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# Country report

## Gender equality



Austria

2020

**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers  
Directorate D — Equality and Union citizenship  
Unit D.2 Gender Equality

*European Commission  
B-1049 Brussels*

# **Country report**

## **Gender equality**

How are EU rules transposed into national law?

### **Austria**

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Reporting period 1 January 2019 – 31 December 2019

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Luxembourg: Publications Office of the European Union, 2020

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PDF ISBN 978-92-76-18961-9

ISSN 2600-0164

doi:10.2838/240611

DS-BD-20-002-EN-N

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## 1 Introduction

### 1.1 Basic structure of the national legal system

Austrian legislation is based on the constitutional principles of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*),<sup>1</sup> additional constitutional legislation, the Federal Financial Constitution Act (*Finanzverfassungsgesetz*) and the provincial constitutional acts for the nine provinces (*Bundesländer*) which constitute the federal territory. A standing principle of Austrian legislation is a strict adherence to the rule of law according to the doctrine of *Stufenbau der Rechtsordnung* (which may be translated as steps of legal interdependence). This refers to the hierarchical structure by which every piece of legislation, legal decision, contract or any other legal transaction is only valid if the legal grounds can be directly deduced from other valid legal sources.

Competence for legislation is split between the federal and provincial levels by Articles 10 to 15 of the Federal Constitutional Act. For instance, the competence for legislating labour law and federal civil service statutes lies with the federal level, while legislation concerning provincial civil servants and contractual employees, including equal treatment rules, lies with the provincial levels. Federal legislation is enacted by Parliament, which consists of two chambers (*Nationalrat* and *Bundesrat*); constitutional changes require two-thirds majorities in each chamber. Administration is the responsibility of federal or provincial authorities according to organisational rules laid out by Articles 7 and 101 to 104 of the Federal Constitutional Act. Civil and criminal cases are decided within the federal court system with the Supreme Court (*Oberster Gerichtshof*) as the final instance of jurisdiction. Administrative decisions can be appealed within the Administrative Court system (*Bundesverwaltungsgericht* and nine *Landesverwaltungsgerichte*) with the Supreme Administrative Court (*Verwaltungsgerichtshof*) as the final instance of jurisdiction. Questions of the constitutionality of administrative decisions or of federal or provincial legal rules can be taken to the Constitutional Court (*Verfassungsgerichtshof*). Equal treatment and anti-discrimination rules are mostly implemented by civil law and labour law provisions, which means that claims need to be taken to the civil courts or to the labour and social courts.

### 1.2 List of main legislation transposing and implementing the directives

Equal Treatment Act for the Private Sector (*Gleichbehandlungsgesetz*, GIBG) BGBl I 66/2004, which also contains the guidelines for the provincial equal treatment legislation for forestry and agricultural workers in Part IV.<sup>2</sup>

Equal Treatment Act for Federal Civil Servants and Federal Contract Employees (*Bundes-Gleichbehandlungsgesetz*, B-GBG);<sup>3</sup> for constitutional reasons the directives have to be implemented separately at provincial legislative level (nine separate equal treatment acts for civil servants of provinces and municipalities), and for forestry and agricultural workers in the provinces (nine separate acts for farm and forestry labourers).

### 1.3 Sources of law

The anti-discrimination and gender equality provisions of the relevant directives must be implemented by federal or provincial legislation according to the constitutional principles. The legislator has chosen to use the German language version of the relevant directive provisions as national legal provisions in most cases. This approach using the broad

<sup>1</sup> <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10000138/B-VG%2c%20Fassung%20vom%2006.04.2019.pdf>.

<sup>2</sup> <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20003395/GIBG%2c%20Fassung%20vom%2006.04.2019.pdf>.

<sup>3</sup> <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008858/B-GIBG%2c%20Fassung%20vom%2006.04.2019.pdf>.

wording of the directives leaves room for interpretation of the relevant laws by the courts, especially in the case of anti-discrimination legislation; case law by the competent courts is an additional source of law. It should be noted, however, that courts are not legally bound by case law; if a case presents grounds for a differing interpretation of the relevant legislation, courts may argue for their dissenting views and thereby open legal pathways to changes in case law.

## 2 General legal framework

### 2.1 Constitution

#### 2.1.1 Constitutional ban on sex discrimination

Article 7(1) of the Federal Constitutional Act states the general equality principle and prohibits privileges based on sex, among other attributes. This is a general rule, addressed mainly to federal and provincial legislation but as a constitutional principle it has to be taken into consideration in all acts of state.

Article 7(2) contains a constitutional objective. Equal treatment of men and women and positive action measures shall be considered as constitutional (not breaching the equality principle) until material equality between men and women is achieved. Constitutional objectives are addressed to legislative bodies and to some extent to administrative authorities; they cannot serve as actionable individual rights.

#### 2.1.2 Other constitutional protection of equality between men and women

Austria is a member of the Council of Europe and is consequently subject to European Court of Human Rights (ECtHR) jurisdiction.

The European Convention on Human Rights, together with the additional protocols, was transposed as national constitutional law and serves as the national charter of fundamental rights in every aspect of legislation and jurisdiction. Additionally, there is specialised constitutional legislation granting specialised fundamental freedoms (e.g. *Staatsgrundgesetz von 1867*, covering among other areas freedom of teaching and research).<sup>4</sup>

Standing legal doctrine states that fundamental rights and constitutional principles apply only to relations between the state and individuals and have no direct third-party effects (*Drittwirkung*). Indirect third-party effects of fundamental rights are commonly recognised in legal doctrine and in case law.<sup>5</sup> For example, indirect third-party effects are recognised in civil law by case law in Paragraph 879 of the Civil Code, which invalidates illegal, unfair, or immoral clauses in contracts; the evaluation of what constitutes a prohibited clause is largely guided by the interpretation of fundamental freedoms.<sup>6</sup>

Article 7(1) of the Federal Constitutional Act also serves as a constitutional principle for legislation and is an important benchmark for testing the constitutionality of legislation and acts of state. For enterprises or other entities owned or controlled by the state, Article 7 and other civil rights are held to develop external third-party effects, which bind their activities to the constitutional principles and to the fundamental rights of the European Convention on Human Rights.<sup>7</sup>

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<sup>4</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10000006/StGG%2c%20Fassung%20vom%2006.04.2019.pdf>.

<sup>5</sup> For example, RIS-Justiz RS0038552 (9 ObA 104/13d), [https://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20130927\\_OGH0002\\_009OBA00104\\_13D0000\\_000/JJT\\_20130927\\_OGH0002\\_009OBA00104\\_13D0000\\_000.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20130927_OGH0002_009OBA00104_13D0000_000/JJT_20130927_OGH0002_009OBA00104_13D0000_000.pdf).

<sup>6</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12018602/NOR12018602.pdf>; see also RIS-Justiz RS0022866, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19800219\\_OGH0002\\_0040OB00138\\_7900000\\_003/JJR\\_19800219\\_OGH0002\\_0040OB00138\\_7900000\\_003.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19800219_OGH0002_0040OB00138_7900000_003/JJR_19800219_OGH0002_0040OB00138_7900000_003.pdf).

<sup>7</sup> For example, Constitutional Court, G 238/88 and others, SlgNr. 12194, [https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR\\_10108988\\_88G00238\\_01/JFR\\_10108988\\_88G00238\\_01.pdf](https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_10108988_88G00238_01/JFR_10108988_88G00238_01.pdf).

## 2.2 Equal treatment legislation

Equal treatment measures were first introduced in labour legislation in 1979 and in all statutes covering civil servants at federal and provincial level in 1993 (Equal Treatment Act for the Private Sector, Federal Equal Treatment Act for Civil Servants).<sup>8</sup> As far as the scope of directives requires, equal treatment legislation has been extended to goods and services, which are traditionally associated with civil law and consequently adjudicated not by the labour and social courts but by the civil courts. Directives 2004/113, 2000/43 and 2000/78 have been implemented by extending the material scope of existing equal treatment legislation in order to cover discrimination on the grounds of ethnicity, age, sexual orientation, and religion or ideology.

The material scope of equal treatment legislation covers sex discrimination, sexual harassment, equal pay, and equal treatment concerning access to employment, working conditions, and the termination of contracts within the context of employment and self-employment on the grounds of sex/gender, age, as well as equal treatment concerning access to goods and services on the grounds of sex and ethnicity.

Prohibitions of disability discrimination have been implemented in specialised legislation protecting persons with disabilities in the workplace and in areas of everyday life (*Behinderten-Einstellungsgesetz, BehEinstG* and *Bundes-Behinderten-Gleichstellungsgesetz, BGstG*).<sup>9</sup>

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<sup>8</sup> Bundesgesetz über die Gleichbehandlung (Gleichbehandlungsgesetz, GIBG), BGBl I 66/2004 in der Fassung BGBl I 40/2017, <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20003395/GIBG%2c%20Fassung%20vom%2002.11.2015.pdf>, Bundes-Gleichbehandlungsgesetz, BGBl I 100/1993 in der Fassung BGBl I 60/2018, <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008858/B-GIBG%2c%20Fassung%20vom%2002.11.2015.pdf>.

<sup>9</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR30000030/NOR30000030.pdf>, <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20004228/BGstG%2c%20Fassung%20vom%2031.03.2019.pdf>.

### 3 Implementation of central concepts

#### 3.1 General (legal) context

##### 3.1.1 Surveys and reports on the definition, implementation and limits of central concepts of gender equality law

The Federal Government is required to issue bi-annual reports to Parliament on the status and development of gender equality in the federal civil service, covering the scope of the Federal Equal Treatment Act.<sup>10</sup> Due to the continuing reporting and the comparability of the data these reports give a good overview of the development and especially of the positive impact of equality measures in the federal civil service. In many areas of the federal civil service women represent 50 % or more of employees (e.g. judges and prosecutors); in areas where women are still underrepresented (e.g. police forces and military), the report provides a tracking tool for progress and an instrument for improving the obligatory equality planning (*Frauenförderpläne*).

Public reporting is also required for the scope of the Equal Treatment Act for the Private Sector. The second part of this report is issued by the Equality Body (*Gleichbehandlungsanwaltschaft*) and covers a bi-annual activity report as well as suggestions for legal amendments and policy advancements. For instance, in the latest report, the Equality Body makes the case for an adjustment in public tender legislation so that serious infringements of discrimination prohibitions by companies that take part in public tenders can be factored into assessments.<sup>11</sup> Apart from the current reporting required by law there is no further official evaluation.

##### 3.1.2 Other issues

Currently the author is not aware of other issues.

##### 3.1.3 General overview of national acts

In addition to the equality and anti-discrimination legislation referred to in Section 2.2, the Act on the Constitution of Labour (*Arbeitsverfassungsgesetz, ArbVG*)<sup>12</sup> is an important law especially in the context of pay equality. It structures the process of collective bargaining and the legal relevance of collective agreements for working conditions in general and for minimum pay levels. Additionally, it contains the rules and regulations for agreements between works councils and company management (*Betriebsvereinbarungen*), which are required to implement positive action measures and work-life balance measures at company level.

##### 3.1.4 Political and societal debate and pension legislative proposals

For several years after the implementation of Directives 78/2000 and 43/2000 in 2004, NGOs and the Equality Body kept up a policy debate concerning 'levelling up' of all discrimination provisions to the highest common standard; this would, for instance, mean that discrimination on all grounds covered by Directives 54/2006/EC, 43/2000/EC, and 78/2000/EC would be prohibited both in the workplace and in access to goods and services. While this would be desirable under fundamental rights aspects, the former

<sup>10</sup> *Bundes-Gleichbehandlungsbericht* (federal report on gender equality), <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungsberichte/gleichbehandlungsberichte-des-bundes.html>.

<sup>11</sup> *Tätigkeitsbericht GAW 2017 und 2018* (bi-annual report by the Ombud for Equal Treatment) [https://www.gleichbehandlungsanwaltschaft.gv.at/documents/340065/720923/GAW+T%c3%a4tigkeitsbericht+2016\\_17/ae93f363-c4ad-4ea6-8496-b979a7647519](https://www.gleichbehandlungsanwaltschaft.gv.at/documents/340065/720923/GAW+T%c3%a4tigkeitsbericht+2016_17/ae93f363-c4ad-4ea6-8496-b979a7647519).

<sup>12</sup> <http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008329/ArbVG%2c%20Fassung%20vom%2020.05.2019.pdf>.

Government coalition between Social Democrats (*Sozialdemokratische Partei Österreichs, SPÖ*) and the conservative People's Party (*Österreichische Volkspartei, ÖVP*) could not agree on concrete measures. The current Government coalition between the conservative People's Party and the Green Party has been considering corresponding measures but could not reach a political compromise; implementation has been postponed.

### **3.2 Sex/gender/transgender**

#### 3.2.1 Definition of 'gender' and 'sex'

The German legal term used for the purpose of legal definitions is '*Geschlecht*', which covers the meaning of 'sex' and can be interpreted as covering the concept of 'gender'. In legal literature, the German term '*Gender*' has been used more widely in recent years but this has so far had no impact on strictly legal terminology. In this context 'gender' is used to investigate the social attributions of sex and the resulting social construction of sex differences, especially in the legal area.

#### 3.2.2 Protection of transgender, intersex and non-binary persons

The legal term '*Geschlecht*', e.g. in Paragraph 3 of the Federal Equal Treatment Act, can be legally interpreted as also covering gender reassignment, for instance protecting individuals who undergo gender reassignment treatments.

According to a recent ruling by the Constitutional Court, civic registry authorities are required to recognise the right of intersex persons to change their registration status to a 'third gender option'.<sup>13</sup>

#### 3.2.3 Specific requirements

Case law states that 'everyday living within the bounds of an emotional attachment to a gender other than the biological one' does not constitute a close enough relation to the reassigned gender; administrative decisions about reassignment of gender require passing at least the first stages of reassignment treatments.<sup>14</sup>

### **3.3 Direct sex discrimination**

#### 3.3.1 Explicit prohibition

The Equal Treatment Act for the Private Sector contains prohibitions of direct discrimination in Paragraphs 5 and 19 (concerning the workplace) and 31 (concerning access to goods and services). Other equal treatment acts are mostly modelled on the wording and content of this provision (e.g. Paragraph 4a of the Federal Equal Treatment Act). The wording of these provisions is closely based on the German language version of Recast Directive 2006/54/EC. Paragraph 5(1) of the Equal Treatment Act for the Private Sector describes direct discrimination as follows: 'Direct discrimination exists, if a person because of his or her sex experiences a less favourable treatment in a comparable situation than another person experiences, has experienced or would experience.'<sup>15</sup> The wording, which is used in all discrimination legislation in a similar way, directly reproduces the wording of the Recast Directive.

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<sup>13</sup>

[https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR\\_20180615\\_18G00077\\_01/JFR\\_20180615\\_18G00077\\_01.pdf](https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_20180615_18G00077_01/JFR_20180615_18G00077_01.pdf).

<sup>14</sup> RIS-Justiz RS0124710,

[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20090421\\_OGH0002\\_010OBS00029\\_09A0000\\_001/JJR\\_20090421\\_OGH0002\\_010OBS00029\\_09A0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20090421_OGH0002_010OBS00029_09A0000_001/JJR_20090421_OGH0002_010OBS00029_09A0000_001.pdf).

<sup>15</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40126080/NOR40126080.pdf>; no official translation available.

### 3.3.2 Prohibition of pregnancy and maternity discrimination

Neither equal treatment legislation nor the Maternity Protection Act (*Mutterschutzgesetz, MSchG*)<sup>16</sup> contain special provisions on pregnancy or maternity discrimination. The prohibition of pregnancy and maternity discrimination as direct discrimination based on sex is well established by the case law of the social and labour courts and the Supreme Court and can be considered a legal principle.<sup>17</sup>

### 3.3.3 Specific difficulties

Currently the author is not aware of specific difficulties.

