

¹⁵⁴ Art. 10 par. 1a & 1b Equal Treatment Act (*GIBG*); Art. 24 par. 5, 37 par. 1 Federal Equal Treatment Act (*B-GBG*).

¹⁵⁵ Art. 3 lit. 5 Upper Austria Antidiscrimination Act (*OöADG*).

¹⁵⁶ Art. 1 par. 2 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁵⁷ See also the Addendum at the start of this Chapter.

3.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)*

Besides procedures in civil courts and administrative procedures according to the general rules (3.5.1 above) the federal bills and the Styrian draft provide for advisory procedures before Equal Treatment Commissions.¹⁵⁸

These Commissions can issue non-binding opinions and non-binding recommendations. Every victim of discrimination can apply to the Commission; but proceedings before the Commission are not a prerequisite for court or administrative action.

The federal private employment bill and the Upper Austria draft also provide for special administrative penal proceedings (see 3.5.4 below).

3.5.4 *Civil, penal and/or administrative sanctions (art. 17 Directive)*

None of the bills/drafts provides for criminal sanctions.

The federal private employment bill and the Upper Austria draft provide for administrative penal proceedings. The Upper Austria draft provides for a maximum fine of EUR 7.000 for perpetrators of discrimination.¹⁵⁹ The federal private employment bill establishes an administrative fine for discriminatory job advertisement; the maximum penalty however is EUR 360 and punishment for employers is excluded for first-time-offenders (admonition only) (Art. 17f *GIBG*); it seems doubtful that this level of sanction would meet the Directive's requirement of 'effective, proportionate and dissuasive' sanctions.

All of the bills/drafts provide for civil sanctions, and – as a principle – a victim of discrimination can choose between undoing of the act of discrimination or compensation of pecuniary damage (in the case of non-recruitment or non-promotion: only damage claim),¹⁶⁰ with in both cases the option to claim non-pecuniary damage.¹⁶¹ This basic rule is subject to the following exceptions:

In the case of termination of employment a victim can only challenge the termination without the option to accept the termination and claim damage.¹⁶² As many victims, for good reasons, refuse to go back to a discriminatory employer, discrimination of such victims would be left unsanctioned (no reinstatement, no compensation). This (and the absence of a claim to non-pecuniary damage if reinstated) seems to fall short of the Directive. Furthermore, in the time-limit of 14 days in all the bills/drafts for challenging a termination seems too short to fulfill the requirements of the Directive.

¹⁵⁸ Art. 1ff Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (*GBK/GAW-G*); Art. 22ff Federal Equal Treatment Act (*B-GBG*); Art. 37ff Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁵⁹ Art. 16 Upper Austria Antidiscrimination Act (*OöADG*).

¹⁶⁰ See also the Addendum at the start of this Chapter.

¹⁶¹ Art. 20ff Equal Treatment Act (*GIBG*); Art. 17ff Federal Equal Treatment Act (*B-GBG*); Art. 67b ff Vienna Service Regulations Act (*WrDO*); Art. 54a ff Vienna Regulations for Contractual Employees (*WrVBO*); Art. 7ff Upper Austria Antidiscrimination Act (*OöADG*); Art. 22ff, 34 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁶² Art. 20 par. 7 Equal Treatment Act (*GIBG*); Art. 18c Federal Equal Treatment act (*B-GBG*); Art. 54d Vienna Regulations for Contractual Employees (*WrVBO*); Art. 8 par. 3 Upper Austria Antidiscrimination Act (*OöADG*); Art. 28 Styria State Equal Treatment Act (*StmkL-GBG*).

In the federal private sector bill compensation for non-pecuniary damage, in the case of non-recruitment and non-promotion, is limited to a maximum of EUR 500 if the employer proves that the victim would not have been recruited or not promoted if no discrimination had occurred (so that discrimination did not have the effect of non-promotion or non-recruitment but caused only exclusion from the selection procedure) (Art. 20 par. 1 & 5 *GIBG*). The ECJ in the case *Draehmpaehl*¹⁶³ held such a limitation to three months salary admissible but at the same time referred to requirements established by two earlier judgments. The first is that a 'purely nominal compensation' is not acceptable (*Von Colson and Kamann*¹⁶⁴). The second is that the conditions need to be 'analogous to those applicable to infringements of domestic law of a similar nature' (*Commission v. Greece*¹⁶⁵). On the one hand (a maximum of) EUR 500 can only be considered purely nominal compensation, on the other hand general Austrian civil and labour law does not provide for similar non-pecuniary damage claims. The same problem arises in respect of the federal public employment bill and the Vienna draft which limit compensation for non-pecuniary (and pecuniary!) damage, in the case of non-recruitment to a maximum of three months salary of a certain category of employees (which is not the category the discriminated employee sought), if the employer proves that the victim would not have been recruited or not promoted anyway¹⁶⁶; in the case of non-promotion they limit compensation for non-pecuniary (and pecuniary!) damage, in the case of non-recruitment to a maximum which is the salary-difference of three months.¹⁶⁷ General Austrian law does not provide for similar limitations of non-pecuniary damage claims.

The Upper Austria draft, in the case of public employees establishes compensation for non-pecuniary damage only for harassment;¹⁶⁸ the same is the case for the Vienna draft.¹⁶⁹

In some areas the bills/drafts lack any sanction. This is the case for discrimination of university-students (Art. 42 *B-GBG*), for victimization of employees in the federal bills and in the drafts of Vienna and Styria¹⁷⁰ and for instruction to discrimination in the Vienna draft.¹⁷¹

The federal public employment bill and the Vienna and Upper Austria drafts are lacking a sanction for discriminatory job advertisement. While the federal private

¹⁶³ European Court of Justice, 22 April 1997, Case C-180/95, *Nils Draehmpaehl v. Urania Immobilienservice OHG* [1997] ECR I-2195, paras. 25 and 29.

¹⁶⁴ European Court of Justice, 10 April 1984, Case 14/83, *Von Colson and Karmann v. Land Nordrhein-Westfalen* [1984] ECR 1891, paras. 23 and 24.

¹⁶⁵ European Court of Justice, 21 September 1989, Case 68/88, *Commission v. Greece* [1989] ECR 2965, para. 24.

¹⁶⁶ Art. 17 Federal Equal Treatment Act (*B-GBG*); Art. 67b ff Vienna Service Regulations Act (*WrDO*); Art. 54a ff Vienna Regulations for Contractual Employees (*WrVBO*).

¹⁶⁷ Art. 18 Federal Equal Treatment Act (*B-GBG*); Art. 67b ff Vienna Service Regulations Act (*WrDO*); Art. 54a ff Vienna Regulations for Contractual Employees (*WrVBO*).

¹⁶⁸ Art. 8-12 Upper Austria Antidiscrimination Act (*OöADG*).

¹⁶⁹ Art. 67b ff Vienna Service Regulations Act (*WrDO*); Art. 54a ff Vienna Regulations for Contractual Employees (*WrVBO*).

¹⁷⁰ Art. 21 Equal Treatment Act (*GIBG*); Art. 20b Federal Equal Treatment Act (*B-GBG*); Art. 18a par. 3 lit. 3 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 3 lit. 3 Vienna Regulations for Contractual Employees (*WrVBO*); Art. 12 par. 4 Upper Austria Antidiscrimination Act (*OöADG*); Art. 32 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁷¹ Art. 18a par. 3 lit. 1 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 3 lit. 1 Vienna Regulations for Contractual Employees (*WrVBO*).

employment bill provides for administrative fines (see above), the Styrian draft allows job advertisements to be published only with the consent of the Equal Treatment Commissioner;¹⁷² if a (directly or indirectly) discriminatory advertisement is placed despite the objections of the Commissioner the advertisement has to be repeated upon the application of the Commissioner¹⁷³