## 3.4 Indirect sex discrimination

### 3.4.1 Explicit prohibition

Paragraph 5(2) of the Equal Treatment Act for the Private Sector reads as follows: 'Indirect discrimination exists, if apparently neutral statutes, criteria or processes can disadvantage members of one sex in special ways compared to members of the other sex, unless they are justified by the appropriate pursuit of a legitimate goal and appropriate for achieving this goal.' The wording is based on the German language version of Article 2(1b) of Directive 2006/54/EC.<sup>18</sup>

### 3.4.2 Statistical evidence

According to the rules on evidence, both the claimant and the defendant have to offer all means of evidence that they consider relevant for the claim or its rejection. This can include statistical evidence where indirect discrimination is concerned. However, general evidence rules in civil procedural law restrict prima facie evidence or presumptions of evidence. Statistical evidence is admitted as circumstantial evidence in support of direct evidence. All evidence in civil cases is subject to free consideration by judges (which is part of the constitutional guarantee of judicial independence), consequently there is no onus on the courts to factor it into their verdicts.

### 3.4.3 Application of the objective justification test

In RIS-Justiz RS0120417<sup>19</sup> the Supreme Court established case law in a landmark case on the indirect discriminatory effects of part-time work for women concerning equal pay and other working conditions. Following the Court of Justice of the European Union (CJEU) (e.g. C-187/00, *Kutz-Bauer*), the Supreme Court also consistently rules that budgetary considerations are not in themselves a legitimate justification for indirect discrimination.<sup>20</sup>

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<sup>16</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008464/MSchG%2c%20Fassung%20vom%2031.03.2019.pdf>.

<sup>17</sup>

RIS-Justiz RS0129463,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20140227\\_OGH0002\\_008OBA00081\\_13I0000\\_001/JJR\\_20140227\\_OGH0002\\_008OBA00081\\_13I0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20140227_OGH0002_008OBA00081_13I0000_001/JJR_20140227_OGH0002_008OBA00081_13I0000_001.pdf).

<sup>18</sup>

<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40126080/NOR40126080.pdf>; no official translation available.

<sup>19</sup>

[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20051219\\_OGH0002\\_008OBA00011\\_05H0000\\_001/JJR\\_20051219\\_OGH0002\\_008OBA00011\\_05H0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20051219_OGH0002_008OBA00011_05H0000_001/JJR_20051219_OGH0002_008OBA00011_05H0000_001.pdf).

<sup>20</sup>

[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20010628\\_OGH0002\\_010OBS00043\\_01Y0000\\_005/JJR\\_20010628\\_OGH0002\\_010OBS00043\\_01Y0000\\_005.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20010628_OGH0002_010OBS00043_01Y0000_005/JJR_20010628_OGH0002_010OBS00043_01Y0000_005.pdf).

#### 3.4.4 Specific difficulties

Case law and legal doctrine have accepted the concept of indirect discrimination, and it is regularly applied in case law. Neither the Maternity Protection Act nor the Fathers' Parental Leave Act (*Väterkarenzgesetz, VKG*) contain special provisions concerning direct and indirect discrimination in the context of parental leave. Parents who claim discrimination as a result of taking parental leave can file a discrimination lawsuit based on the relevant equal treatment legislation as direct or indirect sex/gender discrimination. However, this legal basis requires claimants to offer at least circumstantial evidence of a connection between the facts of their case and their sex, which poses specific evidentiary challenges in actual situations where the claim rests exclusively on proving less favourable treatment due to parental leave.

### 3.5 Multiple discrimination and intersectional discrimination<sup>21</sup>

#### 3.5.1 Definition and explicit prohibition

Multiple discrimination is systematically covered by the material and the personal scopes of the statutes implementing Directives 2006/54/EC, 2000/78/EC, 2000/43/EC and 2004/113/EC (Paragraph 12(3) of the Equal Treatment Act for the Private Sector and Paragraph 19a of the Federal Equal Treatment Act for Civil Servants).

In the legislation for the private sector, it is addressed as a separate issue specifically in connection with the amount of damages; intersectional or, in legal parlance, multiple discrimination should lead to higher compensation amounts. If the circumstances suggest multiple discrimination, this has to be addressed in the brief, which should also list all possible statutory sources. There are no procedural limits to using as many legal sources as a basis for claims as would seem to be possible and adequate.

#### 3.5.2 Case law and judicial recognition

The Equality Commission for the Private Sector (*Gleichbehandlungskommission für die Privatwirtschaft*) has issued several opinions concerning women wearing headscarves. In these cases, the equality body has held that the applicants were discriminated against both on the grounds of sex and of religion.<sup>22</sup>

In a prominent court case, the Supreme Court had to consider claims of multiple discrimination by an employee at a private enterprise, who started wearing a headscarf at her workplace. The Supreme Court ruled that the termination of her contract was not based on sex/gender discrimination but on discrimination on the grounds of religion or ideology.<sup>23</sup>

### 3.6 Positive action

#### 3.6.1 Definition and explicit prohibition

Paragraph 8 of the Equal Treatment Act for the Private Sector and Paragraphs 11 to 11d of the Federal Equal Treatment Act provide a legal basis for positive action measures.

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<sup>21</sup> For more information, see Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

<sup>22</sup> 12. Gleichbehandlungsbericht des Bundes 2018, <https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungsberichte/gleichbehandlungsberichte-des-bundes.html>.

<sup>23</sup> RS0121188, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20160525\\_OGH0002\\_009OBA00117\\_15V0000\\_001/JJR\\_20160525\\_OGH0002\\_009OBA00117\\_15V0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20160525_OGH0002_009OBA00117_15V0000_001/JJR_20160525_OGH0002_009OBA00117_15V0000_001.pdf).

Additionally, Paragraph 97(1)(25) of the Act on the Constitution of Labour (*Arbeitsverfassungsgesetz, ArbVG*),<sup>24</sup> which regulates collective bargaining and workers' participation at company level, regulates labour-management agreements. Such agreements can establish positive action measures for women and measures for a better work-life balance.<sup>25</sup>

### 3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

The legal and political terms most commonly used are '*Gleichbehandlung*' (equal treatment) and '*Gleichstellung*' (which designates factual and legal measures in order to establish material equality and which is the closest equivalent to the central meaning of equal opportunities); the term gender mainstreaming is also used, mostly as a definition for administrative practices, which structure processes of equalisation and positive action measures for all genders.

### 3.6.3 Specific difficulties

In the private sector, the introduction of effective positive action measures at company level depends on labour-management agreements. These in turn require the establishment of works councils, to which workers have a right but for which the company has no obligation. One-sided positive action measures at company level would be possible under the legal scope of civil law and equal treatment legislation and corresponding case law. However, such measures are rarely introduced due to the considerable risk of legal challenges by members of groups outside the scope.

Federal and state civil service employment is structured by law. Employment duties and pay are detailed in federal and state legislation. Consequently, there is practically no scope for individual positive measures. Public service legislation contains explicit provisions for material and procedural positive measures (in this context, Paragraphs 11 to 13 of the Federal Equal Treatment Act are the template for nearly all public service legislation).<sup>26</sup>

### 3.6.4 Measures to improve the gender balance on company boards

Companies with a close economic or organisational relationship to the Austrian Republic (*staatsnahe Betriebe*) are obliged by a Federal Government Council resolution (*Ministerratsbeschluss*) to guarantee a quota of 25 % female members on supervisory and company boards (*Aufsichtsräte*).<sup>27</sup> For these boards, the rate of female representation was at almost 47 % in 2017 (up from 40 % in 2016).<sup>28</sup>

The Act for Incorporated Stock Companies (*Aktiengesetz, AktG*) and the Code of Company Regulations (*Unternehmensgesetzbuch, UGB*) contain non-binding rules for diversity measures relating to a balanced representation in respect of age and gender of supervisory board members together with corresponding reporting commitments. The term 'balanced representation' is not legally defined.

The Corporate Governance Code contains a 'comply or explain' provision for balanced gender representation on supervisory and company boards.

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<sup>24</sup>

<http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008329/ArbVG%2c%20Fassung%20vom%2012.03.2019.pdf>.

<sup>25</sup> Paragraph 97(1)(25) of the Act on the Constitution of Labour,

<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40123096/NOR40123096.pdf>.

<sup>26</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40205684/NOR40205684.pdf>.

<sup>27</sup> Report for 2018 is not yet available, report for 2017 is available at <http://www.imag-gmb.at/cms/imag/projektetails3.htm?channel=CH0602&doc=CMS1456127938138>.

<sup>28</sup> No report for 2018 so far; for 2018 see <https://derstandard.at/2000075573648/Bundes-Frauenquote-in-staatsnahen-Aufsichtsraten-steigt>.

New legislation concerning gender equality on company boards was introduced in October 2017 and came into effect on 1 January 2018.<sup>29</sup> Elections of and postings to supervisory boards of listed stock companies and of companies with more than 1 000 employees and consisting of at least six seats will have to have at least a 30 % quota of the underrepresented sex. Only 'single gender' companies (defined as companies that have a workforce with less than 20 % employees of one sex) are exempt from these regulations. The 30 % quota is sanctioned by an 'empty seat' policy. Elections and postings that fail to meet the required quota minimum are void and board members holding such seats are barred from voting. The new regulations are applicable to all new board elections, however current seats will not be affected.

The quota is only required for boards with six or more seats so that there may still be all-male boards (with five or less members) under the new legislation. There are still considerable legal uncertainties concerning actual handling of the new regulations.

In Austria, 29 companies have to comply with these new regulations. In early 2019, the rate of female board members had already risen to almost 28 %. In comparison, companies on the Vienna stock exchange that are not subject to the quota regulations have only a 14 % rate of female members on supervisory boards. While the improvement of female membership on advisory boards is visible, there are almost no changes at company management levels. 60 of the 68 companies on the stock exchange do not have a single female executive board member.<sup>30</sup>

### 3.6.5 Positive action measures to improve the gender balance in other areas

In 2009 the term gender budgeting was introduced to the federal constitution and to federal and state budget legislation; it is aimed at planning and evaluating the use of tax money and public funds in connection with women's interests.<sup>31</sup>

## 3.7 Harassment and sexual harassment

### 3.7.1 Definition and explicit prohibition of harassment

National legislation defines sex-related harassment as sexualised behaviours that create or intend to create a hostile or intimidating work environment (Paragraph 7 of the Equal Treatment Act for the Private Sector and Paragraph 8a of the Federal Equal Treatment Act).

This definition complies with the EU definition in Article 2(1)(c) of Directive 2006/54.

### 3.7.2 Scope of the prohibition of harassment

The personal scope of these provisions covers any person of any gender working at a corporation or private business with a civil contract or in the context of the federal civil service (civil service legislation at state level also contains corresponding provisions). Case law states that molestation of a homosexual person at the workplace can constitute sexual harassment in the legal sense.<sup>32</sup>

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<sup>29</sup> *Gleichstellungsgesetz von Frauen und Männern im Aufsichtsrat, GFMA-G* (Act on Equality of Men and Women on Boards),

[https://www.ris.bka.gv.at/Dokumente/BqblAuth/BGBLA\\_2017\\_I\\_104/BGBLA\\_2017\\_I\\_104.pdfsig](https://www.ris.bka.gv.at/Dokumente/BqblAuth/BGBLA_2017_I_104/BGBLA_2017_I_104.pdfsig).

<sup>30</sup> <https://www.diepresse.com/5586971/ein-jahr-frauenquote-ndash-und-sie-wirkt>.

<sup>31</sup> Article 13(3) of the Federal Constitution,

<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40094597/NOR40094597.pdf>.

<sup>32</sup> RIS-Justiz RSA0000043,

[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20060714\\_LG00569\\_018CGA00120\\_05T0000\\_001/JJR\\_20060714\\_LG00569\\_018CGA00120\\_05T0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20060714_LG00569_018CGA00120_05T0000_001/JJR_20060714_LG00569_018CGA00120_05T0000_001.pdf).

### 3.7.3 Definition and explicit prohibition of sexual harassment

Sexual harassment is defined as a form of direct sexualised violence in the workplace, as discrimination on the grounds of gender, and as the treatment of a person in a less favourable way because of their rejection or toleration of acts of sexual harassment.<sup>33</sup>

### 3.7.4 Scope of the prohibition of sexual harassment

The personal scope of these provisions covers any person of any sex and of any gender identity (e.g. transgender persons who have started the gender transition) working at a company with a civil contract or in the context of the federal civil service (civil service legislation at state level also contains corresponding provisions).

### 3.7.5 Understanding of (sexual) harassment as discrimination

Sexual harassment and sex-related harassment are explicitly defined as discrimination on the grounds of sex/gender (Paragraph 6(2)(1) and Paragraph 35(2) of the Equal Treatment Act for the Private Sector, Paragraph 8(2)(2) and Paragraph 8a(2)(2) of the Federal Equal Treatment Act).

Sexual harassment can also constitute a criminal offence. This is defined in Paragraph 218 of the Criminal Code,<sup>34</sup> which covers sexual acts committed against the will of the victim that have a negative impact on the victim's dignity. This provision covers the public as well as the private sphere and would also apply to intensive harassment in the workplace. According to the explanatory legislative notes, this provision is applicable in cases where a perpetrator touches a body part of the victim within her or his 'sexual sphere', such as the breasts or the buttocks. The notes clarify that the sexual area of a victim's body would also have to be extended to thighs or upper arms if the intent to violate the 'sexual sphere' of the victim was obvious.<sup>35</sup> The new version of Paragraph 218 of the Criminal Code came into effect on 1 January 2016.

### 3.7.6 Specific difficulties

Due to the rather high evidentiary standards that apply in civil procedural law, court claims concerning sexual harassment and harassment for sexual reasons meet certain procedural challenges. Claimants have an obligation to offer at least circumstantial evidence, which very often mainly or exclusively relies on their own testimony. Judges very often must rely on their subjective assessment of directly conflicting testimonies by the claimant and the defendant. Additionally, if they lose, claimants in civil cases run the risk of being burdened with the costs of their own legal representation as well as those of the defendant.

## 3.8 Instruction to discriminate

### 3.8.1 Explicit prohibition

Explicit prohibition of instructions to discriminate is in the scope of the equal treatment legislation in connection with the workplace and with gender-related access to goods and services (Paragraph 5(4) and Paragraph 32(3) of the Equal Treatment Act for the Private Sector). Paragraph 4a(4) of the Federal Equal Treatment Act for Civil Servants states that 'discrimination also occurs in cases where a person is instructed to discriminate'.

<sup>33</sup> For example, Paragraph 5 of the Equal Treatment Act for the Private Sector, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40052818/NOR40052818.pdf>.

<sup>34</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40093007/NOR40093007.pdf>, *Strafrechtsänderungsgesetz 2015* came into effect on 1 January 2016.

<sup>35</sup> [https://www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00689/fname\\_423854.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00689/fname_423854.pdf).

### 3.8.2 Specific difficulties

The author is not aware of any specific difficulties in relation to the application of the concept.

### **3.9 Other forms of discrimination**

Other forms of discrimination, such as discrimination by association, are not explicitly prohibited by legislation, consequently there is no pertinent case law.

### **3.10 Evaluation of implementation**

Implementation of the gender equality directives has happened within the framework of the directives.

### **3.11 Remaining issues**

In the opinion of the author, the current political climate does not create opportunities for relevant policy changes. The Government's 2017 programme focuses on improvements for families and female health issues; further development of gender equality and anti-discrimination policies is not a priority at federal level.

## **4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)**

### **4.1 General (legal) context**

#### 4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

The persisting gender pay gap in the private sector in Austria has frequently been demonstrated in the pertinent Eurostat evaluations of European Member States. Austria has one of the highest and most persistent gender pay gaps in the EU-28. This results from a mix of root causes such as gaps in childcare facilities and adequate day care for school children, a high rate of part-time work among female employees, and a very unequal distribution of paid and unpaid work between men and women. Current Government policies are widely seen to stabilise and possibly widen the gender pay gap.<sup>36</sup> The annual national statistics confirm these findings.<sup>37</sup> An effective measure to battle wage gaps would be better and more rigorous legislation on pay transparency with a broader access of possible claimants in court cases to pay data at company levels.

#### 4.1.2 Surveys on the difficulties of realising equal treatment at work

No recent surveys are available regarding specific difficulties.

Again, the lack of accessible data for direct comparisons is an important obstacle to effective enforcement of equal treatment legislation at company level.

An action day for equal pay has been institutionalised by a cooperation of NGOs.<sup>38</sup> Every year the concrete date from which paid female labour (in comparison to paid male labour) starts, sees multiple events and information campaigns with the goal to lessen the wage gap.

#### 4.1.3 Other issues

Pensions in the statutory social security systems are calculated both on the duration of contribution periods and on the contribution amounts accumulated during a person's working life. Lower wages therefore result in lower old-age pensions. The gender pension gap in Austria is consistently wide (about 44 % overall).<sup>39</sup> Existing measures in favour of women, above all the granting of pension benefits for care periods, have not resulted in more convergence of pension levels between men and women. Due to the different pay schemes and calculation factors for pensions in the public sector, the gender pay gap and the gender pensions gap are less of a problem for civil servants than for employees in the private sector and for self-employed persons.

#### 4.1.4 Political and societal debate and pending legislative proposals

The current Government has shown no political or policy priorities concerning the gender pay gap or the tackling of equal treatment deficits in the workplace.

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<sup>33</sup> For a summary, see: Austrian Federal Chamber of Labour (March 2019), *Gender pay gap in Austria and the European Union*, position paper, [https://www.akeuropa.eu/sites/default/files/2019-03/Gender%20Pay%20Gap\\_2.pdf](https://www.akeuropa.eu/sites/default/files/2019-03/Gender%20Pay%20Gap_2.pdf).

<sup>37</sup> Statistik Österreich, [https://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/soziales/gender-statistik/einkommen/index.html](https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/einkommen/index.html).

<sup>38</sup> <https://www.equal-pay-day.at/>.

<sup>39</sup> For example, <https://www.akeuropa.eu/gender-pension-gap-unequal-wage-does-not-spare-pensions-either>.

## 4.2 Equal pay

### 4.2.1 Implementation in national law

Implementation in national Paragraph 3 of the Equal Treatment Act for the Private Sector<sup>40</sup> and Paragraph 4 of the Federal Equal Treatment Act<sup>41</sup> contain the obligation of employers to grant equal pay for equal work or work of equal value.

### 4.2.2 Definition in national law

Pay does not have a succinct legal definition in national law. Pay for employed persons is a concept that is regulated by a complex system of tax and social security law as well as by labour regulations at several levels. In the private sector, the required minimum pay levels are largely regulated by collective agreements.

Pay in a general sense is the amount of money that a person is entitled to be paid for his or her labour according to general wage levels or their work contract. Viewed systematically, the relevant provisions comply with the concept of Article 157 of the TFEU.

Pay for federal civil servants is regulated by the Federal Civil Servants' Salary Act (*Gehaltsgesetz, GehG*),<sup>42</sup> which contains no distinctions between the sexes. Pay levels are annually adjusted to inflation (similar legislation exists at state level).

Paragraph 11 of the Equal Treatment Act for the Private Sector obliges all parties at every level of collective bargaining to follow the principle of equal pay for equal work or work of equal value and to take care that no discriminatory criteria for job evaluation processes are implemented at the collective bargaining level, which effectively constitute legal minimum wage levels in all sectors. By law, the personal scope of collective agreements is extended to all employees of a sector, irrespective of their union membership. Collective remuneration levels are also an important guideline for establishing the amount of adequate pay in areas without collective wage norms.

There is well-established case law by the Supreme Court that obliges employers to eliminate gender-specific criteria from the hiring process and from wage negotiations.<sup>43</sup> Following the CJEU ruling in *Brunnhöfer* (C-318/99), the Supreme Court confirmed the pre-existing case law that determined that contributions to occupational pension schemes are pay within the meaning of Article 156 of the TFEU.<sup>44</sup>

According to Paragraph 9 of the Equal Treatment Act for the Private Sector, job advertisements must contain the minimum amount of collective pay required for the job in question and they must indicate if a higher salary can be negotiated; individually negotiated pay is considered one of the grounds for equal pay problems in practice.

According to Paragraph 11a of the Equal Treatment Act for the Private Sector, enterprises that regularly employ more than 150 persons have to publish a report on income distribution among the male and the female part of their workforce every two years. This

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<sup>40</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151372/NOR40151372.pdf>.

<sup>41</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40146089/NOR40146089.pdf>.

<sup>42</sup> <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008163>.

<sup>43</sup> RIS-Justiz RS0110047, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19980520\\_OGH0002\\_009OBA00350\\_97D0000\\_001/JJR\\_19980520\\_OGH0002\\_009OBA00350\\_97D0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19980520_OGH0002_009OBA00350_97D0000_001/JJR_19980520_OGH0002_009OBA00350_97D0000_001.pdf).

<sup>44</sup> RIS-Justiz RS0060292, <https://www.ris.bka.gv.at/Ergebnis.wxe?Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=False&GZ=&VonDatum=&BisDatum=02.09.2019&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=RS0060292&Position=1>.

provision only entered into force in its entirety in 2014 (with a transition phase between 2010 and 2014).

#### 4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

Paragraph 3 No. 2 in conjunction with Paragraph 5 of the Equal Treatment Act for the Private Sector explicitly state that direct and indirect discrimination concerning the determination of pay are forbidden and give definitions for direct and for indirect discrimination that conform with the requirements of Directive 2006/54.

#### 4.2.4 Related case law

The Supreme Court has established case law stating that EU law has absolute precedence over national sources of law. Contraventions to Article 157 of the TFEU (formerly Article 141) at all levels, including in collective agreements, bargaining agreements at company level, and single contracts, invalidate the relevant clauses and grant immediate legal grounds for suits. The concept of equal pay applies in full to all actual situations after the date of accession to the (then) EC in 1995.<sup>45</sup>

#### 4.2.5 Permissibility of pay differences

In accordance with established case law, pay differences on the grounds of sex/gender are not permissible and can be made grounds for individual labour law claims in the civil court.

#### 4.2.6 Requirement for comparators

In court filings and in applications to the equality body concerning discrimination in the workplace, claimants have to demonstrate (that is, offer at least circumstantial proof) that they have experienced less favourable treatment than a concrete employee of another sex/gender (Paragraph 5(1) of the Equal Treatment Act for the Private Sector). In cases where no concrete comparator can be demonstrated, the claimant has to rely on a hypothetical comparator.

The question of a hypothetical comparator has become relevant following an age discrimination case in the private sector.<sup>46</sup> As the wording of Paragraphs 3 (concerning sex discrimination) and 19 (concerning among other grounds age discrimination) of the Equal Treatment Act for the Private Sector are identical, this also applies to sex/gender discrimination cases. In the cited court case, a male job applicant could prove that he was not hired for the job because of his age. As there were no other applicants for this particular job, the court had to interpret Paragraph 5(1) of the Equal Treatment Act for the Private Sector, stating that the law requires a hypothetical comparator to be considered if no concrete comparator is available.

#### 4.2.7 Existence of parameters for establishing the equal value of the work performed

Collective agreements can contain work evaluation systems; implementation at company level mostly depends on obligatory agreements between works councils and employers. The Equal Treatment Act for the Private Sector contains a mandate for collective bargaining, but no obligation that regulates collective bargaining processes in general; employees who consider works council agreements as a violation of the principle of equal pay would have to make corresponding courts claims against their employers. The

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<sup>45</sup> RIS-Justiz RS0117073, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20021113\\_OGH0002\\_009OBA00193\\_02A0000\\_001/JJR\\_20021113\\_OGH0002\\_009OBA00193\\_02A0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20021113_OGH0002_009OBA00193_02A0000_001/JJR_20021113_OGH0002_009OBA00193_02A0000_001.pdf).

<sup>46</sup> RIS-Justiz RS0128532, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20130129\\_OGH0002\\_009OBA00154\\_12F0000\\_001/JJR\\_20130129\\_OGH0002\\_009OBA00154\\_12F0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20130129_OGH0002_009OBA00154_12F0000_001/JJR_20130129_OGH0002_009OBA00154_12F0000_001.pdf).

principle of equal pay would become more effective if it were to be implemented not only as mandatory in equal treatment legislation but also as a mandatory guideline in collective bargaining rules.

#### 4.2.8 Other relevant rules or policies

Paragraph 5 and Paragraph 12(12) of the Equal Treatment Act for the Private Sector can serve as a template for all equal treatment statutes, which contain largely the same wording.<sup>47</sup> Acts of indirect discrimination may be justified if they are pursuing a legitimate goal by adequate means. In order to test the possible justification for a measure or rule that is at first seen as indirectly discriminatory it would have to be demonstrated that the measure does not violate any other relevant legal rules or principles and that it demonstrates clearly which goal is pursued and why the goal is adequate within the scope of the relevant policy field.

#### 4.2.9 Job evaluation and classification systems

No job evaluation or classification systems that do not fall under a collective agreement were found at the time of reporting. It should be noted that collective agreements contain pay grids that are structured by qualification levels and by seniority and which lay out the minimum pay levels required for jobs belonging to the respective category. The employers are required to evaluate the classification of jobs by the requirements of applicable collective agreements and indicate which career bracket is connected to an individual job. This decision can be challenged and corrected in individual court cases. The collective agreements and the pay grids as one of their most important parts are re-negotiated annually by the social partners and consequently are under regular observation and adaptation.

#### 4.2.10 Wage transparency

Paragraph 11 of the Equal Treatment Act for the Private Sector obliges all parties at every level of collective bargaining to follow the principle of equal pay for work of equal value and to take care that no discriminatory criteria for work evaluation processes are implemented. Pay levels for federal civil servants are regulated by the Federal Civil Servants' Salary Act, which contains no distinction in pay between sexes/genders and is annually adjusted to inflation, as are salaries for provincial civil servants.

Wage policies in the private sector are regulated to a very large degree by sectoral collective agreements. These are required to contain gender-neutral pay schemes that structure minimum pay levels according to material and temporal qualification levels. Collective agreements are accessible to the public in a database maintained by the Trade Union Federation (*Österreichischer Gewerkschaftsbund, ÖGB*), which is regularly updated as soon as pay rises come into effect.<sup>48</sup> According to Paragraph 9 of the Equal Treatment Act for the Private Sector, job advertisements must contain the minimum amount of pay for the job. This is mandated to a very large extent by the applicable sectoral collective agreement; in rare cases, where a job falls into an area not regulated by a collective agreement, adequate pay levels can be inferred by looking at the best comparable sectoral pay schemes. However, a higher rate of pay can be negotiated at any time, which is where equal pay problems may arise in practice.

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<sup>47</sup> Paragraph 5, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40126080/NOR40126080.pdf>, Paragraph 12, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151376/NOR40151376.pdf>.

<sup>48</sup> [https://www.kollektivvertrag.at/cms/KV/KV\\_0/home](https://www.kollektivvertrag.at/cms/KV/KV_0/home).

#### 4.2.11 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

According to Paragraph 11a of the Equal Treatment Act for the Private Sector, enterprises that regularly employ more than 150 persons have to publish a report on income distribution among the male and female part of their workforce every two years. This provision only entered into force in its entirety in 2014 (with a transition phase between 2010 and 2014). In these income reports, the pay levels of the company's staff must be anonymised and then detailed by gender and then by qualifications and by correlation to existing pay schemes in the applicable collective agreement. Income reports are confidential, but may be used as collateral evidence by claimants in equal pay court cases in order to substantiate prima facie proof of pay discrimination.

#### 4.2.12 Other measures, tools or procedures

A recent initiative propagated by the competent Federal Ministry for Social Affairs aims at providing data and facts about equal pay at various company levels and offers companies access to relevant consulting information.<sup>49</sup>

### 4.3 Access to work, working conditions and dismissal

#### 4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

Paragraph 1 of the Equal Treatment Act for the Private Sector and Paragraph 1(1) of the Federal Equal Treatment Act contain a comprehensive definition of the personal scope of the implementing legislation.<sup>50</sup>

In the private sector, all employees with a work contract under the applicable labour legislation fall under the personal scope. This includes workers with regular contracts, with fixed-term and part-time contracts, and also workers with irregular work contracts who have a steady working relationship with one or more employers.<sup>51</sup> In the public sector, the personal scope of equal treatment legislation covers public servants and persons employed under federal or provincial public employment legislation (*Vertragsbedienstete*).

#### 4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

Paragraphs 3(1) and 4 of the Equal Treatment Act for the Private Sector and Paragraph 4 of the Federal Equal Treatment Act contain a comprehensive definition of the material scope of the implementing legislation in accordance with Article 14 of Recast Directive 2006/54.

#### 4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

Both relevant laws contain an exception from strict equal treatment requirements in cases of genuine occupational requirements (e.g. Paragraph 9(1) of the Equal Treatment Act for the Private Sector).<sup>52</sup>

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<sup>49</sup> <https://www.equalpay.at/zahlen-daten-fakten/fundierte-belegschaftsstruktur-und-gehaltsanalyse-der-equal-pay-basisbericht/>.

<sup>50</sup> Civil service legislation in the states also reflects this.

<sup>51</sup> In legal terminology, persons working under such contracts are referred to as 'employee-like persons' (*arbeitnehmerähnliche Personen*) or as 'free contractual workers' (*freie Dienstnehmer/innen*).

<sup>52</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151374/NOR40151374.pdf>.

#### 4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

Protection against the dismissal of pregnant women and breastfeeding mothers is traditionally contained in the Maternity Protection Act (Paragraphs 10 and 12) and further implemented by case law. Pregnant workers are protected against dismissal from the time of giving notice of the pregnancy to their employers, during the whole pregnancy and for four months after giving birth. During the protected period, employers must apply to the labour and social courts for written permission to execute a termination of contract while demonstrating legally defined causes for dismissal.

These provisions are extended to parents on parental leave until four weeks after their return to the workplace. A less stringent protection against dismissal applies to workers who enter a phase of protected part-time work for parents (*Elternteilzeit*).

Paragraph 10a of the Maternity Protection Act grants pregnant women an extension of contract time until the start of the maternity protection period in case a fixed-term contract ends before that point in time.

#### 4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

Implementation of that Article was not deemed necessary within the scope of equal treatment legislation as it is already contained in maternity protection legislation, to a larger extent than required by the Recast Directive.

#### 4.3.6 Particular difficulties

In the opinion of the author, there are no particular implementation difficulties concerning equal access to work, vocational training, employment contracts, working conditions, promotion and protection against dismissal on grounds connected to sex.

#### 4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

Positive action measures were implemented for the federal civil service (Paragraphs 11 to 11d of the Federal Equal Treatment Act) from 1993 onward.<sup>53</sup> At the level of private companies, social partners can implement positive action measures by works council agreements (Paragraph 97 No. 25 Act on Constitution of Labour).<sup>54</sup>

### 4.4 Evaluation of implementation

The beginnings of equal treatment legislation in Austria date back to 1979, when the first equal treatment legislation for the private sector came into effect. One of the first measures based on the new legislation was the elimination of separate wage groups for men and women.

Implementation of the relevant directives started before Austria's accession to the European Community in 1995 as part of the *acquis communautaire*.

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<sup>53</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008858/B-GIBG%2c%20Fassung%20vom%2030.04.2019.pdf>.

<sup>54</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008329/ArbVG%2c%20Fassung%20vom%2010.07.2020.pdf>.

Legislators have taken care to implement new or changed directives as soon as necessary. There have, however, been few legislative or policy initiatives that provide a wider scope or more detailed legislation than required by the directives.

#### **4.5 Remaining issues**

Overall, Austria is compliant with the requirements posed by EU law, but is not promoting progressive legislative developments. That may be due to a greater policy focus on issues of work-life balance, especially care policies for pre-school and primary school children in recent years.<sup>55</sup>

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<sup>55</sup> Overview of historical development and current policies: *Ihr gutes Recht* (issued by the Ombud for Equal Treatment, 2016), [https://www.gleichbehandlungsanwaltschaft.gv.at/documents/340065/441451/Ihr\\_Gutes\\_Recht.pdf/38e514c6-d785-4d1a-8e39-6713d81eb51e](https://www.gleichbehandlungsanwaltschaft.gv.at/documents/340065/441451/Ihr_Gutes_Recht.pdf/38e514c6-d785-4d1a-8e39-6713d81eb51e).