The federal private employment bill establishes a very effective sanction for firms not observing the prohibition of discrimination: exclusion from assistance granted by the federation (Art. 22 *GIBG*). The federal public employment bill and the state drafts do not include such a sanction on the basis that the state itself is the employer; but the state drafts do neither establish such sanction in areas outside employment (save Vienna)¹⁷⁴ which however does not cover sexual orientation outside employment (see 3.1.8 above). Also the federal private employment bill does not extend the exclusion to public procurement, what would render the effectiveness of this sanction perfect.¹⁷⁵

3.5.5 *Natural and legal persons to whom sanctions may be applied*

In general sanctions can be applied to all the persons which come under the scope of the prohibition of discrimination (3.2.8 above).¹⁷⁶

The federal bills and the Styrian draft establish that, in the case of harassment by third persons (other employees or clients etc.), compensation can be claimed from the employer only if he/she does not intervene *by intent or carelessness*¹⁷⁷; in my opinion a requirement not established by the Directive.

While the Upper Austria draft prohibits discrimination also to self governing bodies, it provides no civil sanctions for them, only administrative penal sanctions.¹⁷⁸ And the Styrian draft, while establishing a much wider personal scope of the prohibition (3.2.8 above), establishes sanctions for recruitment-, promotion- and payment-discrimination only if the employer is responsible for the discrimination.¹⁷⁹

3.5.6 *Awareness among law enforcers of sexual orientation issues*

The Styrian draft provides that one member of the Equal Treatment Commission in each sexual orientation case must be a sexual orientation discrimination expert appointed by the state government.¹⁸⁰ And in appointing the ombudspersons regard should be had to experience in representation of

¹⁷² Art. 10 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁷³ Art. 30 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁷⁴ Art. 7 Vienna Antidiscrimination Act (*WrADG*).

¹⁷⁵ See Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (COM/2001/0566 final). See also the Addendum at the start of this Chapter.

¹⁷⁶ Art. 20ff Equal Treatment Act (*GIBG*); Art. 17ff Federal Equal Treatment Act (*B-GBG*); Art. 67b ff Vienna Service Regulations Act (*WrDO*); Art. 54a ff Vienna Regulations for Contractual Employees (*WrVBO*); Art. 7ff Upper Austria Antidiscrimination Act (*OöADG*); Art. 22ff, 34 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁷⁷ Art. 15 Equal Treatment Act (*GIBG*); Art. 16 Federal Equal Treatment Act (*B-GBG*); Art. 12 & 29 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁷⁸ Art. 1, 16 Upper Austria Antidiscrimination Act (*OöADG*).

¹⁷⁹ Art. 22, 23, 26 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁸⁰ Art. 37 Styria State Equal Treatment Act (*StmkL-GBG*).

employees in matters of equal treatment.¹⁸¹ No such provisions can be found in the other bills/drafts.

While the federal private employment bill and the Styrian draft require the various enforcement bodies (see 3.5.2) to be equally composed of men and women¹⁸², there is no provision in any of the bills/drafts which would require or promote that members of the other discriminated groups covered by Art. 13 EC, such as homo- and bisexual men and women, are reasonably represented within those bodies.¹⁸³

3.5.7 *Standing for interest groups (art. 9(2) Directive)*

The Vienna draft establishes the right of interest groups to represent (act as counsel for) victims in courts and administrative authorities.¹⁸⁴ The Upper Austria basically also provides for such representation (Art. 7 par. 3), but not in the area of employment.¹⁸⁵

The federal bills and the Styria draft allow for representation only in administrative proceedings and before the Equal Treatment Commissions but not in the courts.¹⁸⁶

The federal bills and the Styrian draft allow interest groups to provide expert opinions in proceedings before the Equal Treatment Commissions, but not in the courts.¹⁸⁷

So all the bills/drafts are falling short of the Directive given that the mere right to represent a complainant (instead of an attorney) does not suffice; otherwise the requirement 'with his or her approval' in Art. 9(2) of the Directive would make no sense, since such representation is always and intrinsically with approval, it is even by the order of the complainant. So 'on behalf' should mean more, i.e. a right for NGOs to bring complaints on their own (but with the approval of a victim of discrimination).¹⁸⁸

The opportunity to provide expert opinions would satisfy 'in support', but only the federal bills and the Styrian draft allow for this and also solely in proceedings before the Equal Treatment Commissions, but not in the courts.