## 5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)<sup>56</sup>

### 5.1 General (legal) context

#### 5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

One recent survey confirmed earlier findings that Austrian workers are generally satisfied with their labour market status, but at the same time consider the working hours and the demands at the workplace to be too high.<sup>57</sup>

One of the conclusions reached in an older survey from 2014 on the conditions, effects, and availability of childcare at company level was that employees with small children consider the existence of childcare facilities at their workplace an important factor in their employment decisions. Another result from this survey was that employees with children under 12 years of age prefer flexible working time arrangements.<sup>58</sup>

#### 5.1.2 Other issues

Austria has a comparably high rate of female participation in the workforce with a rate of part-time female workers between the ages of 15 and 64 of over 50 %, especially in rural areas. Decisions for working part time are influenced by education level, number of children and amount of disposable household income.<sup>59</sup> Part-time work contributes to a large extent to the high gender pay gap and gender pension gap.

#### 5.1.3 Overview of national acts on work-life balance issues

Maternity Protection Act (*Mutterschutzgesetz*)  
Fathers' Parental Leave Act (*Väterkarenzgesetz*)  
Paternity Leave Act (*Familienzeitbonusgesetz*)<sup>60</sup>

Additionally, regulations on *force majeure* leave and carer's leave provisions for seriously ill relatives are regulated within the scope of labour legislation concerning additional paid holidays (*Urlaubsgesetz*) and carer's leave for terminally ill patients, or seriously sick children, or care-dependent relatives as well as corresponding modification of working contracts (*Arbeitsvertragrechtsanpassungsgesetz*).

#### 5.1.4 Political and societal debate and pending legislative proposals

The current Government has not committed to extending specific work-life balance policies.

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<sup>56</sup> See Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

<sup>57</sup> <https://kontrast.at/work-life-balance-studie-2019/>.

<sup>58</sup> [https://www.femtech.at/sites/default/files/Studie\\_Vereinbarkeit\\_Beruf\\_Familie\\_2014.pdf](https://www.femtech.at/sites/default/files/Studie_Vereinbarkeit_Beruf_Familie_2014.pdf).

<sup>59</sup> <https://www.addendum.org/feminismus/teilzeit/>.

<sup>60</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008464/MSchG%2c%20Fassung%20vom%2030.04.2019.pdf>,

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008674/VKG%2c%20Fassung%20vom%2030.04.2019.pdf>,

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20009586/FamZeitbG%2c%20Fassung%20vom%2030.04.2019.pdf>.

## 5.2 Pregnancy and maternity protection

### 5.2.1 Definition in national law

Pregnancy per se is not defined in national law. As the relevant legislation specifies an overall protection period for women of at least 16 weeks before the due date and after having given birth, separate definitions of workers having given birth are not necessary. Paragraph 4a of the Maternity Protection Act gives special consideration to breastfeeding mothers; this is not of great practical relevance, as the overwhelming number of female workers take a period of parental leave in the first year after delivery.

### 5.2.2 Obligation to inform employer

Employees are not obliged to inform employers of their pregnancy. However, the specific protections of maternity legislation are not applicable until the employer has received definite information about the pregnancy. Employers can demand a doctor's certificate, which is required to state the estimated date of delivery. The start of maternity leave is calculated based on this certificate.

### 5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

In 2006 the Supreme Court submitted a case to the CJEU concerning the question of whether a worker who is currently undergoing fertility treatment in preparation for in vitro fertilisation is to be considered a 'pregnant worker' according to Article 2 of Directive 92/85. In C-506/06 *Mayr* the CJEU ruled that a pregnancy within the meaning of Article 2 requires the embryos to have been implanted into the womb. During the fertility treatment, the woman is not protected by Directive 92/85 but any adverse decisions concerning her work may constitute discrimination according to equal treatment rules. This has been integrated in to the relevant case law.<sup>61</sup>

### 5.2.4 Implementation of protective measures (Article 4-6 of Directive 92/85)

Paragraphs 2a to 9 of the Maternity Protection Act<sup>62</sup> list the protective measures during pregnancy. The regulations are applicable from the point in time when the employer first receives reliable information about the pregnancy. The scope covers pregnancy and breastfeeding periods. (Note: As almost 100 % of women start parental leave directly after maternity leave, breastfeeding provisions do not have a very large practical impact.)

Women covered by maternity protection are prohibited from working under conditions where they:

- have to lift or move weights regularly;
- have to work standing most of the time without the possibility of resting periods in a sitting position after week 20 of the pregnancy;
- are exposed to hazardous or infectious materials (as listed in the evaluation documents by the Labour Inspectorate);
- have to operate machinery with their feet;
- have to work on means of transportation;
- have to work piece-rate or on production lines after week 20 of the pregnancy;
- have to sit most of the time without the possibility of changing position regularly;
- have to work in pressurised air (limitative list).

<sup>61</sup> RIS-Justiz RS0123605, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20080616\\_OGH0002\\_008OBA00027\\_08S0000\\_002/JJR\\_20080616\\_OGH0002\\_008OBA00027\\_08S0000\\_002.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20080616_OGH0002_008OBA00027_08S0000_002/JJR_20080616_OGH0002_008OBA00027_08S0000_002.pdf).

<sup>62</sup> Maternity Protection Act (*Mutterschutzgesetz*), <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008464/MSchG%2c%20Fassung%20vom%2014.04.2019.pdf>.

The protection measures in Directive 92/85 have been implemented completely. All provisions are implemented and supervised by a specialised department of the Labour Inspectorate.

#### 5.2.5 Case law on issues addressed in Article 4-5 of Directive 92/85

The protection measures supervised by the Labour Inspectorate fall under the jurisdiction of the Supreme Administrative Court. Under well-established case law, the court regularly states that observation of maternity protection measures is a strict obligation of employers. Not applying these protective measures constitutes a violation of administrative duties by the employer, even if an employee states that it would be in her interest.<sup>63</sup>

#### 5.2.6 Prohibition of night work

Paragraph 6 of the Maternity Protection Act states that night work between 8 p.m. and 6 a.m. is strictly forbidden, with the exception of pregnant women working in healthcare, in theatres and concert venues and in (offices of) public transportation companies.

#### 5.2.7 Case law on the prohibition of night work

Older case law states that the prohibition of working under the protective rules of maternity protection does not invalidate the underlying work contract in any way. The employer carries the risk of having to observe even restrictive regulations.<sup>64</sup>

#### 5.2.8 Prohibition of dismissal

Paragraphs 10 to 12 of the Maternity Protection Act regulate protection against dismissal for pregnant and for breastfeeding workers.

Employers can only terminate contracts after having informed the works council and having obtained subsequent consent from the labour courts. Employers are required to sue their employees for dismissal in order to argue their case before the competent labour and social law courts. In court, the employers have to offer evidence of the asserted special grounds for dismissal (see below). In cases where a dismissal takes place before the employee has notified her employer of the pregnancy, she can reverse the dismissal by informing the employer as soon as possible.

A dismissal or the termination of the contract requires special grounds listed in Paragraph 12 of the Maternity Protection Act.<sup>65</sup> These provisions state, for instance, that a failure to show up for work without any justification for a significant period, physical or severe verbal assaults against the employer or his or her family, theft, fraud, or breaches of trust that would also qualify as a criminal offence (e.g. fraud or serious theft).<sup>66</sup>

Work contracts can also be terminated if the enterprise is shut down and remains closed for more than four months (Paragraph 10 Section 3 of the Maternity Protection Act).

Employees who are dismissed without the prior consent of the labour courts can choose to rely on an unjustified premature dismissal and claim reinstatement or to cease working and to receive legal severance pay (*Kündigungsschädigung*).

<sup>63</sup>

[https://www.ris.bka.gv.at/Dokumente/Vwgh/JWR\\_1988080154\\_19900425X02/JWR\\_1988080154\\_19900425X02.pdf](https://www.ris.bka.gv.at/Dokumente/Vwgh/JWR_1988080154_19900425X02/JWR_1988080154_19900425X02.pdf).

<sup>64</sup>

RIS-Justiz RS0016838,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19701027\\_OGH0002\\_00400B00092\\_7000000\\_001/JJR\\_19701027\\_OGH0002\\_00400B00092\\_7000000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19701027_OGH0002_00400B00092_7000000_001/JJR_19701027_OGH0002_00400B00092_7000000_001.pdf).

<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178134/NOR40178134.pdf>.

<sup>66</sup>

<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178134/NOR40178134.pdf>.

The principles of protection from dismissal also apply during parental leave for mothers (Paragraph 15 (4) of the Maternity Protection Act) and fathers (Paragraph 7 of the Fathers' Parental Leave Act).<sup>67</sup>

### 5.2.9 Redundancy and payment during maternity leave

Paragraph 14 of the Maternity Protection Act provides that pregnant workers, who must stop working due to protection measures under Paragraphs 2a and 2b of the Maternity Protection Act (concerning protection from workplace-related health dangers to the mother or the foetus) must be paid their average wages (excluding special premiums and average overtime pay) by the employer.<sup>68</sup>

### 5.2.10 Employer's obligation to substantiate a dismissal

Dismissals of pregnant workers, of breastfeeding mothers, and of workers on parental leave is subject to prior written consent by the labour and social courts. Employers are required to file a brief with the courts in which they substantiate which of the legally defined reasons for dismissal they claim and offer relevant proof.

### 5.2.11 Case law on the protection against dismissal

Case law demands the immediate assertion of possible grounds for dismissal within about one week of occurrence.<sup>69</sup> If permission to dismiss is obtained from the courts, employers must terminate the contract immediately or they lose their right to do so.<sup>70</sup> Protection against dismissal depends on the employer's concrete and provable information about the pregnancy by the employee within at least five working days after the date of the (written) termination.<sup>71</sup>

## 5.3 Maternity leave

### 5.3.1 Length

Maternity leave is at least 16 weeks (eight weeks before and eight weeks after delivery); in cases of premature births, multiple births or C-sections it is extended to 20 weeks (12 weeks after delivery). In some specific cases, maternity leave can begin at an earlier date before delivery in order to preserve maternal health or the pregnancy (Paragraphs 3 and 5 of the Maternity Protection Act).<sup>72</sup> Case law states that regular maternity leave periods (not factoring in medical leave before delivery) should not exceed 20 weeks.<sup>73</sup>

### 5.3.2 Obligatory maternity leave

Maternity leave is obligatory. Employers who let women work during maternity leave periods risk administrative fines. Maternity leave is universally implemented and routinely

<sup>67</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178136/NOR40178136.pdf>,  
<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40052586/NOR40052586.pdf>.

<sup>68</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12110925/NOR12110925.pdf>,  
<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12110925/NOR12110925.pdf>.

<sup>69</sup> RIS-Justiz RS0122552,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20071022\\_OGH0002\\_009OBA00102\\_06Z0000\\_001/JJR\\_20071022\\_OGH0002\\_009OBA00102\\_06Z0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20071022_OGH0002_009OBA00102_06Z0000_001/JJR_20071022_OGH0002_009OBA00102_06Z0000_001.pdf).

<sup>70</sup> RIS-Justiz RS0131679,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20170824\\_OGH0002\\_008OBA00037\\_17Z0000\\_001/JJR\\_20170824\\_OGH0002\\_008OBA00037\\_17Z0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20170824_OGH0002_008OBA00037_17Z0000_001/JJR_20170824_OGH0002_008OBA00037_17Z0000_001.pdf).

<sup>71</sup> RIS-Justiz, RS0101984,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19960314\\_OGH0002\\_008OBA02003\\_96H0000\\_001/JJR\\_19960314\\_OGH0002\\_008OBA02003\\_96H0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19960314_OGH0002_008OBA02003_96H0000_001/JJR_19960314_OGH0002_008OBA02003_96H0000_001.pdf).

<sup>72</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178136/NOR40178136.pdf>.

<sup>73</sup> RIS-Justiz RS0106548,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19960820\\_OGH0002\\_010OBS02248\\_96B0000\\_001/JJR\\_19960820\\_OGH0002\\_010OBS02248\\_96B0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19960820_OGH0002_010OBS02248_96B0000_001/JJR_19960820_OGH0002_010OBS02248_96B0000_001.pdf).

observed by employers; there are no relevant infringements on record. Legally, maternity protection rules are monitored and enforced by the Labour Protection Authority (*Arbeitsinspektorat*).

### 5.3.3 Legal protection of employment rights (Article 5, 6 and 7 of Directive 92/85)

Employers are required to ensure that pregnant workers are removed from dangerous or prohibited working conditions and assigned to a suitable workplace (e.g. remove pregnant bus drivers from working on a means of transportation). If there is no suitable workplace available in the company, the pregnant worker to be sent on paid leave until maternity protection starts.

### 5.3.4 Legal protection of rights ensuing from the employment contract

Employees have the right to return to the same workplace after parental leave. Employers are required to factor parental leave periods into advancement periods for paid leave provisions and extension of notice periods.

Several collective agreements also require that parental leave periods are factored into advancement in collective pay schemes.

### 5.3.5 Level of pay or allowance

Pregnant women who have worked with earnings above the social security threshold (2020: EUR 460.66 per month) are entitled to a maternity benefit (*Wochengeld*) under statutory social health insurance rules. It is calculated based on the average net earnings of the last three calendar months before maternity protection and usually equals net income before maternity leave.<sup>74</sup>

Civil servants commonly continue to collect their regular pay during maternity leave.

Unemployed pregnant women are entitled to a maternity benefit that amounts to 180 % of their regular monthly unemployment benefit or unemployment per diem.

Similar provisions are in place for self-employed workers with annual earnings above the social security threshold (2020: EUR 7 005 taxable income), who are entitled to a fixed maternity benefit of EUR 55.04 per day in 2019.

In all cases, maternity benefits include full coverage in the statutory health and pension insurance scheme without individual contributions.<sup>75</sup>

### 5.3.6 Additional statutory maternity benefits

Additional statutory maternity benefits are not deemed necessary, as the benefits generally are at or near net income levels before maternity leave.

### 5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

Every pregnant worker with earnings above the social security threshold or with unemployment benefits is entitled to maternity benefit, in all cases without waiting periods. Due to the calculation method of the maternity benefit for employees, the amount

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<sup>74</sup> Paragraph 162 of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz, ASVG*), <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40196108/NOR40196108.pdf>.

<sup>75</sup> Social security contributions and benefits in kind during maternity benefit and parental leave periods are financed by the social insurance carriers directly, partly with refunds from a specialized state fund for family burdens (*Familienlastenausgleichsfonds, FLAF*).

may be lower than the actual contractual wage, if the employment period before maternity has been shorter than three months.

### 5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

Paragraph 15 of the Maternity Protection Act and Paragraph 3 of the Fathers' Parental Leave Act stipulates that the main duties of a work contract are suspended during maternity leave and parental leave. As soon as the leave period has been completely used up, the work contract resumes with full effect and employees have the right to return to their former occupation. Work-related rights are guaranteed during maternity leave. According to a new regulation, parental leave periods have to be factored into time-related pay scheme advancements, so that the salary of every employee returning to the workplace after the leave period starts at the same level they would be eligible to collect if they had been working.<sup>76</sup>

### 5.3.9 Legal right to share maternity leave

Maternity leave is aimed at protecting the health of pregnant workers and of mothers and new-borns. Under these circumstances, it would not appear to make sense to divide maternity leave between parents.

Federal civil servants (as well as some state civil servants) were granted the right to one month of paternity leave in 2010 by law. Following this example, social partners negotiated the introduction of voluntary paternity leave provisions in several collective agreements. In 2017 new legislation was passed, which now grants all private sector employees the possibility of negotiating one month of paternity leave with their employers.<sup>77</sup> Fathers can claim part of their part of the Small Children's Allowance (*Kinderbetreuungsgeld*) during paternity leave, which also includes statutory health benefits in kind.

### 5.3.10 Case law

A current parental leave period for an older child ends at the start of a following maternity leave period for the next child (RIS-Justiz RS0070603).<sup>78</sup>

The start and duration of maternity and parental leave periods and of the maternity benefit is determined by the date of birth as stated in the relevant medical certificate (RIS-Justiz RS0070633).<sup>79</sup>

Parents have to notify their employers of their intent to start parental leave as well as of the intended duration within the legal notification periods (RIS-Justiz RS01165533).<sup>80</sup>

The legal protection against dismissal of pregnant workers by the employer and the formal requirement for a written agreement to end the work contract start when the employer is

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<sup>76</sup> Paragraph 15f Maternity Protection Act, in force from 1 August 2019, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40215892/NOR40215892.pdf>, Paragraph 7c Fathers' Parental Leave Act, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40022232/NOR40022232.pdf>.

<sup>77</sup> Paternity Leave Act (*Familienzeitbonusgesetz*, BGBl I No. 53/2016, <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20009586/FamZeitbG%2c%20Fassung%20vom%2019.05.2019.pdf>).

<sup>78</sup> [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19880413\\_OGH0002\\_009OBA00132\\_8700000\\_012/JJR\\_19880413\\_OGH0002\\_009OBA00132\\_8700000\\_012.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19880413_OGH0002_009OBA00132_8700000_012/JJR_19880413_OGH0002_009OBA00132_8700000_012.pdf).

<sup>79</sup> [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19880113\\_OGH0002\\_009OBA00502\\_8700000\\_001/JJR\\_19880113\\_OGH0002\\_009OBA00502\\_8700000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19880113_OGH0002_009OBA00502_8700000_001/JJR_19880113_OGH0002_009OBA00502_8700000_001.pdf).

<sup>80</sup> [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20020516\\_OGH0002\\_008OBS00297\\_01M0000\\_001/JJR\\_20020516\\_OGH0002\\_008OBS00297\\_01M0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20020516_OGH0002_008OBS00297_01M0000_001/JJR_20020516_OGH0002_008OBS00297_01M0000_001.pdf).

notified of the pregnancy and are extended during maternity leave and parental leave periods (RIS-Justiz RS0113373).<sup>81</sup>

## 5.4 Adoption leave

### 5.4.1 Existence of adoption leave in national law

Adoption leave is covered in Paragraph 15c of the Maternity Protection Act and Paragraph 5 of the Fathers' Parental Leave Act. It may be taken from the moment the adoption proceedings have reached the stage where the child is officially included in the adoptive parents' household up to the second birthday of the child; in cases where older children below the age of seven are adopted, adoption leave of at least six months can be taken.

### 5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

Article 16 of Directive 2006/54 is implemented by the statutory extension of Paragraphs 10 and 12 Maternity Protection Act (protection against dismissal for pregnant and breastfeeding women) to all parental leave periods for biological and adoptive mothers (Paragraph 15(4) of the Maternity Protection Act) and fathers (Paragraph 7 of the Fathers' Parental Leave Act).<sup>82</sup>

### 5.4.3 Case law

None specifically addressing adoption leave.

## 5.5 Parental leave

### 5.5.1 Implementation of Directive 2010/18

There is almost no current legislation to implement Directive 2010/18, as a policy survey arrived at the conclusion that the requirements of Directive 2010/18 were already met by existing legislation even before the date of transposition. Concerning the prohibition of discrimination in Clause 5(4), the existing regulations within equal treatment legislation were deemed to be sufficient.<sup>83</sup>

### 5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

In accordance with Clause 1 of Directive 2010/18, the personal scope of parental leave legislation for mothers (Paragraph 1 of the Maternity Protection Act) and fathers (Paragraph 1 of the Fathers' Parental Leave Act) covers employees in the private and public sector.<sup>84</sup>

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<sup>81</sup>

[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20000315\\_OGH0002\\_009OBA00274\\_99F0000\\_003/JJR\\_20000315\\_OGH0002\\_009OBA00274\\_99F0000\\_003.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20000315_OGH0002_009OBA00274_99F0000_003/JJR_20000315_OGH0002_009OBA00274_99F0000_003.pdf).

<sup>82</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178136/NOR40178136.pdf>,  
<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40052586/NOR40052586.pdf>.

<sup>83</sup> For further information, see Palma Ramalho, M. do R., Foubert P. and Burri S. (2015), *The implementation of Parental Leave Directive 2010/18 in 33 European countries*, European network of legal experts in the field of gender equality, European Commission Directorate-General for Justice, Freedom and Security, Brussels, p. 34.

<sup>84</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178132/NOR40178132.pdf> and <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178149/NOR40178149.pdf>. Maternity leave and parental leave for women are covered in the *Mutterschutzgesetz*, the parallel provisions for men are covered in the *Väterkarenzgesetz*, with universal paternity leave for private employees only starting after the cut-off period of this report.

### 5.5.3 Scope of the transposing legislation

The scope of the transposing legislation in Paragraph 1 of the Maternity Protection Act and Paragraph 1 of the Fathers' Parental Leave Act covers both private sector employees and all public servants' statutes including teachers, as well as home workers. There are no exceptions for private sector or public sector workers with irregular contracts (such as part-time or fixed-term contracts). In the case of temporary workers, both the direct employer and the receiving company are obliged to observe the relevant maternity protection provisions.

### 5.5.4 Length of parental leave

The total duration of parental leave is from the end of the maternity leave period, which is reserved for the birth mother, until the second birthday of the child or until the start of the maternity leave period for a younger sibling. The legal concept grants this period to both parents, who must reach an agreement as to if and how they divide it between themselves.<sup>85</sup> There are no differences in duration for the private and the public sector.

### 5.5.5 Age limits

Parents can end their parental leave period at a date of their choosing and defer up to three months of their parental leave, which they must use by the seventh birthday of the child in question or by a possible later date when the child enters compulsory schooling. Adoptive parents and foster parents can claim parental leave for adopted children under the same conditions as birth parents, starting when the child is given into their care. If the child is between two and eight years of age at the time of the adoption, adoptive and foster parents are entitled to six months of parental leave.

### 5.5.6 Individual nature of the right to parental leave

Both parents have the right to parental leave independently. The statutes require parents to coordinate the amount of parental leave with each other. Within the timeline from the end of maternity leave until the second birthday of the child, parental leave may be taken in up to three parts with a two-month minimum duration for one of those parts. The parental leave regulation does not foresee any 'take it or leave it' system. When the parents first switch over (when one of them is finishing up parental leave and the other is starting it), they may take one month of parental leave at the same time (which shortens the overall duration by one month so that parental leave ends one month before the second birthday of the child).

### 5.5.7 Transferability of the right to parental leave

There are no procedural rules in place concerning the coordination of the parental leave between the parents in cases of disagreements. As far as can be ascertained, however, no serious disputes concerning sharing parental leave arise. There is no relevant case law.

### 5.5.8 Form of parental leave

In accordance with the legal provision in place, parental leave is structured as an unpaid full-time leave period during which work contracts are continued; the main obligations (duty to work and duty to pay) are suspended, while secondary obligations (e.g. confidentiality) are still in effect. Parental leave legislation can, by definition, only apply to employees and public servants.

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<sup>85</sup> Parental leave until the second birthday of the child can be taken in three parts of at least two months' duration; further information can be found in *The implementation of Parental Leave Directive 2010/18 in 33 European countries*, pp. 31 to 32 (see note 77).

#### 5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

Parental leave may be divided between parents with the provision that they may not be on parental leave for the same period of time, except for one month of parallel parental leave when switching between parents. There is no provision by which parents can convert parental leave into a time credit; however parental part-time provisions apply from the birth of the child. It is up to parents to plan and decide the way in which they structure their use of their statutory rights.

The current legislation has no length of service requirement (Clause 3(b) of Directive 2010/18).

#### 5.5.10 Notice period

Paragraph 15 of the Maternity Protection Act and Paragraph 3 of the Fathers' Parental Leave Act establish a set of notification periods. In general, parents are required to notify their employers at least four months before the planned start of their parental leave period, except for mothers who may notify their employers of the start of the first part of their parental leave up to the last day of their maternity leave period.

#### 5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

Parents can defer three months of parental leave for later usage by the seventh birthday of the child in question.

#### 5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

There are no special provisions for small or medium enterprises in place.

#### 5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18)

There is no provision for special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18) in the context of parental leave. For older children, there are unpaid leave arrangements in cases of severe illness (*Familienhospizkarenz*).<sup>86</sup> In these cases, parents may also be eligible for a special care benefit (*Pflegekarenzgeld*).<sup>87</sup>

#### 5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

According to Paragraph 15c of the Maternity Protection Act and Paragraph 5 of the Fathers' Parental Leave Act, adoption leave may be taken even before formal completion of the adoption process. It may start from the moment when adoption proceedings have reached the stage where the child is officially included in the adoptive parents' household up to the second birthday of the child; in cases where older children below the age of seven are adopted, parents are entitled to six months of adoption leave.

Paragraphs 10 and 12 of the Maternity Protection Act on protection against dismissal for pregnant and breastfeeding women are by law extended to all parental leave periods for

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<sup>86</sup> Work Contract Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz*), Paragraphs 14 to 14c <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008872/AVRAG%2c%20Fassung%20vom%2003.04.2019.pdf>.

<sup>87</sup> Federal Care Allowance Act (*Bundespflegegeldgesetz*), Paragraphs 21c to 21f, <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008859/BPGG%2c%20Fassung%20vom%2003.04.2019.pdf>.

biological and adoptive mothers (Paragraph 15(4) of the Maternity Protection Act) and fathers (Paragraph 7 of the Fathers' Parental Leave Act).<sup>88</sup>

#### 5.5.15 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

As stated above, parental leave does not end the work contract but suspends main duties until the end of the leave period. The work contract remains unchanged, consequently workers have the right to the same job when they return. In practice, the exact same job might not be available anymore. Irrespective of the reason for that, the worker is entitled to be reinstated in the workplace with a concrete job that complies with the content of their work contract and that is at least equivalent to their primary job.

#### 5.5.16 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

Both the work contract and the rights acquired through the work contract are maintained with the same status the worker had when he or she entered parental leave.

#### 5.5.17 Status of the employment contract or relationship during parental leave

The work contract is maintained with strong protection against dismissal during parental leave.

#### 5.5.18 Continuity of entitlement to social security benefits

Parental leave itself does not convey social security coverage. Recipients of maternity benefits and of the relevant family benefit (Small Children's Allowance) are by law entitled to benefits in kind by the statutory health insurance scheme. Additionally, persons who care for children in the first four years after the birth are by law included in the statutory pension insurance without having to make personal contributions.

#### 5.5.19 Remuneration

Parents of small children who are legal residents are eligible for the Small Children's Allowance. Due to the legal nature of parental leave in labour law (unpaid statutory leave period with suspension of main contractual duties), employers cannot be requested to contribute payments.

#### 5.5.20 Social security allowance

Additionally to the general Family Allowance (*Familienbeihilfe*) parents of small children are entitled to a special allowance for smaller children (Small Children's Allowance);<sup>89</sup> in terms of national legislation it is not part of social security, but rather a non-contributory benefit (financed from the State Fund for Family Burdens (*Familienastenausgleichsfonds, FLAF*) and from general revenue).

#### 5.5.21 More favourable provisions (Clause 8 of Directive 2010/18)

The statutory duration of parental leave is until the child's second birthday or until the birth of a younger child; this exceeds the requirement of Clause 8 of Directive 2010/18.

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<sup>88</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40111596/NOR40111596.pdf>,  
<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40052586/NOR40052586.pdf>.

<sup>89</sup> <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20001474/KBGG%2c%20Fassung%20vom%2030.04.2019.pdf>.

### 5.5.22 Case law

The Supreme Court has stated that the dismissal of a woman who claimed family part-time work is discrimination on the grounds of sex/gender.<sup>90</sup>

## 5.6 Paternity leave

### 5.6.1 Existence of paternity leave in national law

Fathers working as federal public servants or federal contractual employees can apply for four weeks of additional unpaid leave on the occasion of the birth of their children. Most collective agreements offer at least two or three days of additional paid leave to be taken by fathers in connection with the birth of a child (nursing mothers will usually be on maternity leave). Some collective agreements also offer up to four weeks of unpaid paternity leave.

From 1 March 2017, all male employees are offered the legal option to negotiate an unpaid leave period of up to 31 days in connection with the birth of a child (*Familienzeit*). In connection with this leave period they can draw a corresponding part of the Small Children's Allowance with annexed statutory health coverage (*Familienzeitbonus*).<sup>91</sup>

### 5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

See Section 5.5.15 under the new regulations for paternity leave (*Familienzeit*). From 1 March 2017, fathers can negotiate up to one month of unpaid leave within the first three months after the baby's birth. If the father's work contract is terminated because of this (for which the employee would have to offer prima facie evidence), he can sue for the reinstatement of the work contract and continued employment.<sup>92</sup>

The same protection against dismissal applies in the periods between leave periods; in these cases, the protection is based on provisions of the equal treatment acts.

After notifying the employer of the planned start of a parental leave period, fathers have the same level of protection against dismissal during the parental leave and for four weeks after its end as women do during pregnancy and parental leave.

### 5.6.3 Case law

The Supreme Court has ruled that less favourable treatment of a father who has taken parental leave can constitute discrimination on the grounds of sex/gender. Fixed-term contracts can constitute forbidden discrimination under the anti-discrimination legislation, especially in relation to working conditions. However, the ending of a fixed-term contract during parental leave and the fact that the employee was not granted the transition to a regular contract after the end of his parental leave does not constitute sex-based discrimination in relation to working conditions.<sup>93</sup>

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<sup>90</sup> Supreme Court, 25 October 2016, 8 ObA 63/16x, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20161025\\_OGH0002\\_008OBA00063\\_16X0000\\_000/JJT\\_20161025\\_OGH0002\\_008OBA00063\\_16X0000\\_000.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20161025_OGH0002_008OBA00063_16X0000_000/JJT_20161025_OGH0002_008OBA00063_16X0000_000.pdf).

<sup>91</sup> <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20009586/FamZeitbG%2c%20Fassung%20vom%2030.04.2019.pdf>. After the cut-off date for this report, parliament passed new legislation that makes paternity leave obligatory for all employees.

<sup>92</sup> Paternity Leave Act (*Familienzeitbonusgesetz*, BGBl I No. 52/2016, <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20009586/FamZeitbG%2c%20Fassung%20vom%2019.05.2019.pdf>).

<sup>93</sup> Supreme Court, 8 ObA 33/10y.

## 5.7 Time off for *force majeure*

### 5.7.1 Time off for *force majeure*

*Force majeure* leave (that is, additional paid leave in cases of sudden illness of a child or a relative who requires short-term care) is regulated within the material scope of paid holiday legislation (for employees, in the Annual Leave Act, *Urlaubsgesetz*). Paragraph 16 grants additional paid leave of up to two working weeks to employees who have to take care of a sick child or up to one working week for a relative living in the same household.<sup>94</sup> *Force majeure* leave is also extended to parents who are admitted into in-patient care together with their sick children. This leave may also be taken on a day-to-day basis.

### 5.7.2 Case law

*Force majeure* leave does not require an agreement or the approval of the employer, notification by the employee is enough, but the employer is entitled to demand a doctor's certificate.<sup>95</sup> The necessity of a period of *force majeure* leave during a regular paid holiday time interrupts the holiday; the *force majeure* leave must be granted additionally, as long as the employer is properly notified within a reasonable time frame.<sup>96</sup>

## 5.8 Care leave

### 5.8.1 Existence of care (or carers') leave in national law

Additional to *force majeure* leave, employees can apply to their employers for negotiating an unpaid free time period or for a change of their working hours in cases of extended care for terminally ill relatives ('*Sterbebegleitung*') or seriously sick children ('*Familienhospizkarenz*') or for taking care of relatives with heightened care requirements, e.g. making arrangements for transfer into long-term care ('*Pflegekarenz*'). In these cases, the permissibility of contract termination during the leave period or because of it is limited.<sup>97</sup>

### 5.8.2 Case law

There is no existing case law concerning care leave in Austria.

## 5.9 Leave in relation to surrogacy

Parental leave legislation does not refer directly to surrogate-related leave, as Austria has a legal prohibition on surrogacy in place.

Parents may, however, enter into a surrogacy contract in a country where this is legal. If the biological parents are Austrian citizens, the children must be recognised legally as citizens, granted residency rights on entering the country, and included in all provisions of Austrian law, such as social security participation, as legal offspring of the surrogate parents. This would also have to be extended to the right to parental leave and parental

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<sup>94</sup> Paragraph 16 Annual Leave Act (*Urlaubsgesetz*), <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40144616/NOR40144616.pdf>.