¹⁸¹ Art. 44 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁸² Art. 2 par. 9 Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (*GBK/GAW-G*); § 38 par. 1 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁸³ See also the Addendum at the start of this Chapter.

¹⁸⁴ Art. 67g par. 2 Vienna Service Regulations Act (*WrDO*); Art. 54g par. 2 Vienna Regulations for Contractual Employees (*WrVBO*).

¹⁸⁵ Art. 8-12 Upper Austria Antidiscrimination Act (*OöADG*).

¹⁸⁶ Art. 12 par. 2 Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (*GBK/GAW-G*); Art. 23a par. 4 Federal Equal Treatment Act (*B-GBG*); Art. 40 par. 4 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁸⁷ Art. 12 par. 2 Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (*GBK/GAW-G*); Art. 23a par. 4 Federal Equal Treatment Act (*B-GBG*); Art. 40 par. 4 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁸⁸ I understand 'on behalf' as the NGO claiming rights of a victim in (court) proceedings in a way that it (the NGO) becomes party (plaintiff) to those proceedings, instead of the victim. It means that not the victim becomes party to the proceedings (claiming its own rights) but the NGO (claiming rights for the victim), thus sparing the victim from taking part in the proceedings (besides its testimony which nevertheless will be necessary) and to run the risk of having to pay costs to the respondent if the court rejects the claims. Mere representation means that the victim has to stand up and become a party to the court proceedings; the NGO then has only the right to represent the victim as a counsel does. Thus the victim (and not the NGO) is liable to pay the legal fees of the respondent if the case is lost.

In penal administrative proceedings (see 3.5.3 above) there is no legal standing for interest groups (indeed not even legal standing for the victim of discrimination itself) at all.

See also the Addendum at the start of this Chapter.

3.5.8 *Burden of proof of discrimination (art. 10 Directive)*

Administrative authorities always have to investigate the facts of the case; therefore a shift of the burden of proof is not required. The Vienna bill establishes also for the courts the obligation to investigate the facts of the case.¹⁸⁹

The federal bills¹⁹⁰ provide that a victim, in the courts, needs not to prove discrimination but that it suffices if he or she establishes facts from which it may be presumed that there has been direct or indirect discrimination; on the other hand they let it suffice if the respondent himself establishes facts from which it may be presumed that there has not been direct or indirect discrimination, that the burden of proof fully shifts back to the victim)¹⁹¹; this seems to be in contradiction with Art. 10 par. 1 Directive: 'it shall be for the respondent to *prove* that there has been no breach of the principle of equal treatment.' The same regulation is provided by the federal public employment bill and the Styria draft for their Equal Treatment Commissions¹⁹², but there is no regulation of burden of proof for the Equal Treatment Commission in the private employment bill.

Upper Austria and Styria, for proceedings in the courts, take over the wording of the Directive and therefore are in line with the Directive.¹⁹³

3.5.9 *Burden of proof of sexual orientation*

There are no special provisions. What is said under 3.5.8 should apply here as well. But since actual sexual orientation is not required and (just) presumed sexual orientation suffices (3.3.1 above), the problem should not arise.

3.5.10 *Victimisation (art. 11 Directive)*

Victimisation (defined as 'dismissal, notice of quit and any other detriment in reaction to a complaint or to the opening of proceedings enforcing the principle of equality') is prohibited in all bills/drafts¹⁹⁴, and all of them (with the exception of Upper Austria) cover also other employees acting as witnesses or supporting the complaint of a victim.

¹⁸⁹ Art. 67h Vienna Service Regulations Act (*WrDO*); 54h Vienna Regulations for Contractual Employees (*WrVBO*).

¹⁹⁰ See also the Addendum at the start of this Chapter.

¹⁹¹ Art. 20 par. 12 Equal Treatment Act (*GIBG*); Art. 20a Federal Equal Treatment Act (*B-GBG*).