<sup>95</sup> RIS-Justiz RS0108753, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19971022\\_OGH0002\\_009OBA00259\\_97X0000\\_001/JJR\\_19971022\\_OGH0002\\_009OBA00259\\_97X0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19971022_OGH0002_009OBA00259_97X0000_001/JJR_19971022_OGH0002_009OBA00259_97X0000_001.pdf).

<sup>96</sup> Supreme Court, 9 obA 28/09x and other, RISJustiz, RS0116927, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20021016\\_OGH0002\\_009OBA00090\\_02D0000\\_001/JJR\\_20021016\\_OGH0002\\_009OBA00090\\_02D0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20021016_OGH0002_009OBA00090_02D0000_001/JJR_20021016_OGH0002_009OBA00090_02D0000_001.pdf).

<sup>97</sup> Paragraphs 14 to 14d and 15 AVRAG, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR11009026/NOR11009026.pdf>.

part-time arrangements for the parents.<sup>98</sup> So far, no relevant case law concerning labour law regulations and surrogacy can be found.

## 5.10 Flexible working time arrangements

### 5.10.1 Right to reduce or extend working time

Paragraphs 15h to 15o of the Maternity Protection Act and Paragraphs 8 to 8h of the Fathers' Parental Leave Act contain the right to reduce the contractual working time and/or change working patterns for the parents of children up to the age of four. If the work contract of the parent has lasted for at least three years, including parental leave periods, and in enterprises with 21 or more employees, the right is extended to when the child is aged up to seven years.

Employees can approach their employers with a detailed proposal concerning the amount of working time and the required working pattern during a regular working week. In larger enterprises with more than 20 employees this proposal cannot be simply rejected by the employer, who has to provide a counter-proposal in writing. If an ensuing conflict cannot be resolved within a certain time frame, the employer must enter a court brief to reject the employee's claim. In smaller enterprises the employer can reject the proposal, the employee then can enter a brief stating the reasons why this rejection is not justified.

### 5.10.2 Right to adjust working time patterns

See above. While most requests submitted under the regulations for parental part-time work concern reductions in working time, requests for changes in working patterns alone are possible (e.g. requests to be transferred from night shifts to day shifts).

### 5.10.3 Right to work from home or remotely

Such a right is not generally granted under Austrian labour law.

There are no provisions concerning remote work in labour legislation. Some of the more progressive collective agreements or works council agreements in larger companies contain rules on working remotely, but these are not specifically modelled for the benefit of parents.<sup>99</sup>

Parental part-time work modifies the main duties of the work contract only regarding working time and pay; other contents of the contract remain unchanged. According to this systematic framework, the work contract as originally agreed upon resumes with full effect after the parental part-time working period ends. Continuing work in a part-time or changed work pattern would require a change of the existing work contract between the employer and employee, consecutive to the parental part-time working arrangement.

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<sup>98</sup> Constitutional Court B 13/11, [https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR\\_09888786\\_11B00013\\_2\\_01/JFR\\_09888786\\_11B00013\\_2\\_01.pdf](https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09888786_11B00013_2_01/JFR_09888786_11B00013_2_01.pdf).

<sup>99</sup> Although the Covid-19 crisis started shortly after the cut-off date for this report, it should be noted that the lockdown measures starting from 10 March 2020 until the beginning of May 2020 necessitated a broad spectrum of remote working or home office arrangements in all sectors. Companies have made consistent efforts to enable remote working for their employees, e.g. by providing hardware and implementing necessary access measures at company levels. Remote working has suddenly become an accepted and very widespread way of working. A recent survey shows that employees are very satisfied with home office work. More than two thirds of employees who had to work remotely during the lockdown measures wish to continue doing so. It is to be expected that the topic of remote work will become more important at all levels of collective bargaining in the future. For the survey see: <https://wien.orf.at/stories/3046867/>.

#### 5.10.4 Other legal rights to flexible working arrangements

When caring for dying relatives or severely ill children, workers can apply for a temporary reduction in working hours. Similarly, workers can reduce working hours for a period of three months in cases where a severely sick or disabled relative needs help with his or her care.

#### 5.10.5 Case law

During parental part-time work, employees lose their right to lump sum overtime remuneration. Concrete overtime work has to be paid according to the effective duration.<sup>100</sup> Lump sum remuneration for overtime only becomes a fixed part of remuneration and cannot be revoked when the employee starts to work less time only in cases where the employer has not included a revocation clause in the contract.<sup>101</sup>

### **5.11 Evaluation of implementation**

The implementation gives workers the rights required by Directive 2010/18 but does not grant additional rights.

### **5.12 Remaining issues**

In practice, at the end of parental leave periods, most female workers return to the workplace with parental part-time working arrangements in place and remain in part-time work after the end of the legal parental part-time period. The high rate of female part-time work is recognised as an important contributing factor in the persistent gender wage gap in Austria.

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<sup>100</sup> RIS-Justiz RS0130178,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20150624\\_OGH0002\\_009OBA00030\\_15Z0000\\_001/JJR\\_20150624\\_OGH0002\\_009OBA00030\\_15Z0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20150624_OGH0002_009OBA00030_15Z0000_001/JJR_20150624_OGH0002_009OBA00030_15Z0000_001.pdf).

<sup>101</sup> RIS-Justiz RS0051648,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19870701\\_OGH0002\\_009OBA00036\\_8700000\\_003/JJR\\_19870701\\_OGH0002\\_009OBA00036\\_8700000\\_003.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19870701_OGH0002_009OBA00036_8700000_003/JJR_19870701_OGH0002_009OBA00036_8700000_003.pdf).

## **6 Occupational social security schemes (Chapter 2 of Directive 2006/54)**

### **6.1 General (legal) context**

#### 6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

Not available.

#### 6.1.2 Other issues related to gender equality and social security

Apart from minor issues (e.g. concerning an indemnity clause in statutory occupational accident insurance),<sup>102</sup> there are no actuarial differences between men and women in the statutory social insurance systems.

As mentioned below, the existing gender pay gap contributes to a persistent gender pension gap.

#### 6.1.3 Political and societal debate and pending legislative proposals

Austria has implemented a long transition period for raising the retirement age of women in the private sector. While this is broadly debated politically, no earlier policy change is currently considered.

### **6.2 Direct and indirect discrimination**

Employers' contributions to occupational social security schemes are considered to be part of pay. Where occupational pension schemes have been established, they are co-financed by contributions from employers. Both these co-contributions and resulting benefits are consequently regarded as part of pay.<sup>103</sup> Case law of the Supreme Court stresses the importance of the general equality principle that forbids arbitrary differentiation between groups of employees.<sup>104</sup> Even if there are different pensionable ages in the statutory pension systems, different ages for benefits eligibility or contribution ceases earlier for women because of their earlier retirement age are in breach of the equal treatment principle.<sup>105</sup> Established case law by the Supreme Court has clarified that pension scheme contributions by the employer and occupational pension benefits are part of pay and therefore have to comply with rules on equal pay.<sup>106</sup>

### **6.3 Personal scope**

Occupational pension schemes have to be based on an agreement between an employer and the works council or in some cases on a collective agreement with a trade union. Only if and when such an agreement is in place do the legal rules constitute requirements for

<sup>102</sup> Paragraph 184 of the General Social Security Act, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12093674/NOR12093674.pdf>. This clause transfers the right to claim indemnity payments for disability pensions through occupational accident insurance. According to the umbrella association of social security bodies (*Hauptverband der österreichischen Sozialversicherungsträger*), this clause is currently not administered.

<sup>103</sup> RIS-Justiz RS0021639, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19890111\\_OGH0002\\_009OBA00513\\_8800000\\_011/JJR\\_19890111\\_OGH0002\\_009OBA00513\\_8800000\\_011.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19890111_OGH0002_009OBA00513_8800000_011/JJR_19890111_OGH0002_009OBA00513_8800000_011.pdf).

<sup>104</sup> [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20060921\\_OGH0002\\_008OBA00050\\_06W0000\\_003/JJR\\_20060921\\_OGH0002\\_008OBA00050\\_06W0000\\_003.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20060921_OGH0002_008OBA00050_06W0000_003/JJR_20060921_OGH0002_008OBA00050_06W0000_003.pdf).

<sup>105</sup> RIS-Justiz, RS0117672, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20030423\\_OGH0002\\_009OBA00256\\_02S0000\\_002/JJR\\_20030423\\_OGH0002\\_009OBA00256\\_02S0000\\_002.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20030423_OGH0002_009OBA00256_02S0000_002/JJR_20030423_OGH0002_009OBA00256_02S0000_002.pdf).

<sup>106</sup> [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20060921\\_OGH0002\\_008OBA00050\\_06W0000\\_003/JJR\\_20060921\\_OGH0002\\_008OBA00050\\_06W0000\\_003.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20060921_OGH0002_008OBA00050_06W0000_003/JJR_20060921_OGH0002_008OBA00050_06W0000_003.pdf).

contributions, pension benefits and financial security arrangements. Pension scheme agreements have to include all workers and employees within the enterprise or the scope of the collective agreement without exceptions e.g. for part-time work or fixed-term contracts.

The personal scope of the Occupational Pension Schemes Act (*Betriebspensionsgesetz, BPG*)<sup>107</sup> and the Private Pension Fund Act (*Pensionskassengesetz, PKG*)<sup>108</sup> covers every worker and employee working under a private contract whose employer has established an occupational social security scheme for pensions, including board members.

Additionally, the Occupational Financial Provisions Act (*Betriebliches Mitarbeiter- und Selbständigenvorsorgegesetz, BMSVG*)<sup>109</sup> requires employers to pay a monthly contribution for every employee, based on a percentage of gross monthly earnings, into a scheme usually operated by a specially certified financial company; the personal scope also covers all employees working under a private contract. Since 2007 this provision has been extended to self-employed persons who are required to pay an additional contribution of 1.53 % of annual taxable earnings to a specialised financial fund holder.<sup>110</sup>

The scope of the acts mentioned above is more limited than Article 6 of Directive 2006/54 – it does not cover unemployment or sickness benefits for periods of disability in respect of work.

Austrian employers are required to continue employees' pay during comparatively long periods of sick leave (at least six weeks of full pay and at least four weeks of half pay, even longer in cases of occupational accidents). Additionally, there is a well-established and secure system of social security benefits in place by way of the statutory social security systems, which are financed by mandatory contributions from both employees and employers. Statutory health insurance and unemployment insurance schemes include practically all employed and many self-employed persons with earnings above the social security threshold. The broad coverage of statutory social security makes additional occupational schemes covering unemployment or health benefits superfluous. Article 6 of Directive 2006/54 allows for adapting the implementation of the chapter on occupational social security schemes in accordance with national law and/or practice.

#### **6.4 Material scope**

The material scope covers occupational old-age pensions, disability pensions and survivors' benefits. Occupational accidents and illnesses and unemployment are not covered. This is a result of the well-established framework of statutory social security where both employers and employees are obliged to pay contributions. Mandatory social insurance is contribution based: the benefits are calculated on the amount of contributions and the duration of their payment without regard to the sex of the recipient.

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<sup>107</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10007036/BPG%2c%20Fassung%20vom%2019.05.2019.pdf>.

<sup>108</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10007055/PKG%2c%20Fassung%20vom%2019.05.2019.pdf>.

<sup>109</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20002088/BMSVG%2c%20Fassung%20vom%2019.05.2019.pdf>.

<sup>110</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10007036/BPG%2c%20Fassung%20vom%2005.11.2015.pdf>,

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10007055/PKG%2c%20Fassung%20vom%2005.11.2015.pdf>,

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20002088/BMSVG%2c%20Fassung%20vom%2005.11.2015.pdf>.

Occupational pension schemes are considered as an additional 'second column' of retirement benefits. They are introduced as internal pay benefits to complement, not replace, statutory old age or disability pensions. As part of pay, the contributions to occupational pension schemes may not have a discriminatory basis or effect.

## **6.5 Exclusions**

Under the Occupational Financial Provisions Act, employers and self-employed persons insured under the Trade and Commerce Social Security Act (*Gewerbliches Sozialversicherungsgesetz, GSVG*) must pay mandatory contributions into a financial scheme that is set to provide additional occupational pension benefits to employees or to self-employed persons. There are no exclusions for workers with irregular contracts in place.

## **6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54**

The examples of discrimination in Article 9 have been implemented into Paragraph 3 of the Equal Treatment Act for the Private Sector (and corresponding regulations at federal and provincial level). Supreme Court case law concerns cases of discrimination in the workplace;<sup>111</sup> there is no case law concerning discrimination in the broader concept of work-related rights, e.g. membership of associations.

## **6.7 Actuarial factors**

According to legal doctrine, the principles laid out in the CJEU case *Test-Achats* and the general principles of equal pay within the meaning of Article 154 of the TFEU are applicable to occupational social security schemes. Consequently, gender differences concerning contributions by employers or actuarial factors are prohibited.

## **6.8 Difficulties**

Currently there are no special difficulties with the concept of gender equality in occupational social security schemes.

## **6.9 Evaluation of implementation**

The implementation meets the requirements of EU law.

## **6.10 Remaining issues**

Not available.

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<sup>111</sup> Online reference:

<https://www.ris.bka.gv.at/Ergebnis.wxe?Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=False&GZ=&VonDatum=&BisDatum=21.05.2019&Norm=GIBG+%c2%a73&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Position=1>.

## 7 Statutory schemes of social security (Directive 79/7)

### 7.1 General (legal) context

#### 7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

The persistent gender pay gap in Austria and widespread part-time work by women contribute to a significant gender pension gap. On average, statutory pensions received by women are between 40 % and 50 % lower than those received by men. Both the pay gap and the pension gap are significantly smaller for public servants.<sup>112</sup> Statutory pensions and pensions for public servants are calculated on the basis of either lifelong work earnings or on an average of the best years of income in combination with the overall duration of income above the social security threshold without any gender-specific rules. The differences in pension amounts largely result from lower wages, from longer breaks in employment, e.g. for childcare or for care of elderly relatives, and from the significantly higher rate of female part-time work.

#### 7.1.2 Other relevant issues

An important factor that contributes to the gender pension gap is the lower retirement age of female employees in the private sector (see also Section 7.5) which results in shorter contribution periods and consequently in lower pensions. The lower pension age of women also contributes to a greater impact of age discrimination on women in the labour market.

#### 7.1.3 Overview of national Acts

Austria's social security system is separated into statutory systems that cover health insurance, old age pensions, occupational accidents and health risks, and disability benefits according to the activity status of the insured person.

Employees and unemployed persons fall under the scope of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz, ASVG*), which also covers mandatory health insurance for pensioners.

Statutory social security for business persons and self-employed persons is regulated in the Trade and Industrial Social Security Act (*Gewerbliches Sozialversicherungsgesetz, GSVG*) and for farmers in the Farmers' Social Security Act (*Bauernsozialversicherungsgesetz, BSVG*).

Statutory health insurance for federal and provincial public servants is regulated by specialised legislation (*Beamten-Kranken- und Unfallversicherungsgesetz, B-KUVG*).

Employees have mandatory unemployment insurance under the Unemployment Insurance Act (*Arbeitslosenversicherungsgesetz, AIVG*), which also offers an option for self-employed persons.

All social security systems are contribution based with monthly contributions paid by both employers and employees or by self-employed persons based on legally mandated percentages of annual taxable earnings.

The personal scope of Article 2 is completely covered by national legislation.

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<sup>112</sup> Official pension statistics published by Statistik Austria, [https://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/soziales/gender-statistik/pensionen/index.html](https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/pensionen/index.html); see also European Commission (2013), *The gender gap in pensions in the EU*, Luxembourg, p. 79, available at: [http://ec.europa.eu/justice/gender-equality/files/documents/130530\\_pensions\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/130530_pensions_en.pdf).

#### 7.1.4 Political and societal debate and pending legislative proposals

The Government, which at the time of writing consisted of a coalition of the conservative People's Party and the right-wing Freedom Party, was developing a policy that would scrap long-time unemployment benefits and redirect recipients into the social welfare system with much lower benefits. This would result in having major negative impacts on poverty levels, especially for older women and single parents. Above all, this policy change would lead to a broadening of the gender pension gap, because welfare recipients are excluded from pension insurance (health insurance would be covered), while recipients of unemployment benefits are included in statutory pension insurance systems, with contributions being paid by the public employment service (*Arbeitsmarktservice, AMS*).