¹⁹² Art. 25 par. 2 Federal Equal Treatment Act (*B-GBG*); Art. 43 par. 4 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁹³ Art. 7 par. 2 & Art. 12 par. 6 Upper Austria Antidiscrimination Act (*OöADG*); Art. 31 par. 6, Art. 32, 35 Styria State Equal Treatment Act (*StmkL-GBG*).

¹⁹⁴ Art. 21 Equal Treatment Act (*GIBG*); Art. 20b Federal Equal Treatment Act (*B-GBG*); Art. 18a par. 3 lit. 3 Vienna Service Regulations Act (*WrDO*); Art. 4a par. 3 lit. 3 Vienna Regulations for Contractual Employees (*WrVBO*); Art. 12 par. 7 Upper Austria Antidiscrimination Act (*OöADG*); Art. 32 Styria State Equal Treatment Act (*StmkL-GBG*).

For (lack in) personal scope of the prohibition and sanctions see 3.2.8 and 3.5.4, 3.5.5 above.

3.6 Reform of existing discriminatory laws and provisions

None of the bills/drafts contains provisions on that matter.

3.6.1 Abolition of discriminatory laws (art. 16(a) Directive)

Discriminatory laws can only be abolished by the legislature or the Constitutional Court. Civil servants can challenge decisions by administrative authorities based on such discriminatory legislation in the Constitutional Court (Art. 144 B-VG). Other employees have to challenge decisions by their employers based on such discriminatory legislation in the labour Courts and could only ask the Court (of second or higher instance) to refer the matter to the Constitutional Court (Art. 140 B-VG).

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

3.6.2 Abolition of discriminatory administrative provisions (art. 16(a) Directive)

Discriminatory provisions in secondary legislation (decrees implementing primary legislation) can only be abolished by the issuing administrative authority or by the Constitutional Court. Civil servants can challenge decisions by administrative authorities based on such discriminatory legislation in the Constitutional Court (Art. 144 B-VG). Other employees have to challenge decisions by their employers based on such discriminatory legislation in the labour Courts and could only ask the Court (of second or higher instance) to refer the matter to the Constitutional Court (Art. 139 B-VG).

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

3.6.3 Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)

In view of the obligation to apply national law in accordance with the Directive (Art. 10 and 249 (3) EC)¹⁹⁵ discriminatory provisions in private law agreements should be null and void under Art. 879 General Civil Code ('*Allgemeines Bürgerliches Gesetzbuch*', ABGB) for being against the law. Every court has to consider this nullity and let such provisions unapplied. Besides that a

¹⁹⁵ *Hatje* in Schwarze, 2000, at Art. 10 EGV § 27ff.

declaration of nullity can be obtained in the special declaratory proceedings mentioned in 3.5.1 above.

Discriminatory application of neutrally worded provisions can be challenged (and the partner benefits claimed) in the labour Courts.

If rules take the form of public law (administrative) rules (as is often the case for rules governing the independent occupations), the principles set out in 3.6.2 above apply.

Monitoring (of the compliance with the discrimination prohibition) has not been done, will not be prescribed by the proposed implementation legislation and is not intended.

3.6.4 *Discriminatory laws and provisions still in force*

No statutory provisions are known which, in their wording, enshrine discrimination on the basis of sexual orientation in employment.

Some collective agreements, in providing benefits to unmarried couples, refer to the definition of 'life companion' ('*Lebensgefährte*') in social insurance law,¹⁹⁶ which explicitly requires the partner to be of opposite sex (Art. 123 *Allgemeines Sozialversicherungs-Gesetz, ASVG*, General Act on Social Insurance). Other collective agreements are neutrally worded but, given the absence of an explicit prohibition of sexual discrimination, there is considerable potential for discriminatory application.

There are employers providing survivors' pensions not only to married partners but also to unmarried; however, without a thorough (monitoring) analysis it can not be said whether those employers (explicitly or in application) are differentiating between opposite sex and same-sex couples. No one in Austria looked into these issues so far.