### **7.2 Implementation of the principle of equal treatment for men and women in matters of social security**

There is no special article or paragraph in the statutory social security regulations concerning gender equality. Apart from the transition period still allowing for different pensionable ages until 2033 for men and women in the statutory social security schemes, the schemes do not differentiate between men and women. Contribution rates, access to benefits and calculation of benefits are the same for men and women irrespective of their family or marital status.

### **7.3 Personal scope**

The personal scope of Austrian social security schemes in the private sector and for public servants covers that of Article 2 of Directive 79/7 completely.

### **7.4 Material scope**

In some respects, the material scope of social security legislation is broader than required by Article 3 of Directive 79/7. Personal pension entitlements also cover surviving family members of insured persons, who can claim widows'/widowers' / orphans' pensions with annexed public health insurance.

### **7.5 Exclusions**

The Austrian Constitutional Court repealed all provisions concerning different pensionable ages for men and women in 1992. In response, the legislator implemented a long transition period for the raising of women's pensionable age in the statutory social security schemes, starting in 2024 and raising the pension age for women in six-monthly steps until it reaches 65 in 2033.<sup>113</sup> Austria has consequently declared an exception to Article 7 concerning the age for pension eligibility for men and women in the statutory social security systems. This does not apply to the pension systems of federal public servants who have a uniform pension age of 65. It should be noted that all public servants' social security schemes and most of the professional associations have introduced a uniform pension age without transition periods.

Other than that, there are no gender-specific exclusions in place.

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<sup>113</sup> Constitutional Act on Different Age Limits for Men and Women in Statutory Social Security Pension Schemes (*Bundesverfassungsgesetz über unterschiedliche Altersgrenzen von männlichen und weiblichen Sozialversicherten*, BGBl 1992/832), <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008799/Unterschiedliche%20Altersgrenzen%20von%20m%C3%A4nnlichen%20und%20weiblichen%20Sozialversicherten%2c%20Fassung%20vom%2005.04.2019.pdf>.

## 7.6 Actuarial factors

Sex as an actuarial factor is almost non-existent in statutory social security. A sex-based actuarial difference concerned additional pension annuities resulting from voluntary additional contributions by insured persons, which were privileging women. The relevant ordinance has been amended; from April 2016 the actuarial differences have been eliminated.<sup>114</sup> Another issue of minor importance still exists in Paragraph 184 of the General Social Security Act concerning the actuarial factors used to calculate indemnities for occupational accident pensions.<sup>115</sup> Numbers and amounts of indemnities paid under this provision have been steadily decreasing in recent years. Currently, the largest of the self-governing bodies that provide mandatory occupational accident and occupational health insurance, the Austrian Workers' Compensation Board (*Allgemeine Unfallversicherungsanstalt, AUVA*) has instituted a moratorium on granting these indemnities (based on a resolution by the governing board).

## 7.7 Difficulties

Apart from the very protracted period set for the raising of the retirement age for women in the private sector, there are no specific gender-related difficulties to be found within the regulation of social security schemes. De facto inequalities, especially the high gender pension gap, result from external factors that cannot be addressed by social security legislation.

## 7.8 Evaluation of implementation

In 2010 a CJEU case highlighted the fact that the annual statutory increase in pension benefits must be considered in the light of Directive 79/7. Differentiated percentages that result in indirect discrimination of a large group of women are precluded by Article 4.<sup>116</sup>

## 7.9 Remaining issues

Austria has implemented a long transition period for raising the retirement age of women in the statutory social security systems (with the exception of federal civil servants, where there are no differences in retirement ages). The debate on an earlier lifting of female retirement ages is ongoing, but there is no consensus on necessary policy changes.

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<sup>114</sup> BGBl II 64/2016, [https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2016\\_II\\_64/BGBLA\\_2016\\_II\\_64.pdfsig](https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_II_64/BGBLA_2016_II_64.pdfsig).

<sup>115</sup> Paragraph 184 of the General Social Security Act, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12093674/NOR12093674.pdf>, and Ordinance BGBl II 1999/245, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10009150>.

<sup>116</sup> CJEU C-123/2010, Waltraud Brachner v Pensionsversicherungsanstalt, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=41DA66023465B535DA8F76BAA39C0A54?ext=&docid=111583&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=45300>.

## **8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)**

### **8.1 General (legal) context**

#### 8.1.1 Surveys and reports on the specific difficulties of self-employed workers

None available.

#### 8.1.2 Other issues

Currently, there are no issues concerning non-discrimination in self-employment.

#### 8.1.3 Overview of national Acts

Paragraph 1(3) of the Equal Treatment Act for the Private Sector states that 'the formation, establishment or extension of an enterprise as well as the beginning or extension of any kind of self-employed occupation' is part of the material scope of the implementing legislation.<sup>117</sup>

#### 8.1.4 Political and societal debate and pending legislative proposals

Currently, there is no public debate concerning self-employment.

### **8.2 Implementation of Directive 2010/41/EU**

Paragraph 1(3) of the Equal Treatment Act for the Private Sector has been introduced as a measure for implementing the Directive.

### **8.3 Personal scope**

#### 8.3.1 Scope

The personal scope of equal treatment legislation covers all persons who enter business relations as defined in Paragraph 1(3) of the Equal Treatment Act for the Private Sector. The nature of the business will then determine whether the occupation falls into the material scope of one of the professional associations or if one of the several social security statuses concerning self-employment is applicable.

#### 8.3.2 Definitions

There is no formal legal definition of self-employment in place. Self-employment is largely defined by membership in one of the professional associations (*Kammern*) or by exercising a self-employed occupation for which no professional association exists. Another way of ascertaining if a person is self-employed is to assess their social security status. Persons who are insured under the Trade and Commerce Social Security Act or under the Farmers' Social Security Act (*Bauern-Sozialversicherungsgesetz, BSVG*) are legally considered to be self-employed.

Legal doctrine and case law also recognise a form of quasi self-employment in the form of 'free contractual workers' (*freie Dienstnehmer/innen*). Persons working under these contracts do not have the same contractual obligations as 'real' employees, and do not fall into the personal scope of labour legislation but are subject to organisational and economic bonds to an employer. This makes their social status comparable to that of regular employees and conveys eligibility for social benefits such as unemployment and sickness

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<sup>117</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151371/NOR40151371.pdf>.

benefits. Under social security legislation, free contractual workers belong to the larger group of employed persons.

### 8.3.3 Categorisation and coverage

By law, everybody who earns an income above the legally defined social security threshold is included in the social security system and required to pay the corresponding contributions. This is the foundation for the accumulation of benefit entitlements. In general, a minimum insurance duration of 180 months (15 years) over a working life is required for the acquisition of a pension entitlement (with exceptions for disability pensions for persons under 26).

Legislation for the mandatory professional associations defines the personal scope for each association (e.g. medical doctors, vets, dentists, solicitors, architects). With some exceptions, members of professional associations typically work on a self-employed basis independently of company structures or as entrepreneurs within their profession.

### 8.3.4 Recognition of life partners

Under statutory social security regulations both spouses and life partners are included in the coverage and consequently entitled to survivor's benefits and to inclusion in in-kind benefits from health insurance (in many cases free from contributions).

## 8.4 Material scope

### 8.4.1 Implementation of Article 4 of Directive 2010/41/EU

Article 4 has been implemented by Paragraph 1(3) of the Equal Treatment Act for the Private Sector.

### 8.4.2 Material scope

The personal and material scopes cover every person who enters a trade, a profession or another economic area in order to earn their living.

## 8.5 Positive action

Not regulated.

## 8.6 Social protection

See above. Every person who has earned an income above the social security threshold for at least 180 months (15 years) over their working life is eligible for a pension benefit from one of the statutory social security systems; this also applies to self-employed workers. Pension benefits for persons born after 1955 are calculated by a percentage (1.78 %) of the overall sum of valorised yearly contributions. The regular retirement age is 65 for men and 60 for women born before 1963 (female retirement age rises step by step to 65 for women born from June 1968 onward). The median annual pension for persons insured under the rules that generally apply to self-employed persons is EUR 25 000 for men and EUR 15 400 for women.<sup>118</sup> None of the statutory pension systems contain any directly discriminatory actuarial factors; the significant gender pension gap is a result of lower wages and shorter working careers of women.

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<sup>118</sup> *Statistical Handbook of the Austrian Social Insurance 2018*, Tables 3.13 and 3.18.

## 8.7 Maternity benefits

Paragraphs 102 and 102a of the Trade and Commerce Social Security Act (*Gewerbliches Sozialversicherungsgesetz, GSVG*)<sup>119</sup> and Paragraphs 97 and 98 of the Farmers' Social Security Act (*Bauern-Sozialversicherungsgesetz, BSVG*)<sup>120</sup> regulate maternity benefits in kind and in cash. Pregnant women and nursing mothers included in the statutory social insurance system can demand the provision of an assistant for the management of their business or they can claim maternity benefit (EUR 55.04 per day in 2019).

Under this legislation, self-employed persons are automatically included in the statutory social security system if their annual taxable income surpasses the social security threshold.

## 8.8 Occupational social security

### 8.8.1 Implementation of provisions regarding occupational social security

Working persons who have met the temporal and income requirements and have reached the legal retirement age or meet the requirements for a disability pension are entitled to pension benefits under the existing social security legislation, which, as shown above, applies to self-employed persons within the meaning of Directive 2010/41/EU.

### 8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)

There are no exceptions in place.

## 8.9 Prohibition of discrimination

By extending the personal scope of the Equal Treatment Act for the Private Sector to self-employed persons, they are by law also included in the provisions concerning the prohibition of direct and indirect discrimination in Paragraph 5 of the Equal Treatment Act for the Private Sector.<sup>121</sup>

## 8.10 Evaluation of implementation

The requirements of Article 10 of Directive 2006/54 and Directive 2010/41 have been met by the measures taken for implementation. Ongoing systematic reviews of the relevant statutory social security schemes have shown that the existing provisions also meet the implementation requirements.

## 8.11 Remaining issues

None.

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<sup>119</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008422/GSVG%2c%20Fassung%20vom%2019.05.2019.pdf>.

<sup>120</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008431/BSVG%2c%20Fassung%20vom%2019.05.2019.pdf>.

<sup>121</sup>

<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40126080/NOR40126080.pdf>.

## **9 Goods and services (Directive 2004/113)<sup>122</sup>**

### **9.1 General (legal) context**

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

None available.

9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

No specific information available.

9.1.3 Political and societal debate

Currently not a topic.

### **9.2 Prohibition of direct and indirect discrimination**

Paragraphs 30 to 40c of the Equal Treatment Act for the Private Sector prohibit direct and indirect discrimination on the grounds of sex/gender in access to goods and services. Access in this respect also covers the concept of 'supply'.

### **9.3 Material scope**

The wording of the material scope of Paragraph 30 of the Equal Treatment Act for the Private Sector concerning sex discrimination has been modelled on Article 3 and covers the same scope.

### **9.4 Exceptions**

Paragraph 30(3) of the Equal Treatment Act for the Private Sector specifies the area of private and family life as well as the content of media and of advertising as exceptions in accordance with Article 3(3) of Directive 2004/113.

### **9.5 Justification of differences in treatment**

Paragraph 33 of the Equal Treatment Act for the Private Sector states that providing goods, services and housing mainly for persons of one sex is a justifiable exception if this is a proportionate means to a legitimate goal. This section was introduced to ensure that gender-separate services, e.g. gender-segregated entrance times into public pools, could not be challenged based on sex/gender equality. So far there is no pertaining case law.

### **9.6 Actuarial factors**

Following the CJEU C-236/09 ruling in the case of *Test-Achats*, the legislator repealed Paragraph 9(2), (3) and (4) of the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*), which contained specific provisions for the use of sex-specific actuarial factors and added the new Section (2) with the wording: 'The factor of sex may not lead to different premiums or benefits for men and women'. The changes were introduced without a widespread national debate.

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<sup>122</sup> See, for example, Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

### **9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113**

See Section 9.6.

### **9.8 Positive action measures (Article 6 of Directive 2004/113)**

None implemented.

### **9.9 Specific problems related to pregnancy, maternity or parenthood**

None to be seen.

### **9.10 Evaluation of implementation**

The provisions of Directive 2004/113 and of the CJEU ruling in the case of *Test Achats* have been implemented in the time frame required by EU law.

### **9.11 Remaining issues**

None.

## **10 Violence against women and domestic violence in relation to the Istanbul Convention**

### **10.1 General (legal) context**

#### 10.1.1 Surveys and reports on issues of violence against women and domestic violence

Survey: <https://www.aof.at/index.php/studien-zu-gewalt?start=4>.

The survey gives an overview of a study that was done by the Institute for Family Research at Vienna University in 2011 on the occurrence and prevalence of domestic violence in Austria. It contains the best data currently available on these topics.

#### 10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

Austria provides detailed online information about the relevant steps to be taken in cases of domestic violence:

[https://www.oesterreich.gv.at/themen/gesundheit\\_und\\_notfaelle/gewalt\\_in\\_der\\_familie.html](https://www.oesterreich.gv.at/themen/gesundheit_und_notfaelle/gewalt_in_der_familie.html).

Legislation is contained in the Security Police Act (*Sicherheitspolizeigesetz*) and in the Civil Enforcement of Liabilities Act (*Exekutionsordnung*).

#### 10.1.3 National provisions on online violence and online harassment

New regulations are considered necessary; policy discussions are still ongoing at the time of writing. The Government had announced the regulation of a requirement for users of online discussion boards to register with a personal ID.<sup>123</sup>

#### 10.1.4 Political and societal debate

The Government has cut back funding for specialised NGOs, e.g. for a monitoring project for acts of online hatred and violence.

### **10.2 Ratification of the Istanbul Convention**

Austria was the first country in Europe to introduce specific legislation that provided protection against domestic violence and implemented a system of legal and procedural protections for women, together with a network of shelters and social support for female victims of domestic abuse. Austria was also one of the first EU Member States to ratify the Istanbul Convention.

The ratification of the Istanbul Convention did not result in any major changes in the existing legislation. It did, however, direct some of the focus of the policy debates on shortcomings in data collection and specific monitoring. The current Government is not prioritising further improvements in domestic violence legislation or funding.

Apart from plans for a more consistent approach to data gathering and evaluation, the specific changes to criminal law in connection with the ratification concerned making sexual harassment a criminal offence.

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<sup>123</sup> After the cut-off date of this report, the government was voted out by a parliamentary vote of no confidence before these policies could be made into legislation; elections are scheduled for September 2019.

## **11 Compliance and enforcement aspects (horizontal provisions of all directives)**

### **11.1 General (legal) context**

#### 11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

None available.

#### 11.1.2 Other issues related to the pursuit of a discrimination claim

Discrimination claims are integrated into the systematic context of labour law and civil law. Lawsuits concerning discrimination must be filed in the competent civil courts or labour courts and can generate a significant financial risk for the claimant if they lose the case. Also, the burden of proof is not completely reversed in discrimination cases; according to case law it is lightened in comparison to general rules (see also Section 11.5).

#### 11.1.3 Political and societal debate and pending legislative proposals

Currently there is no political or policy debate at federal level.

### **11.2 Victimisation**

The provisions on victimisation have been implemented into national law. Again, the Equal Treatment Act for the Private Sector may serve as a template.<sup>124</sup> In several provisions (Paragraph 5(3) and (4), Paragraph 6(3) and (4), and Paragraph 3(2) and (3)), the same or very similar wording is used: an order by the employer or by a manager or supervisor to discriminate against another person (in the context of the workplace or access to goods and services) constitutes an act of direct or indirect discrimination. In the same way, retaliation against persons who have a working or personal relationship with the victim of discrimination is defined as discrimination in and of itself. This covers the requirements of the directives.

In case law, the provision in Paragraph 6 of the Equal Treatment Act for the Private Sector has been used by the Supreme Court as the legal basis for a ruling that a legal entity (specifically a business corporation) is accountable for discrimination (here: sexual harassment) perpetrated by an employee as well as for the inactivity of their supervisor to stop the discrimination.<sup>125</sup>

### **11.3 Access to courts**

#### 11.3.1 Difficulties and barriers related to access to courts

Access to the courts is open to citizens and to all persons and enterprises who claim to have a legal interest that is actionable in Austria. In many cases, claimants do not need professional legal representation, at least at first instance. However, legal representation is advisable in discrimination cases. This is because claimants can lose important proof or miss decisive legal arguments if these are not presented in the first instance.

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<sup>124</sup>

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20003395/GIBG%2c%20Fassung%20vom%2006.04.2019.pdf>.

<sup>125</sup> RIS-Justiz RS0127723,

[https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20111221\\_OGH0002\\_009OBA00118\\_11K0000\\_001/JJR\\_20111221\\_OGH0002\\_009OBA00118\\_11K0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20111221_OGH0002_009OBA00118_11K0000_001/JJR_20111221_OGH0002_009OBA00118_11K0000_001.pdf).

However, access to the civil courts is limited to specific persons or to legal entities who can prove that they themselves are impaired by discrimination (or any other breach of law or contract). There are no provisions that would permit NGOs to act by proxy, with the exception of *Klagsverband* (<http://www.klagsverband.at/>), which is an umbrella organisation of several NGOs acting in the field of anti-discrimination. *Klagsverband* has been specifically granted the procedural right to act in court, with the agreement of individual claimants.<sup>126</sup>

Access to civil courts with legal representation is burdened with a considerable financial risk, which often acts as an actual barrier to the pursuit of claims. Civil claimants who lose their case are required not only to pay for their own legal representation but also for the legal costs incurred by the defendant (and vice versa in the case of winning). The costs of court proceedings and legal representation are normally calculated based on the value of the claim and the number of legal interventions by counsel within a trial.

### 11.3.2 Availability of legal aid

Austria has no specific legal aid system. Private insurance for legal protection (*Rechtsschutzversicherung*) is available and can cover most of the expenses of civil court and criminal cases under the terms and conditions of insurance contracts.

The statutory corporations for employees (*Kammern für Arbeiter und Angestellte*) and the trade unions offer free legal consultations in labour law and social security law and free legal representation for all jurisdiction levels in urgent cases, but only for their members.

Claimants can also file a petition to the relevant court for financial aid in relation to court fees, which may also include legal representation by a lawyer (*Verfahrenshilfe*). This can be granted in cases where legal representation is considered necessary and if the claimant meets certain financial criteria.

## 11.4 Horizontal effect of the applicable law

### 11.4.1 Horizontal effect of relevant gender equality law

The question of the horizontal effect of gender equality law does not pose any particular problem in ensuring compliance with and in enforcing gender equality law in Austria.

### 11.4.2 Impact of horizontal direct effects of the charter after *Bauer*<sup>127</sup>

The recognition of horizontal direct effects of the Charter provisions does not yet have any specific relevance for better enforcement of gender equality law in Austria.

## 11.5 Burden of proof

According to Paragraph 12(12) of the Equal Treatment Act for the Private Sector, an employee who enters a discrimination claim at the Labour and Social Court (*Arbeits- und Sozialgericht, ASG*) has to offer at least indirect proof of existing discrimination. The employer can then try to rebut this by offering proof that another non-discriminating motive must be considered as more probable for the relevant decision or that a discrimination decision is based on a genuine requirement.<sup>128</sup> The burden of proof is not completely reversed in discrimination cases but is lighter than in other civil proceedings. Case law states that claimants have to observe general rules of civil procedural law and

<sup>126</sup> Paragraph 62 of the Equal Treatment Act for the Private Sector, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151389/NOR40151389.pdf>.

<sup>127</sup> Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018] EU:C:2018:871.

<sup>128</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12110925/NOR12110925.pdf>.

have to offer at least circumstantial proof of discrimination; they cannot rely on prima facie proof.<sup>129</sup>

## 11.6 Remedies and sanctions

### 11.6.1 Types of remedies and sanctions

Sanctions for discrimination are almost exclusively limited to civil law. Persons who claim to have been subject to discrimination are granted civil compensation and in some cases damages by filing civil claims with the labour and social courts or the civil courts, depending on the discriminating circumstances.

Violations of the requirement for gender-neutral job advertisements are sanctioned by administrative fines of up to EUR 360 for each violation.

There are no provisions for protection against discrimination in criminal law (except for severe racial discrimination and criminal sanctions for severe cases of sexual harassment).

### 11.6.2 Effectiveness proportionality and dissuasiveness

Civil remedies and sanctions cover a broad spectrum. Persons who are dismissed from work under circumstances that indicate discrimination may sue for reinstatement of the work contract and return to their workplace. Victims of discrimination can claim compensation for the loss of their workplace or for losing out on access to goods and services, and also for damages for personal impairment by discrimination (e.g. Paragraph 12(3) of the Equal Treatment Act for the Private Sector).<sup>130</sup> During the implementation processes, the existing civil remedies were structured according to the general legal principles and structures of labour law and civil law, especially tort law. Within the context of labour law, the possibility of suits for reinstatement after dismissals for prohibited reasons are, in the opinion of the author, an effective measure of protection against retaliation in discrimination cases. Claimants can expect either to return to their workplace or to receive significant severance compensation in cases where both the claimant and the defendant agree to end proceedings with a compromise settlement. In the same way, the legal right to sue for personal damages in addition to a loss of earnings offers an effective remedy in cases where the claimant does not wish to return to the specific workplace. Traditionally, courts have been hesitant to grant large amounts of damages. Case law states that the amount of damages must reflect the severity of the impairment caused by a prohibited discrimination and must be calculated by referring to the claimant's earnings in a specific workplace.<sup>131</sup>

## 11.7 Equality body

The relevant equality body is the Ombud for Equal Treatment (*Gleichbehandlungsanwaltschaft, GAW*),<sup>132</sup> which consists of three independent parts that are responsible for handling discrimination complaints and taking these to the Equal Treatment Commission (*Gleichbehandlungskommission, GBK*), and for promoting equality and anti-discrimination activities, especially inquiries into individual or sectoral discrimination. The three offices of the Ombud for Equal Treatment cover gender discrimination in working life; discrimination on grounds of ethnicity, religion or ideology, age or sexual orientation in working life; and discrimination on grounds of ethnicity and

<sup>129</sup> RIS-Justiz RS0123960, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20080709\\_OGH0002\\_009OBA00177\\_07F0000\\_001/JJR\\_20080709\\_OGH0002\\_009OBA00177\\_07F0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20080709_OGH0002_009OBA00177_07F0000_001/JJR_20080709_OGH0002_009OBA00177_07F0000_001.pdf).

<sup>130</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151376/NOR40151376.pdf>.

<sup>131</sup> RIS-Justiz RS0029686, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_19901205\\_OGH0002\\_009OBA00266\\_9000000\\_002/JJR\\_19901205\\_OGH0002\\_009OBA00266\\_9000000\\_002.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19901205_OGH0002_009OBA00266_9000000_002/JJR_19901205_OGH0002_009OBA00266_9000000_002.pdf).

<sup>132</sup> <https://www.gleichbehandlungsanwaltschaft.gv.at/>.

gender concerning access to goods and services. The Ombud for Equal Treatment has five regional branches.

The Equal Treatment Commission functions in addition to and in close cooperation with the Ombud for Equal Treatment.<sup>133</sup>

The Equal Treatment Commission sits in three senates corresponding to the three offices of the Ombud for Equal Treatment: Senate I is responsible for discrimination on the grounds of sex in working life; Senate II is responsible for discrimination on the grounds of ethnicity, religion or ideology, age or sexual orientation in working life; and Senate III is responsible for discrimination on the grounds of sex or ethnicity concerning social protection, social benefits and education as far as covered by federal legislative competences.

The Equal Treatment Commission can be approached by the Ombud for Equal Treatment or by applicants directly. It is competent to conduct inquiries (mostly through witness testimony and analysis of documents) and to issue non-binding legal opinions. If the same case is subsequently brought to court, the commission's opinion may be offered as additional evidence by either the claimant or the defendant. The commission can also act as an informal arbitrator and offer suggestions for compromise agreements. The Equal Treatment Commission is widely regarded as the expert body concerning questions of equal treatment and legal anti-discrimination matters.

### **11.8 Social partners**

Representatives of the social partners are statutory members of the Equal Treatment Commission and have the right to co-decide the commission's opinions.

Traditionally, the social partners have been involved in policy development and consultations about legislative initiatives. This entails, among other functions, the inclusion of policy and legislative initiatives in the customary review process before the formal parliamentary process starts. Social partner institutions are invited to submit written expert opinions on legislative initiatives by the federal and provincial Governments stating their policy views on the contents. These opinions include political stances and policy suggestions and are also sometimes utilised as policy guidelines for parliamentarians.

The 2017-2019 Government coalition of the conservative People's Party (*Österreichische Volkspartei, ÖVP*) and the populist right-wing Freedom Party (*Freiheitliche Partei Österreichs, FPÖ*) has reversed the traditional political approach to the political role of the social partners; there are now considerably fewer tripartite consultations, especially with social partners on the workers' side. Similarly, the Government has scaled back the social partners' traditional participation in the legislative review process.

The main policy area involving the cooperation of the social partners is wage policy, which is largely conducted by annual collective agreement negotiations. Collective agreements are the legal basis of national wage policies and can also cover various other workplace policies and conditions.

Social partners are granted the competence to collective bargaining based on the Act on the Constitution of Labour (*Arbeitsverfassungsgesetz, ArbVG*), which grants the right to collective bargaining to the employee trade unions and to statutory employers' associations, most importantly the Chamber for Trade and Commerce (*Wirtschaftskammer*). Collective agreements have the legal status of binding general labour ordinances. Their personal scope applies to all enterprises and to all workers in the relevant sector or industry and covers the whole state territory or regional area

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

(*Flächenkollektivverträge*). The state does not have direct influence on the collective bargaining process and consequently cannot issue guidelines or regulations for wage and labour relations in this area. The principle of equal pay for equal work has been observed by the collective bargaining parties for many years, resulting in, for example, the elimination of special low wage groups for female workers (*Leichtlohngruppen*). Collective agreements are also increasingly used to implement progressive provisions such as additional paid or unpaid paternal leave periods, additional paid days of *force majeure* leave, positive action measures, or the factoring in of parental leave periods for time-related working rights.

### 11.9 Other relevant bodies

There are no other relevant bodies at federal level.<sup>134</sup>

### 11.10 Evaluation of implementation

The implementation of the directives is based closely on the directives themselves, with little departure from their framework, except for the structural or constitutional demands of national law. In many cases, the directives are implemented by transferring the German language wording directly into national law. It is then left to the courts to interpret the provisions in accordance with the structures of national legislation.

This can be seen in the instance of case law relating to compensation for discrimination in the workplace, especially for sexual harassment. The principles of tort law are largely laid out in the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). Discrimination in the workplace and concerning access to goods and services is generally conceived as an infringement of civil rights that entitles the injured person to damages. It is a general principle of tort law in Austria that compensation for damages should exceed material or pecuniary compensation of concrete monetary losses only in cases of severe infringements of civil rights. Accordingly, compensation in discrimination cases cannot exceed concrete losses incurred by the claimant, e.g. missed severance payments (in civil cases, claimants can also demand a certain amount of missed interest under the general rules of civil procedure). Only in some more severe cases, e.g. sexual harassment, must an additional amount for the immaterial damage caused by 'the personal impairment suffered' (*für die erlittene persönliche Beeinträchtigung*) be added to the usual amounts for damages. Because of this firm focus of discrimination damages within the structures of general tort law, the labour and social courts have not granted compensation that exceeds more than concrete monetary losses; case law in sexual harassment cases states that the amount of additional personal damages should be based on the concrete salary and not exceed about three months of average payments.<sup>135</sup> At the same time, case law states that sexual harassment is an attack on human dignity.<sup>136</sup> Embedding sanctions for discrimination firmly within the structures of civil law may be effective but may not be dissuasive in all cases due to the legal limitations for damage amounts.

### 11.11 Remaining issues

None.

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<sup>134</sup> The Austrian Labour Inspectorate has no gender equality or anti-discrimination mandate.

<sup>135</sup> RIS-Justiz RS0130287, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20150827\\_OGH0002\\_009OBA00087\\_15G0000\\_001/JJR\\_20150827\\_OGH0002\\_009OBA00087\\_15G0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20150827_OGH0002_009OBA00087_15G0000_001/JJR_20150827_OGH0002_009OBA00087_15G0000_001.pdf).

<sup>136</sup> RIS-Justiz RS0113529, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJR\\_20000405\\_OGH0002\\_009OBA00292\\_99B0000\\_001/JJR\\_20000405\\_OGH0002\\_009OBA00292\\_99B0000\\_001.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20000405_OGH0002_009OBA00292_99B0000_001/JJR_20000405_OGH0002_009OBA00292_99B0000_001.pdf).

## 12 Overall assessment

The overall implementation of the Directives is aiming at thoroughness while taking into account the systematic requirements of the existing civil law and civil procedure laws. The implementing legislation leaves a considerable area of interpretation to the courts, which leads to a large body of case law that has to be taken into consideration in every legal assessment of a concrete case.

Some areas of concern remain. In many cases, implementation only consists of directly transferring the wording from the German language version of the directives into national legislation, leaving it to the courts to interpret the meaning within the systematic context of the national legislative framework.

Some of the concepts of the directives meet considerable systematic obstacles, e.g. burden of proof reversal. Prima facie evidence is not part of the evidentiary rules in civil cases, and the implementation of the relevant parts of the directives was not carried into civil proceedings legislation but remained within the scope of equal treatment legislation, leaving the application of the burden of proof rules to case law; bound by the rule of law, the Supreme Court had to adapt case law to these systematic restraints. This way the claimant is effectively required to offer at least circumstantial proof of his or her claim in order to enter the stage of material deliberation in a court case.

The implementation of the directives within the scope of civil law and civil proceedings law also restricts the ability of courts to award higher damages for breaches of discrimination protections (which can be seen as limiting the effectiveness of sanctions). Courts are bound by systematic rules and by corresponding case law to assess civil damages by the individual impact of a proven discrimination on the claimant, using their concrete financial situation as the required measurement. For instance, damages for personal injury in cases of sexual harassment in the workplace are limited to the amount of two to three monthly wages by case law, thereby assessing the personal impact of proven sexual harassment incidents on persons with smaller incomes to be financially less than on higher earning persons.

While maternity protection against dismissal and against discrimination is well established by case law, neither the Maternity Protection Act nor the Fathers' Parental Leave Act contains specific rules against discrimination on grounds of parental leave. While the requirements of Article 5 of Directive 2010/18/EU are contained in various statutes, the legal basis for claims of direct or indirect discrimination on the grounds of sex/gender in conjunction with parental leave or with parenting requirements is comparatively weak. Workers claiming discrimination based on reasons of taking up their parental rights and duties would have to rely on the provisions of the applicable Equal Treatment Act. Every relevant equal treatment statute contains the wording that 'no one may be discriminated against because of sex, especially not based on family status or the circumstance of having children.' In a court case, claimants would have to offer evidence that connects the fact of taking parental leave directly to their sex and to their family status as well as to a discriminating fact or occurrence, while the defendant can offer evidence of other circumstances or motives being the more probable reasonable cause for their decisions.

The implementation of the directives in Austria significantly relies on a soft law approach, which manifests in the role of the Equality Ombud and the Equal Treatment Commission especially. Both institutions only have limited possibilities of taking concrete action against individual or systematic discriminations. They have no roles in court cases where concrete decisions about remedies and/or sanctions are being made (with the exception of entering Commission decisions as non-binding additional evidence in court proceedings). The assessments of discrimination incidents by the Ombud or the Equal Treatment Commission for the Private Sector carry no obligation for employers or for contractors to act accordingly.

- The soft law approach used in a large part of the implementation of the directives limits the role of the Equality Ombud and the Equality Commissions for the private sector and for federal civil servants, as these institutions can only issue non-binding results and have very limited possibilities for intervening in discrimination cases.
- Due to systematic restraints there is no complete reversal of the burden of proof in discrimination cases.
- The implementation of discrimination prohibitions within the framework of civil law and damages puts systematic restraints on sanctions, which can be seen as lacking in effectiveness.
- Legislation on maternity protection, fathers' parental leave and paternity leave contains no discrimination prohibitions aimed at specific discriminations caused by family- and care-related leave.

## Annex

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