Interviews done by the author in the course of a study for the expert group revealed extreme differences in practice between employers in the *transportation sector*. The Austrian private airline company *Niki Air* said that they are making no difference, neither between married and unmarried couples nor between opposite-sex-couples and same-sex-couples, in granting partnership benefits such as free or discounted flight tickets and extra days off (for relocation, family occasions, child birth, bereavement, nursing etc.) They even imagine that extra days off could be granted for marriage also for an employee marrying a same-sex partner (abroad); why should the gender of the spouse make a difference for the employer, the official asked. The *Austrian Federal Railways*, on the contrary, for whom (being owned by the federation) the Directive (already) directly applies, declared that, as long as there is no implementing legislation in force, they would continue to withhold partnership benefits (as free or discounted train tickets and extra days off for nursing etc.) from same-sex partners; if an employee relies on the direct applicability of the Directive he or she should go to court, the official summarized the position of the company. These differences were mirrored on the side of employees' associations. While the *Trade Union of Salaried Employees in the Private*

¹⁹⁶ So does the collective agreement for salaried employees in the chemical industry of 1 November 2000 (§ 13).

Sector, which is competent for private airlines, seemed well-informed and engaged, had already dealt with sexual orientation issues and even commissioned one of its employees to deal with sexual orientation issues, the *Trade Union of Railway Employees* could not provide an official informed enough to give information on the issue.

Further information would require an in-depth study into the thousands of collective agreements, workshop agreements and internal rules and practices. No such study has been done, nor is it planned, neither by state agencies nor by the social partners.

3.7 Concluding remarks

There is no implementation legislation in Austria so far.¹⁹⁷

Bills and drafts presented so far (by the federation and three of the nine states) in some areas go quite beyond the minimum obligations of the Directive (Art. 8 para. 1 Directive) (examples; not all favourable provisions in all bills/drafts):

- prohibition of sexual orientation discrimination also beyond employment;
- Ombudspersons and Equal Treatment Commissions given the task of also sexual orientation discrimination issues (constitutional problems and the fact that the enforcement bodies are construed as government agencies with the majority of its members appointed by members of the government, which for public employees even is the employer, could however weaken the effectiveness of these bodies);
- exclusion from public assistance of firms not observing the prohibition of discrimination;
- quite restrictive use of exceptions authorised by the Directive.

Major shortcomings in implementation however are (examples; not all shortcomings in all bills/drafts):

- *Standing for interest groups*: no legal standing of interest groups, i.e. in proceedings before those authorities that can issue binding decisions (private sector: courts, public sector: administrative authorities).
- *Burden of proof*: shifting back of the burden of proof to the victim if the respondent him/herself establishes facts from which it may be presumed that there has not been direct or indirect discrimination.
- *Compensation*: limitation to a maximum amount (as low as EUR 500,--) if the employer proves that the victim would not have been recruited or not promoted if no discrimination had occurred; in case of termination no compensation if victim does not return to the (discriminatory) firm.
- *Penalties*: maximum penalty of as low as EUR 360,-- and exclusion of punishment for employers as first-time-offenders (admonition only).

¹⁹⁷ See also the Addendum at the start of this Chapter.

- *Harassment*: only conduct which effects harassment covered, but not conduct which has (only) the purpose of doing so; lack of coverage of instruction to harassment.
- *Self-employed persons*: not covered or only access to self-employment covered, not conditions and termination.
- *Limitations of the personal scope of the prohibition of discrimination*.
- *Compulsory and voluntary work*: no provisions, as for compulsory military service, compulsory military replacement service, (compulsory) work of prisoners and voluntary non-occupational (honorary) work.
- *Lack of sanctions for some kinds of discrimination*.
- *No monitoring*.
- *Scope*: None of the nine states has presented a legislative initiative to implement the Directive for agricultural workers.

Six of the nine states (Vorarlberg, Tyrol, Salzburg, Lower Austria, Burgenland, Carinthia) have not yet presented a legislative initiative to implement the Directive.¹⁹⁸

¹⁹⁸ But see the Addendum at the start of this Chapter.

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